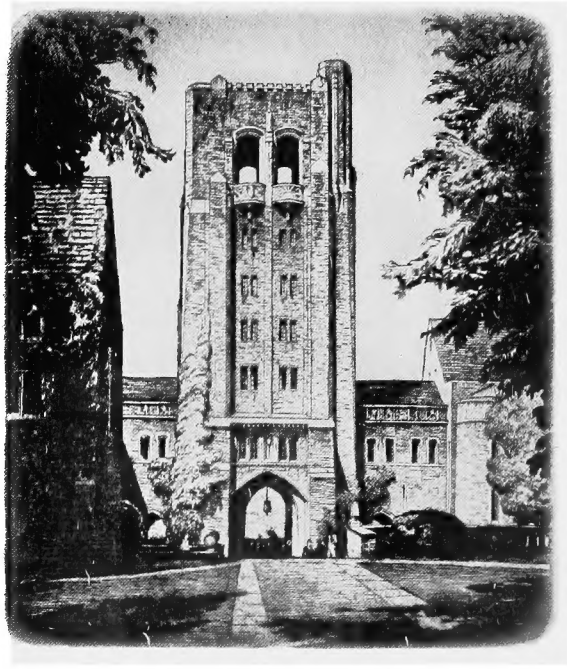

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A TREATISE

ON THE

MEASURE OF DAMAGES;

OR, AN

INQUIRY INTO THE PRINCIPLES

WHICH

GOVERN THE AMOUNT OF PECUNIARY COMPENSATION AWARDED BY COURTS OF JUSTICE.

BY

THEODORE SEDGWICK,

AUTHOR OF "A TREATISE ON STATUTORY AND CONSTITUTIONAL LAW."

Cum pro *eo quod interest* dubitationes antiquæ in infinitum productæ sint, melius nobis visum est, hujusmodi prolixitatem, prout possibile est, in angustum coarctare.

Cod. De sent. quæ pro eo quod int. prof. lib. vii, tit. xlvii.

SIXTH EDITION,

By HENRY D. SEDGWICK.

NEW YORK:
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1874.

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DANIEL LORD, ESQ.

Dear Sir:

If you find no fault, I am very sure that I shall not be elsewhere censured for placing your name (although without any previous permission), upon the dedication page of this work.

Your opinion of the importance of the subject, is one of the circumstances that have most strongly urged me to proceed with it. But I have other reasons for requesting you to accept this volume.

You show us all, by a teaching far better than barren precept, how much true dignity and usefulness, as well, if we may be allowed to judge, as real happiness, attend a life assiduously, intelligently, and, above all, honorably devoted to that profession of which we are the votaries.

I am, dear Sir,

With sincere regard and respect,

Your obedient servant,

THEODORE SEDGWICK.

New York, January, 1847.

PREFACE TO SECOND EDITION.

In preparing the Second Edition of this work for the press, I have done all in my power to show my sense of the favorable manner in which it has been received, and to increase its utility. I have examined the numerous volumes of Reports which have appeared both in England and this country, and have availed myself, as far as possible, of the increased attention which has been latterly paid to the subject. This has led not only to a great increase of matter, but to changes so considerable in the arrangement of the work, that I have found it impossible to preserve the original paging. The two last chapters are entirely new.

The principal difficulty which I encountered in preparing the first edition—the difficulty of adapting any scientific arrangement of the rules of compensation to the technical forms of action of the common law—has been somewhat increased by the great changes that have been introduced into legal proceedings within the last few years. New York, and several of the sister States, have adopted a system of pleading which amounts to a total subversion of the common-law procedure; and Massachusetts has made very serious innovations on it. We are evidently in the midst of a revolution which, in our own time, will not only efface most of the distinctions between law and equity, but will completely sweep away the common law so far as its forms of proceeding are concerned; and in so doing, work a change in the administration of justice, far more complete than was ever before effected in so short a period. Our example and influence are already making themselves felt in England; and the alterations there, though perhaps they will be more cautiously made, bid fair to be not much less sweeping.

Convinced, as I have long been, that these changes—although attended by the evils which always wait upon great and sudden modifications of existing arrangements, evils aggravated in this case in our country by our tendency to act rather with energy and vigor than with caution and deliberation—still, that these changes will finally establish our jurisprudence on a basis more intelligible, more harmonious, more beneficial, I cannot in any sense regret their introduction.

For the time being, however, in regard to the order and arrangement of this work, I have felt the full inconvenience resulting from the present chaotic state of our procedure. I have endeavored to avoid it as far as possible by

keeping steadily in view what is manifestly the inevitable result of the experiments now going on, viz.: the final and total abrogation of the forms of common-law pleading both in England and America. When that end is at length attained, and when the application for redress shall be made to depend solely on the right, then, and not till then, it will be easy to classify and arrange the rules governing the measure of relief in a manner that shall be at once legal and logical; that shall satisfy the technical demands of the practitioner, and at the same time gratify that love of reason and justice which animates the mind of him who desires to find something in the law besides a mere collection of abstract and arbitrary rules.

New York, July, 1852.

PREFACE TO THIRD EDITION.

In preparing a Third Edition of this work for the press, I had hoped to be able to give more of my time and personal attention to the work than, owing to various reasons, I have found it possible to do.

But perhaps, under the circumstances, there is no particular cause for regret. The diligence and accuracy of Messrs. Abbott Brothers, to whom the reader is indebted for the notes to this edition, have supplied all the recent decisions; and it is yet hardly time to remodel the work, as I hope some day to do, with reference to the great changes that have taken place in our jurisprudence since the first publication of the treatise, in 1847.

Those changes are in active operation, but their ultimate results cannot yet be with safety predicted. If another edition of this work shall be required, I hope then to be able to refashion it so as to bring it into conformity with the great alterations that have taken place in the system of pleading, and, in fact, in the whole administration of justice, both in England and in this country.

I should not do justice to myself, if I omitted to take some notice of the kind and cordial way in which this work has been received on both sides of the Atlantic. It is in my power in other ways to make my acknowledgments to the eminent authorities of my own country, who have spoken favorably of this treatise; but to the voices from afar, I can hardly make any response, except by availing myself of an opportunity like this. The courts of Westminster Hall have treated this work in a manner that cannot but be very gratifying to an author; and I take pleasure in thus sending my thanks across the water, for the friendly manner in which it has been spoken of by Mr. John George Phillimore, in his "Essay on the Principles and Maxims of Jurisprudence;" by Mr. Edward Powell, in his very able "Treatise on the Practice of the Law of Evidence;" by Mr. Herbert Broom, in his "Commentaries on the Common Law;" and by Mr. J. D. Mayne, in his "Essay on Damages."

New York, June, 1858.

PREFACE TO FOURTH EDITION.

In the present edition of this work, the topics, without being arbitrarily distributed into sections, have been classed under descriptive headings, and many of the chapters have been to some extent rearranged by bringing together the different parts of the same subject. The errors of the press in the third edition have been corrected wherever discovered, and a few slight but unavoidable alterations made in substance. Beyond these essentials, the text has been conscientiously left as it was. The division of the chapters remains as before, and in the changes made, the marginal paging has been preserved as far as possible.

The author's notes are distinguished by being placed in a double column, and are separated by a line from the others. Those to the third edition by Messrs. Abbott Brothers, have been substantially incorporated with the new matter. Although freely altered and condensed, no material part of them unaffected by subsequent decisions, has been omitted. The new notes will be found to contain large, and it is hoped important, additions, including the discussion of several subjects which have been developed in the ten years since the last edition, and were not before alluded to, or were but barely mentioned. Where other pages of the book are referred to in the notes, the marginal page is intended, unless the head page is expressly cited.

In the table of cases, the number cited in the last edition is nearly doubled, and the former citations have been verified and corrected. The index is enlarged and elaborated. Great pains have been taken to approach complete accuracy, that vanishing goal of the legal writer, the attainment of which, in any absolute sense, is quite impossible. How far short of it the editor has fallen, he is painfully aware.

Although he has not felt himself justified in attempting to change the plan of the book, so as to consider the measure of damages independently of the forms of action which are still so widely retained, it is hoped that its usefulness will not be found materially less where these forms are abolished than where they still exist. The essential principles controlling the subject must remain the same, although relieved from the embarrassment which is sometimes caused by special modes of procedure.

A few late material decisions and typographical errors are pointed out in a note at the end; and such inaccuracies as occur in the citations of authorities are corrected in the table of cases.

The editor, in offering the humble fruits of his labor, cannot forbear saying that the examination of several thousand cases on the subject of the measure of damages, chiefly published since the last edition, has confirmed the conviction which he before entertained, in common as he believes with the profession at large, of the great value of the book, and of the essential correctness of its statements of the law.

He has to thank Mr. Arthur George Sedgwick, of the Boston Bar, a son of the author, for a very clear digest of late decisions in Massachusetts.

H. D. S.

New York, May, 1868.

PREFACE TO FIFTH EDITION.

The last edition of this work was published about a year since, and the time which has elapsed since then is so short, that this edition is very much the same as the fourth. In preparing it for the press, the editor has taken the work of his predecessor as a starting-point, and confined his labors to the simple task of bringing that work down to the latest dates. Whatever merit, therefore, this edition may have, belongs to the previous editor, while whatever errors it may contain, should be laid to the charge of his successor.

The natural increase in the volume of the work from the additions in the present edition does not appear in the number of pages, because of a change in the size of the type.

The reader's attention is specially directed to the final note of corrections and additions.

A. G. S.

Boston, July, 1869.

PREFACE TO SIXTH EDITION.

The time and labor expended on this edition are better indicated by the large increase in the index and table of cases, than by the seventy pages of additions to the notes. But even these augmentations, although the editor has endeavored to avoid mere amplification, do not show all that has been done. Few branches of the law at the present day are so unstable, or we should rather say so progressive, as that which seeks to prescribe the rules of damages. Every year suggests, if it does not establish new modifications or refinements affecting it. In order, therefore, that the former editorial notes should conform to the latest phases of the subjects discussed, they have been carefully revised, and some of the most important substantially rewritten. At the same time, the uniformity of arrangement and appearance of this edition with the two last preceding ones has been preserved.

The editor has renewed the attempt at accuracy made in the fourth edition. Yet, as his present researches have shown him the incompleteness of his former success, it will no doubt be the duty of a future editor to correct mistakes made now. But it is hoped that scarcely more will be found than are, humanly speaking, inevitable in such a work.

Inexact citations are corrected in the table of cases, and such typographical errors as he has noticed, (but one of which however is very material), are pointed out in the Final Note. In this note, also, will be found some important memoranda of recent decisions.

As in the previous editions, where other pages of this work are referred to, the reference is to the marginal page, unless the head page is expressly cited.

For an indulgent consideration of all his short-comings, the editor appeals to the fraternal guild of lawyers, a part of whose education it is to "add to brotherly kindness, charity." At least he may count on the lenient judgment of those, whose miserable fortune it has also been to carry a law-book through the press, amidst the distractions of professional life.

H. D. S.

New York, May, 1874.

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INTRODUCTION.

THE only work which our libraries contain on the subject of the Rule or Measure of Damages, is that by Sayer,* published in the last century; it covers, however, but a very small portion of the ground now embraced by this branch of the law, and is of scarcely any value to the American student.†[1] No serious attempt seems, indeed, to have been made to reduce the rules of damages to principle, till a comparatively recent period. Lord Kaims says, in his Principles of Equity, "In the English courts of common law, there is no accurate distinction made between damage certain and uncertain. Damages are taxed by the jury, who give such damages as, in conscience, they think sufficient to make up the loss, without regarding any precise rule."‡ This was written less than a century ago. In an action for an escape, tried in 1776, Lord Ch. J. Wilmot said, "In ac-

* The Law of Damages, by Joseph Sayer, Sergeant at Law, London, 1770.

This was strictly true at the time of the publication of the first edition of this work, in 1847. Since then, more attention appears to have been paid to the subject. Mr. Herbert Broom's highly valuable "Commentaries on the Common Law," published in 1855, contain two lucid and comprehensive chapters on the measure of damages in actions of contract and actions of tort; and in 1856, an entire English "Treatise on the Law of Damages" was published by John D. Mayne, Esq., of the Inner Temple. This latter work has been republished in this country, in volume 92 of the Philadelphia Law Library, and fills about three hundred pages in the American reprint. The scope of the work embraces the measure of damages, the mode in which they are assessed and reviewed, the practice of granting new trials, the law of set-off, compensation under the Lands Clauses Act, etc. This valuable treatise was prepared, of course, chiefly with reference to use in England; and appears to be a very faithful compilation of the English cases. It does not, however, attempt to present fully our American law on the subject; the learned author saying very frankly in his preface, "I have only resorted to American decisions where none of our own were in point" Mr. Mayne's work is clear and well arranged, and will undoubtedly be of great utility to the English practitioner.[2]

† The second volume of Mr. Greenleaf's excellent work on Evidence, p. 209, contains a chapter on Damages, in which will be found far the best view of the subject that has ever yet been taken; but the space allotted to it forbade anything but a rapid and general survey.

‡ 2d edition, 1767, p. 78, in notes.

[1] The subject has lately received attention as an incident to other legal topics. In Professor Parsons' valuable work on Contracts, the fifth edition of which was published in 1864; in Mr. Chief Justice Redfield's elaborate book on the Law of Railways, the fourth edition of which appeared in 1869; in Mr. Francis Hilliard's treatise on Remedies for Torts, published in 1867; in that of Messrs. Shearman and Redfield on Negligence, the second edition of which appeared in 1870; and in the shorter one of Mr. Thomas William Saunders, an American edition of which was published in 1872, a portion of the pages are devoted to the law of damages, as far as relates to the subjects under discussion.

[2] A second edition of Mr. Mayne's book prepared by Lumley Smith, Esq., of the Inner Temple, was published in 1872.

tions on the case, the damages are totally uncertain and at large."* It is almost superfluous to say, that no such arbitrary discretion is now tolerated, except in a very limited class of cases, if, indeed, it can be properly said to exist at all.

The tribunals of justice, both in England and America, have for some time assiduously labored to reduce this branch of
[4] our science to fixed rules; and in the present condition of our jurisprudence it may be considered surprising that the subject has not received more attention from our text-writers.

The amount of damages, or, in other words, the pecuniary compensation awarded by tribunals of justice, in the widest acceptation of the term embraces almost the whole field of legal redress; and a treatise on the subject of the rules which govern the amount of damages, if considered in their largest and most general sense, would include nearly the entire philosophy of the law. I use here the term Law, in contradistinction to Equity. In taking a broad and general view of the matter of damages, we should necessarily be led to consider questions which lie at the very basis of our system of jurisprudence: to what extent compensation ought on principle to be carried; whether full and complete remuneration should be provided for every case of civil injury; or whether, as now, the reparation should be confined within much narrower limits. Again, for what particular wrongs reparation should be provided. Should the crime of seduction be punished by a civil action founded on a fiction of service? Should the injured husband have compensation in an action for criminal conversation? In what cases should redress be furnished for slanderous or libelous publications? Ought the malicious refusal to fulfil contracts for the mere payment of money, to be more severely punished than honest incapacity? Should there be any reparation for a frivolous and vexatious suit beyond the costs, or should further redress, as now, be confined to cases of malicious prosecution? Should a merely false representation as to the credit of a third party, be allowed to be made with impunity, or should it be necessary, as now, to show also a fraudulent intent? In what cases should provision be made for the counsel fees of the prevailing party?

These, and similar inquiries would, as I say, embrace almost the whole philosophy of legal relief. But I have by no means in this volume intended to occupy ground so extensive, or to discuss questions so theoretical. My aim has been more limited; and, if much humbler, at least, I hope, more practically useful.

* Ravenscroft *v.* Eyles, 2 Wils. 295.

My purpose has been to examine those cases only, where a wrong having been done, or, in technical language, a right of action existing, the question remains, What is the amount [5] of compensation to be awarded? In other words, what is the rule or measure of damages in courts of Law?

In doing this, my principal purpose has been, to present the law as it is; while at the same time, I have thought it my duty to exhibit the contradictions and discrepancies which exist in this, as indeed in almost every part of our jurisprudence; and which must exist, so long as those changes take place in the administration of justice, which sometimes furnish a theme for well-grounded censure, but more frequently exhibit its capacity of self-adaptation to the perpetual fluctuations of our social and commercial condition.

In preparing the work, my chief embarrassment has arisen from the difficulty of making a proper and scientific division of the subject. The whole arrangement of our Anglo-American jurisprudence, as originally created in the mother country and adopted here, the primary distinction between law and equity, and the subordinate divisions of the old common law forms of action, are so purely arbitrary and technical, that it is almost impossible to prepare a treatise on a subject so extensive as that of the measure of damages, which shall be at once useful and logically arranged. To be useful, it must, to a very considerable extent at all events, conform to those arbitrary divisions and formulæ which, however much modified both in England and in America by recent legislation, have still left a deep, perhaps a permanent impress, on our whole jurisprudence, although they are now generally recognized to be equally irreconcilable with scientific analysis or logical order. Conscious of the difficulty, yet seeing no mode to avoid it altogether, I have endeavored, as far as possible, to make the treatment of my subject correspond with that which Blackstone originally adopted in his admirable Commentaries, and which subsequent writers on our law have generally followed.

I have again been embarrassed by the extent of the subject. There is a very evident distinction between the cause of action and the measure of damages; in other words, between the right of recovery and the amount of compensation; and yet, as most actions at law result in damages, it is by no means easy in all cases to define what properly belongs to each. "The rules on the subject of damages," says one of the great French civilians, with his usual clearness, "regard either whether they are due at all, or of what they consist. The first question is one of law, which depends on whether the party charged is liable or not.

"This being determined, the second question remains;
[6] namely, to discriminate, with regard to the damages sustained, between that portion which is to be made good and that which is to be borne by the sufferer." * [1]

This division, very clear and simple in theory, it will not always be found easy to reduce to practice.

Another source of difficulty has arisen from the fact that some parts of the subject have been already treated with great fullness and ability. Benecke's and Stevens' works on Indemnity and Average exhaust that branch of the law of damages which relates to insurance. The various books on Set-off, among which is Mr. Barbour's valuable treatise, and the late Mr. Graham's work on New Trials, equally cover the whole subject so far as they go. And where I have found the ground thus occupied, I have contented myself with a very general survey.

In preparing the work, I have endeavored, as far as possible, to extract some general and reasonable rule from cases often conflicting and discrepant: but as the subject, in any connected form, is almost entirely new, I have thought that I should best serve the bar, and at the same time most efficiently contribute to a generalization of the whole matter, by giving the decisions sufficiently at large to show the principle which they seek to establish, instead of contenting myself with a brief reference. This course may undoubtedly, in some cases, lead to prolixity; but it seems to me to be attended by more than counter-balancing benefits. Our law is so truly to be found in our reports, that it seems to me always better to give the very words of judicial opinions, than to attempt to put them in different language. In regard to the matter of damages, too, this course has seemed to me particularly expedient. It is in the course of a trial that questions of this class generally present them-
[7] selves; and while I have endeavored to clear the way to a correct appreciation of the whole subject, my especial object has been to make a work which should be practically useful at *nisi prius*.

I have found another reason for this course, in the unsettled

* Toutes les régles de la matière des dommages et interêts regardent, ou la question de sçavoir s'il en est dû ou celle de sçavoir en quoi ils consistent. La question s'il est dû des dommages et interêts, est toujours une question de droit, qui depend de sçavoir si celui à qui on les impute doit en être tenu..... Cette première question de sçavoir, s'il est dû des dommages et interêts, étant décidée, c'en est une seconde, de sçavoir en quoi ils consistent, c'est à dire, de discerner dans toute l'étendue du dommage qui est arrivé ce qui doit en être imputé à celui qui est obligé de dédommager, et ce qui ne doit pas lui être imputé.—Domat, *Loix Civiles*, book iii. tit. 5, sec. ii. § 2.

[1] See *post*, 38, note.

state of this branch of the law. The contradictions are so numerous, the discrepancies so great, and the subject, in a connected shape, so new, that I have hesitated to affirm any position without citing my authority at large. And in collating the decisions, I have found so much variance of opinion in the numerous tribunals which follow the course of the common law, that it is with great difficulty, in many cases, that I have been able to do more than state the doubts as they exist.

I have endeavoured to point out the analogies of this branch of the science not only in our own system, but by going back to the great original of jurisprudence, the civil law, and also by reference to the more eminent judicial writers of France; and I can only wish that I had leisure to make this part of the work more full and complete. I have had constantly in my mind the precept and example of the late lamented Story;* but no one can be more sensible than myself of the immense disparity between the models of the master and the efforts of the pupil.

I suggest these various considerations by way of an anticipated excuse for the many errors and imperfections which I am but too sensible this work must present; and I throw myself upon the candid and indulgent consideration of a very learned and able profession.† I do not at all flatter myself [8] with the hope of complete success. But if this volume tend in any degree to reduce to greater certainty this department of our jurisprudence—to stimulate the devotion, or to abridge the toil of those who painfully devote themselves to the great science of justice—my labor will be abundantly repaid.

* "There is a remarkable difference, in the manner of treating juridical subjects, between the foreign and the English jurists. The former almost universally discuss every subject with an elaborate theoretical fullness and accuracy, and ascend to the elementary principles of each particular branch of the science. The latter, with a few exceptions, write *practical* treatises, which contain little more than a collection of the principles laid down in the adjudged cases, with scarcely an attempt to illustrate them by any general reasoning, or even to follow them out into collateral consequences. In short, these treatises are little more than full indexes to the reports, arranged under the appropriate heads; and the materials are often tied together by very slender threads of connection. They are better adapted to those to whom the science is familiar, than to instruct others in its elements. It appears to me that the union of these two plans would be a great improvement in our law treatises, and would afford no inconsiderable assistance to students in mastering the higher branches of their profession."—Story *Pref. to Com. on Bailments.*

† A serious difficulty has arisen from the fact that the digests of the reports afford but little aid. There is, I believe, in no one of them any such head as "Rule or Measure of Damages." Wharton's Pennsylvania Digest (ed. 1836) has not even any head of "Damages"; and Harrison's, the most complete of all, has, under the head of "Damages," only a very inconsiderable number of cases. It has been necessary, therefore, to go through the index to each volume of reports separately; which, considering our *multorum camelorum onus*, is not a holiday task. I hope our reporters and digesters may hereafter think it not improper to reserve one head for the Rule or Measure of Damages.[1]

[1] The difficulty mentioned by the author no longer exists, and the head of "Damages" now has its fair share in the indices and digests both of the British reports and our own.

CHAPTER I.

GENERAL VIEW OF THE SUBJECT.

Distinction between Common Law and Equity, as to the Relief given.—Sir Hugh Cairn's Act. — Origin of Damages. — Different Principles on which Different Systems of Jurisprudence act in awarding Damages. — That of the English and American Systems is Compensation. — Nature and Extent of this Compensation generally. — Difficulties arising from the Forms of Action.

The subjects of legal investigation, when practically considered, generally resolve themselves into three great heads of inquiry: the right of the parties or the cause of action, the forms of proceeding, and the mode of relief. It is of the last only of these three divisions, that these pages are intended to treat; nor are they intended to discuss the whole topic of redress; on the contrary, they will be confined to a single head of this extensive branch.

The student of English jurisprudence can never master the subject of which I am about to write, nor, indeed, scarcely any other of our complicated science, until he has completely familiarized himself with the fundamental division and distinction between LAW and EQUITY. There is, indeed, nothing more curious in legal science, hardly anything more interesting in the history of the human mind, than to trace the processes by which the twofold fabric of English jurisprudence gradually arose. How the COMMON LAW, springing from the ancient usages of the Teutonic stock, at once identified itself with the interests of the great feudal proprietors of the soil, and fashioned their real law; and at the same time called to its aid the Trial by Jury, and thus endeared itself to the popular heart; while, on the other hand, the Civil Law, under the name of EQUITY, emerging from the great wreck of the Roman Empire, claimed for itself a jurisdiction which the cumbrous and artificial processes of its rival could not embrace, and by the mere force of its logical order, scientific analysis, and simple reason, has succeeded in obtaining a hold on the legal organization and science of the world which bids fair, under one name or another, to end in an almost complete re-establishment of its ancient supremacy. But these are considerations of too general a nature to be here

pursued further. Contenting myself with a cordial invitation to the student not to neglect these old mazes of our legal history, I confine my observations to matters of more immediate practical interest.

The relief afforded by a tribunal, may be either preventive or remedial. If remedial, it may again be either specific, or it may consist in the mere award of pecuniary remuneration. The common law, as it exists in England, and as it was introduced into the United States, is generally remedial in character, and its remedies are of a pecuniary description. It has few preventive powers; it can rarely compel the performance of contracts specifically; its relief, for the most part, consists in the award of pecuniary damages. Whether it punishes wrongs, or remunerates for breach of contract, in either case its judgment simply makes compensation, by awarding a certain amount of money by way of damages to the sufferer.*

The rules which in this matter govern its action, *i. e.*, the amount of compensation awarded by common law tribu-
[10] nals, or in other words the Measure of Damages, will be the subject of this treatise.

A mere enumeration of the forms of action and proceedings at common law, when we consider them in contradistinction to equitable relief, is sufficient to show that the powers of the former tribunals are almost solely remedial, and confined, with few exceptions, to the infliction of pecuniary damages.

Equity.—Equity operates by injunction; it restrains the aggressor from the contemplated violation of right; it gives specific relief by decreeing the very thing to be done which was agreed to be done; it compels the unwilling party to give testimony; it executes trusts, expounds testaments, and adapts its plastic hand with ease to the varied wants and complaints of man in a state of society. But, as a general rule, it refrains from awarding pecuniary reparation for damage sustained.†[1]

* And all the questions growing out of these subjects are investigated in one and the same proceeding. "It is incident to every common law complaint of injury and damage, that the existence of the injury, the right to compensation, and the amount of damage alleged to have been sustained, are tried and decided in one proceeding and upon one trial." East and West India Docks *v.* Gattke, 15 Jur. 261.

† It is true that a court of equity will sometimes give damages in lieu of the specific performance of a contract, but that is only, as a general rule, where it has obtained jurisdiction of the cause on other grounds. Wiswall *v.* M'Gown, 2 Barb. S. C. R. 270.

[1] In Great Britain, since the Third edition of this work, an act designed to amend the course of procedure in chancery, commonly known as Sir Hugh Cairn's Act (21 and 22 Vic. c. 27), has been passed, which provides that in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any contract, covenant,

COMMON LAW.—With the common law the case is very different. The end at which it arrives is, in almost all instances, one and the same; in the actions founded upon contract, account, assumpsit, covenant, debt, the only object of the plaintiff is to obtain, and the only power of the court is to make a judgment awarding a certain amount of money, by way of redress for the breach of the agreement. In the case of an action brought for the breach of a contract for the payment of money only, a suit for damages does, indeed, as Lord Mansfield has observed,*

* Robinson *v.* Bland, 2 Burr. 1077, 1086. "Where *assumpsit* proceeds on a demand of money, it is in truth and substance, and so taken in some of the cases, a more special action of Debt: for where the demand is for the payment of a sum of money, it is a technical fiction to call the sum recovered *Damages;* it is the specific thing demanded." Lord Loughborough in Rudder *v.* Price, 1 H. Bl. 547.

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or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any contract, covenant, or agreement, it shall be lawful for the same court, if it think fit, to award damages to the party injured, either in addition to or substitution for such injunction or specific performance, and that such damages may be assessed by a jury, or before the court itself, as it shall think fit. See Durell *v.* Pritchard, Law R. 1 Chancery Appeals, 244. Under this act, it was held by Sir W. P. Wood, V. C., that the court will not award damages in addition to a decree for specific performance where it does not appear that the plaintiff has sustained any special injury. Hinnock *v.* the Marchioness of Ely, 2 Hemming & Miller, 220. Nor, after making a decree for specific performance, can it add an order assessing damages for the breach of the covenant. Corporation of Hythe *v.* East, L. R. 1 Eq. 620. Nor can it award the damages unless there is an agreement capable of being specifically performed. Lewees *v.* The Earl of Shaftesbury, Law R. 2 Eq. 270; Ferguson *v.* Wilson, L. R. 2 Ch. Ap. 77. In cases where, under this statute, the court, instead of granting an injunction against interference with the complainant's right, may give compensation, the compensation is given once for all. It cannot be given as in an action at law, *toties quoties.* Stokes *v.* The City Offices Co., limited, 13 L. T. R. 81. It is questionable whether, even under the new codes of practice in the American States, comprehensive as they are, such a jurisdiction could be exercised as that conferred by this English legislation. See Troy *v.* Clarke, 30 Cal. 419.

Where courts of equity exercise jurisdiction to assess damages, as in the case of a wrongful taking and detention of property, they will give neither vindictive nor speculative damages, but compensation only. Sanders *v.* Anderson, 10 Rich. Eq. (S. C.) 232.

One great and characteristic head of equity jurisdiction is that of Trust. A trustee cannot purchase the trust estate for his own benefit. In case of doing so he will be charged with the full value of the property purchased. Schenck *v.* Dart, 22 N. Y. 420; Hasbrouck *v.* Hasbrouck, 27 N. Y. 182. And in New York, when an administrator sells the estate of his intestate on credit and without security, he is to be charged with the whole amount of the purchase money, on the ground that he was guilty of negligence in parting with the estate without payment or security. King *v.* King, 3 Johns. Ch. 352; Orcutt *v.* Ormes, 3 Paige, 459; Hasbrouck *v.* Hasbrouck, 27 N. Y. 182 (*supra*).

So a guardian converting his ward's stocks is chargeable with the highest value they reached after the conversion, Lamb's Appeal, 58 Penn. St. 142; and if a loss which cannot be accurately ascertained, befall property held by a trustee, and *a fortiori,* if the trustee destroy his accounts before they are settled, the court will presume against him as far as possible consistently with the facts established. And where an agent, by his conduct, made it impossible to determine how much profit had been realized under a contract, he was not allowed the commission to which he would otherwise have been entitled. Gray *v.* Haig, 20 Beav. 219. See also Leeds *v.* Amherst, 20 Beav. 239, and post. 475.

In Tennessee, where a bill was filed to have a title-bond re-formed according to the contract of the parties, and to obtain compensation for 110 acres included in the contract, but not conveyed, and to which the defendants had no title, it was held that the measure of the complainant's recovery, was the amount paid for the 110 acres, and that as the sale had been in gross, this amount should be determined by ascertaining their value at the time of the sale, in proportion to the whole quantity sold at the price specified, Frazier *v.* Tubb, 2 Heiskell (Tenn.), 663. See also Mullins *v.* Aiken, 2 Heiskell (Tenn.), 535.

from the nature of the case, become a *suit for specific performance.*[1] But this is almost the only instance where a suit at law compels the very thing to be done which the defendant agreed to do. In the actions of tort, case and trespass, trover, replevin and detinue, the rule is the same, with the exception that in the two latter the law makes a feeble and partial attempt to enforce the return of the specific chattels, for the taking or detention of which the suit is brought.

To this general rule, however, there are some further
[11] exceptions, which must be borne in mind. In the action of ejectment, and in the proceedings to recover dower, as well as in cases of nuisance by abating the grievance complained of, the common law gives a specific remedy. By the proceedings of quo warranto, mandamus, and prohibition,* and the great writ of habeas corpus also, these tribunals exercise powers very analogous to those of a court of equity. But of these, so far as they belong to our subject, more particularly hereafter.

Blackstone, in his Commentaries, ranks damages among that "species of property that is acquired and lost by suit and judgment at law." "The primary right to a satisfaction for injuries, is given by the law of nature, and the suit is only the means of ascertaining and recovering that satisfaction." "The injured party has unquestionably a vague and indeterminate right to some damages or other, the instant he receives the injury; and the verdict of the jurors, and the judgment of the court thereupon, do not, in this case, so properly vest a new title in him, as fix and ascertain the old one. They do not give but define the right."†

In Robert Pilfold's case, it is said,‡ "It is to be known that this word *Damna* is taken in the law in two several significations, the one properly and generally, the other *relative* and *stricte.* Damna *pro injuria illata*, and *expensæ litis*"—in other words,

* And the ancient and now obselete writ of *estrepement.*

† Book ii. ch. 29, p. 438.

‡ Rep. part x. p. 115.

[1] The contrary view is, however, often entertained. Thus, it is held in California, that the true theory of the recovery on a money demand is "not that the party recovers the particular note or chose in action, as is commonly imagined, but that he recovers damages for the non-performance of the contract." Guy *v.* Franklin, 5 Cal. 416. The distinction does not often involve any practical consequences; but in McLane *v.* Elmer (4 Ind. R. 239), a practical question turning on this distinction was raised. In that case the suit was on a note promising to pay $300, "without the benefit of the stay of execution." Judgment was rendered that the plaintiff recover, etc., and that defendant have no stay of execution. *Held*, on appeal, that the part of the judgment prohibiting stay of execution must be reversed. The court could not enforce the specific performance of the agreement, but could only award damages for the breach of it.

damages and costs—"for damnum, in its proper and general signification, *dicitur a demendo, cum deminutione res deterior fit.*"* It is of the *Damna pro injuria illata*, or of damages as now known by that phrase in opposition to costs, that we are here treating.

It is of the rules which govern this species of property, that I propose to treat in this volume, under the name of the Measure of Damages; and I arrange the subject in an order of which the following is a general outline: The origin of Damages under the English system, and the Tribunals by which they are now imposed. The General Principles by which they are regulated. The Measure of Damages in particular cases. Set-off, Recoupment, and Mitigation of Damages. The rule of Damages under special Statutes. The Control exercised by the Court over the Jury in regard to Damages. Pleading, Practice, and Evidence, as applicable to the subject.

In investigating the origin of our present system of pecuniary compensation, it is not difficult to trace it back to those Anglo-Saxons, whose marked and peculiar character has so deeply impressed itself on every quarter of the globe.

Under the civil law, we shall see hereafter that the rights and remedies of the subjects of the imperial government of Rome, were carefully protected in regard to the matters of which we now speak. But when that beautiful and elaborate structure shared the fate of its creators, the rules of right sank [12] with it; and the law but slowly emerged from the wreck and chaos of empire. For nearly ten centuries the intellectual progress of Europe was arrested, or retarded; and during that period the earlier processes of civilization had necessarily to be worked out anew.

ANGLO-SAXON JURISPRUDENCE.—English jurisprudence finds its earliest monument in the sixth century, in the laws of Ethelbert, king of Kent; and this code, known as *Leges Æthelbirhti*, illustrates our present subject too curiously to be unnoticed here.

In this code we find the attention of the lawgiver confined almost exclusively to wrongs, or, as we should now say, to ac-

* The origin of the word *Damnum* is thus given by Grotius: *Damnum forte a demendo dictum. Ita Varro, Libro V: Damnum a demptione, cum minus re factum quam quanti constat. Alii magis probant derivare a Græco δαπανη, ut sit dapnum, deinde damnum; ut ὑπνός, sopnus, omnus. Nec absurde deducas a Græco δαμνω, quod est βιάζω, aut ex ζημία, damia, damnum, ut regia, regnum.*—De Juro Bell. et Pac. lib. ii. cap. 17. The Digest says, *Damnum et damnatio ab ademtione et quasi deminutione patrimonii dicta sunt.*—De Damno Infecto, l. xxxix, tit., 2, § 3.

tions of tort; and the *Were*, *Weregildum*, or *Weregild*,—literally a man's money, or the price of a man,—is the earliest award of damages to be found in our jurisprudence. The antiquity of compositions for murder is illustrated by Homer (Iliad Σ., 498, where, in the description of the shield of Achilles, two disputants are represented wrangling before the judge for the weregild or price of blood, *εἵνεκα ποινῆς ἀνδρὸς ἀποφθιμένου.**

"The passion of revenge," says Mr. Hallam, "always among the most ungovernable in human nature, acts with such violence upon barbarians that it is utterly beyond the control of their imperfect arrangements of polity. It seems to them no part of the social compact, to sacrifice the privileges which nature has placed in the arm of valor. Gradually, however, these fiercer feelings are blunted, and another passion, hardly less powerful than resentment, is brought to play in a contrary direction. The earlier object of jurisprudence is to establish a fixed atonement for injuries, as much for the preservation of tranquility as the prevention of crime. Such were the weregilds of the barbaric codes." †

"Damages," says Sir Francis Palgrave, "recovered in a civil action for an assault, or any personal injury not being a felonious act, correspond to the Anglo-Saxon *Were*. When Alfred [13] enacts that the seduction of the wife of a Twelf hændman, or an Eorl, is to be compensated by payment of one hundred and twenty shillings; of the wife of a Six hændman, by payment of an hundred shillings; and of the wife of a Ceorl, by payment of forty shillings, he does nothing more whatever than fix and declare the amount of the verdict, instead of leaving the assessment of damages, as we do, to the direction of the judge and the discretion of the jury." ‡

The *Were* is not to be confounded with the *Wite*, the one answering to our civil damages for personal trespasses, ‖ the

* Hallam's Middle Ages, vol. i, p. 154, chap. ii, part ii.

† Hallam, ut supra. La "Composition," says Guizot, "est le premier, pas de la législation criminelle, hors du régime de la vengeance personnelle. . . . . La composition est une tentative pour substituer un régime légal á la guerre; c'est la faculté donnée à l'offenseur, de se mettre, en payant une certaine somme à l'abri de la vengeance de l'offensé; elle impose à l'offensé l'obligation de renonçer à l'emploi de la force."—*Hist. de la Civilization en France*, tom. i. pp. 275 and 276 (Deuxième ed.).

‡ Palgrave's Rise and Progress of the English Commonwealth, vol. i, pp. 205 and 32.

‖ "The *Wite* was a penalty paid to the crown by a murderer. The *Were* was the fine a murderer had to pay to the family or relatives of the deceased; and the *Wite* was the fine paid to the magistrate who presided over the district where the murder was perpetrated. Thus the *Wite* was the satisfaction to be rendered to the community for the public wrong which had been committed, as the *Were* was to the family for their private injury."—Bosworth's *Anglo-Saxon Dictionary, in voc.* Were and Wite.

Dr. Lappenberg, in his History of England under the Anglo-Saxon Kings (see B. Thorpe's translation, London, 1845, vol. ii, p. 336, *Particular and Penal Laws*), mentions several other fines imposed, besides the *Were* and the *Wite*, in cases of homicide. He says, "The relations of the slain received the whole *were*-

other to our criminal mulct or fine. It is to both the *were* and the *wite* that Tacitus refers when, speaking of the Germans, he says, "*Sed et levioribus delictis pro modo, pœna; equorum pecorumque numero convicti mulctantur, pars mulctæ regi vel civitati, pars ipsi qui vindicatur, vel propinquis ejus, exsolvitur.*" *

It is a curious fact, that the laws of remote and barbarous periods show the most minute care in fixing the amount of compensation to be recovered by way of damages. We have the laws of twelve Anglo-Saxon monarchs, from the middle of the sixth century to the Norman Conquest. Of these, the earliest, as I have said, are those of Ethelbert, in the latter part of the sixth century; and his application of the *were*, or, in other words, his rule of damages, is singularly minute.

"If the hair be plucked, or pulled, let fifty sceattas † be paid in compensation. If the scalp be cut to the bone [14] [of the skull] so that the latter appear, let compensation be made by payment of three shillings.

"If an ear be cut off, let compensation be made by payment of twelve shillings.

"If a piece of the ear be cut off, let compensation be made by payment of six shillings.

"Whoever fractures the chin bone, let him forfeit twenty shillings for the offence.

"For each of the front teeth, six shillings.

"For the tooth that stands by the front teeth (on either side), four shillings.

"For every [finger] nail, one shilling.

"If the great toe be cut off, let a fine of ten shillings be incurred.

"If the great toe nail be cut off, let thirty sceattas be paid for compensation. For every other toe nail, ten sceattas." ‡

gild annexed to his rank in the community." "Previously to paying the *weregild*, the king's *mund*, a fine to the king for the breach of his protection, was to be levied; after which, within twenty-one days, the *healsfang* (apprehensio colli, collistrigium), a mulct in commutation of the pillory, or some similar punishment, was to be discharged, and after that, within twenty-one days, the *manbot*, or indemnity to the lord of the slain, for the loss of his man. In addition to all these, there was still the *fyht wite*, due to the crown for the breach of the peace, which, as well as the *manbot*, could never be remitted."

* De Moribus Germaniæ, c. 12. Palgrave, vol. i, p. 99.

† A silver coin, weight 19 gr. *Vide* Hawkins' English Silver Coins, p. 18.

‡ I have taken the above extract from Sir Francis Palgrave, vol. ii, page cvii. The last Latin translation of the Anglo-Saxon laws was by Wilkins, in 1721. The recent Record Commission, among its most valuable and important labors in the field of early English jurisprudence, have published, under the direction of Mr. Thorpe, the first English translation of these curious codes. The history of no part of the law should be written without giving them a careful examination.

Besides the folio edition of the Anglo-Saxon laws, published by the Record Commission, there is an edition in two volumes, 8vo, which I have now before me; the translation of the passage above is substantially the same as that of Palgrave, with the exception that, in the former, "*Bote*" is used for its equivalent "*compensation*."

It will be noticed that the *were*, or damages, in the laws of Ethelbert, is assessed in money. But, says Sir Francis Palgrave, "until a metallic currency was introduced, the legal fines and penalties were paid in kind; in the laws of Hoel Dda all such fines are reckoned in cattle, and the same mode of computation prevails in the *Brehon* laws of Ireland, and the '*Assythments for Slauchter*' of the Scots. An intermediate stage is denoted by the laws of the Continental Saxons. Their *weres* are fixed in *solidi*, or shillings. But the *solidus* was an imaginary denomination; and instead of counting down the coin, the offending party might drive his legal tender into the farm of the plaintiff. An ox passing sixteen months old, represented the greater solidus; the lesser solidus was a yearling ox, or a ewe and her lamb.

Amongst some Saxon tribes, the solidus was reckoned
[15] in corn; thirty bushels of oats, forty of rye, and sixty of wheat, being each its equivalent; and it is most probable that the necessity of adjusting the ancient fines to the standard of Roman Britain, was the cause which produced the enactment of the Kentish laws." * "The coined money in England," says Mr. Sergeant Heywood, speaking of the Saxon period, "was so trifling in quantity, that most of the transactions of commerce, and all buying and selling, were carried on by barter, and cattle obtained the name of *Viva pecunia*, from being received as money upon most occasions, at certain regulated prices." †

* Palgrave's History, vol. i, p. 44.

† The Ranks of the People under the Anglo-Saxon Government, by Samuel Heywood, Sergeant, Introd. p. lii. *In Wera reddere poterit quis*, says the law of the Conqueror, § 10, *equum non castratum pro XX solidis, et taurum pro X solidis, et jumentum pro V solidis.* And see Lex Saxonum, tit. xviii. De Solidis. As to the value of the *Solidus*, Gibbon says, "Till the twelfth century we may support the clear account of twelve *denarii*, or pence, to the *solidus*, or shilling, and twenty *solidi* to the pound weight of silver, about the pound sterling. Our money is diminished to a third, and the French to a fifteenth of this primitive standard."—*Hist. Ch.* 58, note.

The use of cattle as a measure of value is of very great antiquity,—thus Homer:—

> The third bold game Achilles next demands,
> And calls the wrestlers to the level sands;
> A massy tripod for the victor lies,
> Of twice six oxen, its reputed price;
> And next, the loser's spirits to restore,
> A female captive, valued but at four.
> *Iliad*, book 23, 1815.

It seems probable that money became the general measure of value in England not long after the Norman Conquest.

The old feudal services were all originally rendered in kind; the reliefs in horses and arms—military service in person. But in the reign of Henry II, "the humor of the times being," says Mr. Sullivan, "that everything should be paid in money" (Lectures on the Laws of England, Lect. 31, p. 290), the reliefs were commuted for a specific sum, and personal service was exchanged by the same king for escuage and scutage, and the same thing took place in regard to rents (pp. 288 and 289). See also Heywood on Ranks.

The civilized Romans recognized a metallic currency as the measure of value: *qui non facit quod promisit, in pecuniam numeratum condemnatur, sicut evenit in omnibus faciendi obligationibus.*—L. 13 in f. ff: de re: judic; and says Domat, vol. I, p. 271; *Des Interêts, L'argent tient lieu de toutes les choses qu'on peut estimer.*—Liv. iii, tit. v, sect. ii, § 16.

The laws of the Saxons, and those of Hoel Dda, both noticed in the above extract from Sir Francis Palgrave, may not be without sufficient interest in connection with our present subject to permit a brief note. The date of the *Leges Saxonum et Frisionum* has been the subject of great controversy among the antiquarians [see a Historical Treatise on Trial by Jury, Wager of Law, etc., by Thorl

The laws of the Anglo-Saxon monarchs, which we have from the period of Ethelbert of Kent to the Norman Conquest, contain all, more or less, the application of the [16]

Gudm. Repp, Edinburgh, 1832, p. 23]; some ascribing them to Charlemagne, and others to Harold Blue Tooth of Denmark, whose reign closed A. D. 984. The latter opinion would seem the better; in either case, these laws are of interest to the scholar of English jurisprudence, as they at all events belong to the same race from which our ancestors sprang, although after they had left the parent land. Nothing can exceed the simplicity and brevity of these codes:—

In Christi nomine incipit Legis Saxonum, Liber de Vulneribus.

1. De ictu nobilis, solid. XXX, vel si negat, tertia manu juret.

2. Livor et Tumor, LX, solid. vel sexta manu juret.

3. Si sanguinat, cum CXX, solid. vel cum undecim juret.

4. Si os paruerit, CLXXX, solid. vel cum undecim juret.

7. Si per capillos alium comprehenderit, CXX, solid. componat vel XII, a manu juret.

The two bodies of law, the *Lex Saxonum* and the *Lex Frisionum* may be found at length in the *Codex Legum Antiquarum* of Lindenbrog, a curious collection of the legislation of the Middle Ages.

Hoel, or Howell Dda, Howell the Good, was a King of South Wales in the 10th century; the date of his compilation, which consists of three codes, the Venedotian, Dimetian, and Gwentian, is between 914 and 942, and it appears that laws of a similar character are traceable as far back as the 6th century. The republication of these statutes forms one of the great labors of the Record Commission. These laws exhibit the most minute particularity in the estimation of damages. They speak of various sorts of compensation for,—

I. *Saraad*, or a disgrace.

II. *Galanas*, or murder.

And these terms, *saraad* and *galanas*, are also used for the mulct imposed for the offence or crime. There were also two other fines: the *Dirwy* (from Dir, force), a fine of twelve kine, or three pounds; and *Camlwrw*, a fine of three kine, or nine score pence,

The following extracts illustrate this legislation. Venedotian Code, p. 115.

§ 27. In three ways *Saraad* occurs to every person in the world; by striking, assaulting, and taking by violence from him; and if it be a man, if his wife be violated, it is *saraad* to him; if it be a woman, if she find another woman with her husband, it is *saraad* to her; and so nobody escapes without being subject to *sarand*.—

§ 27. The *Galanas* of a steward, a chief of a kindred, a canghellor, and a chief huntsman, is nine score and nine kine, once augmented; and their *saraad* is nine kine and nine score of silver, once augmented.—

P. 108, § 12. A *dirwy* is due for fighting; fighting is assault and battery, and blood and wounds, the three things that constitute fighting; and therefore it is right to pay *dirwy* for them. The amount of the *dirwy* is twelve kine, or three pounds; the amount of a *camlwrw* is three kine, or nine score pence.—

P. 125, § 58. For a dog, or for a bird, or for anything of that kind, there is neither *dirwy* nor forfeiture of life; but *camlwrw* to the lord, and amends to the owner of the property.—

P. 137. Of the worth of fowls.

1. A hen is one penny in value.

2. A cock is two hens in value.—

P. 140. Of skins this treats.

1. The skin of an ox is eight pence in value.

2. The skin of a hart, eight pence.

P. 141. Of the worth of trees this treats.

1. The worth of an oak, six score pence.

5. The worth of a knurled oak, on which there is no fruit, four legal pence.

P. 142. Here Iorwerth, the son of Madog, son of Raawd saw it to be expedient to write the worth of the buildings, and the furniture, co-tillage, and corn damage, together with the proof book.—

P. 145. An iron pan, one legal penny.

A flail, a farthing.—

P. 149. Wadded boots, four legal pence.—

P. 151. Every other thing whatsoever, on which there is no legal worth, *is to be appraised*.—

§ XXIII. Now of the members of the human body.—

P. 157. Of corn damage this treats.—

§ 16. If a horse be found stretching his neck over a hedge, eating the corn, it is not right to take him, but to obtain compensation for damage, unless he be exculpated.

Anomalous Welsh Laws.

P. 708, § 5. Three punishments for ferocious acts; the payment of galanas for the slain; death to him who does the deed; and harrying spoliation of the property of the murderer.

As I have said, I take these extracts from the *Ancient Laws of Wales*,[1] published in one of the folios of the Record Commission; the valuable labors of that Commission, and their munificent liberality to the literary institutions of this country, cannot be too frequently nor honorably noticed.

[1] Ancient Laws and Institutes of Wales, published 1241.

[17] *were;* but in none, with the exception of those of Alfred, between A. D. 871 and 901, do we find the same minute classification of wrongs and remedies which we have just had occasion to notice.

In the laws of Alfred, the rates are higher, whether owing to a better appreciation of personal rights, or to the increase and consequent depreciation of the currency. In the laws of the Conqueror, the *Weres* become very few. Perhaps this is evidence of a civilization gradually increasing, and a jurisprudence slowly improving; for feeble certainly, and unreliable, must be the tribunal charged with the task of imposing damages in civil suits, if the legislator considers it unsafe to be trusted with the assessment of the amount. This elaborate and minute specification, therefore, though on its face it appears to indicate the care and watchfulness of the lawgiver, on a closer examination furnishes stronger proof of his distrust of the judiciary. Arbitrary rules, which do not bend to the justice of the particular matter, especially when used to fix values, are always a misfortune and a defect in jurisprudence: they should never be tolerated, unless on account of some peculiar and extraordinary difficulty in arriving at the truth of the individual case.

What the judiciary was under the Anglo-Saxon government, it is now apparently impossible to learn. Sir Francis Palgrave says,* "Some kind of adjudication probably took place [18] amongst the Anglo-Saxons before the *were* could be required." But any inquiry into this matter, even if practicable, would lead us far beyond our proper limits. It may not, however, be foreign to our subject to notice, that if the *were* or the *wite* could not be paid, it seems slavery was the consequence. "The criminal whose own means were insufficient, and whose relatives or lord would not assist him to make up the legal fine he had incurred, was either compelled to surrender himself to the plaintiff or to some third party, who paid the sum for him by agreement with the injured party. Such a serf was called criminal slave. These are the *servi redemptione* of Henry the First." †

We now come to the examination of the tribunals which, under our present system, are charged with the duty of assessing the amount of damages. Various modes of trial have obtained at different periods of English jurisprudence; trials by ordeal, by battle, wager of law, and by jury.

* Vol. i. p. 205.

† The Saxons in England, by J. M. Kemble, 1849, vol. i, p. 197. In the continuation of this work, which the preface informs us is to discuss, among other things, the law of descent, contracts, and the forms of judicial process, a very valuable addition may be expected to our knowledge of the Anglo-Saxons.

TRIAL BY ORDEAL.—The trial by ordeal, finally prohibited in the early part of the thirteenth century,* was the creature of a superstitious age. It was the offspring of the clergy, and perhaps one among their many efforts to counteract the violence of the military portion of the community. In this aspect, it may not have been without its uses.

TRIAL BY BATTLE.—The trial by battle was the natural growth of the period at which we find it existing. "Man," says the learned and sagacious writer whom I have already several times quoted, "never begins by introducing any law which is entirely unreasonable; but he very frequently allows a law to degenerate into folly, by obstinately retaining it after it has outlived its use and application." † We should naturally expect, in a barbarous and disturbed state of society, where every man's house was a castle, and the whole structure of society upon a martial basis, that questions of right would originally be decided by an appeal to force, and that the first efforts of the legislator and the jurist would only be to systematize and solemnize this mode of determining a controversy by subjecting it to fixed rules, and decreeing the result to determine the right forever. ‡ This mode of trial naturally gave way ‖ before the advancing spirit of order, and little trace of it appears after the fourteenth century. ¶

* Ordeals were prohibited by the 18th Canon of the Fourth Lateran Council, A. D. 1215. Palgrave, vol. i. p. 66.

† Palgrave's Rise and Progress, vol. i. p. 229.

‡ Ainsi, says M. Guizot, s'est introduit dans la legislation le combat judiciaire, comme une regularization du droit de guerre, une arène limitée ouverte à la vengeance.—Guizot, *Hist de la Civilization en France*, tom. i. p. 294 (deuxiéme ed.)

‖ Although singular as it appears, the appeal of death was not abolished in England till 1819. See Ashford v. Thornton, 1 B. & Ald. 405, which resulted in an act of Parliament.[1] The reign of Richard II., 1398, saw one famous trial by battle (being an appeal of treason) between two great lords, Hereford and Norfolk; and Shakespeare's genius has fixed it in our literature:—

"What my tongue speaks, my right drawn sword may prove."

In France, trials by battle, *le gage de bataille*, were abolished as far as regarded the Royal Domains, by St. Louis (Louis IX.), by his ordinance of the year 1260. He prohibited *les batailles en justice mettant en leur place preuves par temoins, sans ôter les autres bonnes et loyales preuves usitées en cour laique jusqu' à ce temps.* So as to appeals or *faussements de jugements*, as they were called, and which were effected by a challenge to the judge, to mortal combat: they were done away by the 8th Article of the same ordinance: *Si aucun veut fausser jugement, en pays là où faussement de jugement, affiert, il n'y aura point de bataille; mais les clameurs, les repons, et autres erremens du plaid seront rapportés en notre cour.* These provisions were intended to apply only to the Royal Domains, but the influence of the lawyers (*les Legistes*) gradually established the prohibition throughout the kingdom. See Sismondi's Hist. des Francs, tom. viii. ch. xi.; Guizot's Hist. de la Civiliz. en France, vol. iv. p. 162 (dèuxieme ed.); Stephens' Lectures on the Hist. of France, lecture viii., for an interesting and picturesque description of the manner in which the lawyers ousted the barons out of their own courts.

¶ In France, the trial by battle was greatly restricted by an ordinance of St. Louis (Louis IX., 1226–1270). See Sismondi's

[1] Act 59 Geo. III. ch. 46.

[19] WAGER OF LAW.—The wager of law, or trial by compurgators, of which we see constant traces in the Anglo-Saxon laws, and which existed till a very recent period,* may claim a more reasonable origin. A party accused of an offence exonerated himself from the charge, by the oaths of a certain number of witnesses; and as Sir Francis Palgrave well observes, "In criminal cases the whole theory of this trial resolves itself into the ordinary practice of our modern courts of justice. Evidence has been given by which a presumption is raised against the accused; but not being conclusive, it is rebutted by the proofs of general good character." †

THE JURY.—Of the four modes of trial of which we have spoken, then, the one that has survived them all, after undergoing, however, very material modifications in its construction, is the *trial by jury*. But it is not within the scope of our present subject, to trace the gradual formation of this institution. Suffice it to say, that trial by jury, originally a trial by witnesses, the jury being themselves the witnesses,‡ grad-
[20] ually supplanted the various modes of trial by battle, ordeal, and wager of law, and from the time of the reign of Henry II. seems to have begun to acquire stability, if not its present form.‖ At all events, at the period of the

Precis de l'Histoire de France, vol. i. p. 366, and Guizot's Hist. de la Civilization, vol. iv. p. 162. St. Louis abolished it as to the Domains of the Crown. M. Guizot calls private wars and judicial duels (p. 159), "les deux bases essentiels de la féodalité."

* 3 Black. Com. ch. 22, p. 345. In New York, by 2 Revised Statutes, p. 410, part iii. ch. vii. tit. iv. art. 2, § 4. "Trials by battle, and by the grand assize, and all other modes of trial except by a jury or by referees, are forever abolished." Wager of law existed in England till very recently. It was abolished in all cases by 3 and 4 W. 4, ch. 42, sec. 13; Chitty on Pleadings, vol. i. p. 142.

† Vol. i. p. 233. This analogy applies, however, only to those cases where the evidence is presumptive, and not positive; as in the latter class testimony to character is admitted only in mitigation of the sentence. La véritable origine des *Conjuratores*, says Guizot, c'est que tout autre moyen de constater les faits était à peu près impraticable. Pensez à ce qu'exige une telle recherche, à ce qu'il faut de développement intellectuel et de puissance publique pour le rapprochement et la confrontation des divers genres de preuves, pour recueillir et débattre des témoignages, pour amener seulement les témoins devant les juges, et en obtenir la verité en présence des accusateurs et des accusés. Rien de tout cela n'était possible dans la société que régissait la loi salique; et ce n'est point par choix ni par aucune combinaison morale, c'est parcequ'on ne savait et ne pouvait mieux faire, qu'on avait recours alors au jugement de Dieu et au serment des parens."—Guizot, *Histoire de la Civilization en France*, vol. i. pp. 284, 285.

‡ "The ancient jurymen were not impaneled to examine into the credibility of the evidence; the question was not discussed and argued before them; they, the jurymen, were the witnesses themselves, and the verdict was substantially the examination of these witnesses, who of their own knowledge, and without the aid of other testimony, afforded their evidence respecting the facts in question to the best of their belief. In its primitive form, a trial by jury was therefore only a trial by witnesses."—Palgrave, vol. i. p. 244.

‖ Palgrave, vol. i. p. 66, and p. 243. See Repp on Ancient Trial by Jury, already cited (p. 14, in notes), an ingenious treatise to illustrate the gradual formation of the jury, from the wager of law and the trial by battle. To Sir Francis Palgrave's work I acknowledge great obligations. Indeed, to the legal student who desires an acquaintance with the origin of our jurisprudence, it is indispensable. Mr. Petheram says, in his Sketch of Anglo-Saxon Literature, that at its appearance it

earliest systematic records of judicial proceedings in England, the jury had become the tribunal which disposed of the question of fact, and the amount of damages became a principal part of their jurisdiction. All hope of discovering the precise date is now, perhaps, lost, as is the case in regard to the epoch of still greater interest, that of the orgin of parliamentary representation.* It is certain that damages, by their present name, were known at a very early period of the English law. The statute of Gloucester, passed 6 Edward I., A. D. 1278,† after giving damages in certain real actions in which they were not previously recoverable, goes on to give costs in the same cases, and closes by enacting that the act shall apply to all cases where the party is to recover damages. "Et tout ceo soit tenu en tout cas ou homme recover damages."‡

The jury in its present form dates, as has been already [21] said, from about the period of the reign of Henry II. (1150.)‖ Previous to that time, the great mass of business was transacted in the county courts, where the freeholders were judges of both law and fact. The *Aula* or *Curia Regis*, of which the King's Bench is a remnant,¶ disposed of the causes of the great Lords only. The exchequer already existed, but was a part of the *Aula Regis*.** It would seem that this freeholders' court became very obnoxious, as ignorant of law, rendering it multiform, unequal, and unjust; and these abuses were remedied by the appointment of justices in eyre, who settled the questions of law, leaving to the jury the questions of fact.†† The precise origin of this curious division of power, it is, as has been said, now impossible to trace with accuracy. A similar or analogous distinction existed in the Republican age of the Roman Law under the procedure by *formula;* but that feature of their jurisprudence disappeared when the formula, together with the office of the *Judex*, or Referee, was abolished, and the magis-

was not peculiarly successful; but he well adds, "that for many years to come, it must form the basis of our knowledge respecting the frame-work of the Anglo-Saxon government.—Petheram's *Sketch*, p. 146. Those, also, who desire a philosophical view of the barbaric codes, cannot be better referred than to M. Guizot's Histoire de la Civilization en France, the 9th and 10th lessons of the first volume, and Mr. Hallam's History of Europe during the Middle Ages, vol. i. chap. ii., on the Feudal System.

* Turner's Anglo-Saxons, book viii. ch. iv. vol. iii. p. 185, and Appendix III. ch. ix. vol. ii. p. 236.

† Stat. at Large, by Ruffhead, vol. i.

‡ See Barrington's Observations on the Statutes, p. 109. "After verdict given of the principal cause, the jury are asked touching *costs* and *damages*."—Jacobs' *Law Dict.* "*Damage.*"

‖ "Although Henry II was not in strictness the inventor of that legal constitution which succeeded to the Anglo-Saxon policy, yet 'Trial by the Country' owes its stability, if not its origin, to his jurisprudence."—Palgrave, ch. viii, vol. I, p. 243.

¶ Bl. Com. bk. 3, ch. iv, § 6, p. 41.

** Hale's History C. Law, ch. vii; Sullivan's Lect. 32, p. 300; Bl. Com. b. 3, ch. iv, § 6.

†† Sullivan's Lectures, Lect. 32, p. 296; Hale's Hist. of Com. Law, ch. vii, vol. I, p. 246.

trates, under the despotic innovations of the Empire, disposed of the entire litigation *extra ordinem.* To this we shall have
[22] occasion hereafter to advert; suffice it for the present to say that since the period to which we have referred, the maxim has generally held good in the English law, *ad questiones legis respondent judices; ad questiones facti juratores.*

The quantum of damages being in most cases intimately blended with the questions of fact, must have been from the outset generally left with the jury. It is very certain that the limits of their power over the amount of remuneration were not at first as clearly defined as they have since become. In one case, as late as the reign of James I.,* it is said that "the jury are chancellors," and that they can give such damages as "the case requires in equity," as if they had the absolute control of the subject. So an early text-writer puts the case of sheep passing the Severn, and one of them be forced into the water and all the rest follow and be injured, and asks whether he shall have damages for all or for one; but the only solution he can find for the difficulty is, that the "jury must well consider of it."† While on the other hand the old books are full of cases, where, on judgment by default and even on demurrer, the courts themselves fix the amount of damages;‡[1] and the remains of this we see in the power still exercised by the English courts in cases of *mayhem.* Indeed, for a long time after the distinction between law and fact was clearly established, and the separate province of judge and jury defined with considerable accuracy, there appears to have been an almost total want of any clear and definite understanding of those rules of damages which we are about to consider.‖

Before commencing the more practical part of this treatise, however, it will be well to bear distinctly in mind the general principle which the English law has in view in this matter, and how in this respect it differs from other systems of jurisprudence.

[23] Jewish Law.—We have seen in the early laws of the Anglo-Saxons, that with the most minute care, specific damages were arbitrarily assessed in each class of cases, without reference to the actual injury sustained in the particular case. We find in codes still more ancient, rules equally arbitrary in

* Sir Baptist Hixt's case, Rolles' Abr. ii. 703; Trial, pl. 9.

† Shepherd's Epitome, p. 70.

‡ Rolles' Abr. tit. Damages. The Queen's Bench has still the power to assess damages on demurrer, or default, without the intervention of a jury. Whitaker v. Harold, 12 Jur. 395.

‖ For a very full and able description of the powers and duties of court and jury under our system, see Commonwealth v. Porter, 10 Met. 263, and many cases there cited.

[1] See *post,* 598, *et seq.*

this respect. In the Jewish law (Exodus, ch. xxi, ver. 32) various provisions of a similar nature are incorporated; thus, "If a man's ox push (gore) a man servant or maid servant, he shall give unto their master *thirty shekels of silver*, and the ox shall be stoned." So, again, ch. xxii, ver. 9: "For all manner of trespass, whether it be for ox, or ass, for sheep, for raiment, or for any manner of lost thing which another challengeth to be his, the cause of both parties shall come before the judges, and whom the judges shall condemn, he shall *pay double* unto his neighbor." So, again, by a rough equity, ch. xxi, ver. 35: "If one man's ox hurt another's that he die, then they shall sell the live ox, and divide the money of it, and the dead ox also shall they divide."

HINDOO LAW.—The same principle is to be found in the laws of the Hindoos: "Where a claim is proved, the person who gains the suit is put in possession, and the judge exacts a fine of equal value from the defendant. And if the plaintiff loses his cause, he in the like manner pays double the sum sued for." And in regard to torts, the same principle was applied.*

ROMAN LAW.—When we come to the Roman Law, we find the subject elaborately, but not very clearly nor very harmoniously treated. To understand its provisions, it is necessary to bear in mind the fact to which we have already adverted, that until the despotic centralization of the Empire had completely subverted the early institutions of the Republic, the same line was drawn in their administration of justice, as with us, between questions of law and questions of fact. The magistrate who heard the statements of the parties did not decide the cause. He turned the litigants over to a *Judex*,, or single Juror, or Referee, as he may be regarded, giving him at the same time a *formula* or charge by which his decision was to be controlled. This control was, however, not an absolute one, and in some aspects of the cause, and particularly as to the extent of the defendant's liability, and the *Litis æstimatio*, or Measure of Damages, the *Judex* seems to have been clothed with a [24] large discretion. This discretion was, however restrained and limited to a certain extent, by several special statutes.†

The general definition of damages, the *id quod interest* or *utilitas* of the civil law, in the Code of Justinian, is the actual loss

* Ayeen Akberry, by Gladwin, vol. ii. pp. 498, 504.

† See, as to the three stages of the Roman procedure,—the *Legis actiones;* the *Formula,* introduced about 650 A. U. C.; and the forms of the Empire,—Das Römische Privat Recht von Wilhelm Reim, book 5.

sustained and the profit which might have been made—*in quantum mea interfuit, id est quantum mihi abest, quantumque lucrari potui.** A more distinct subdivision of the subject is into *damnum emergens* or loss arising, and *lucrum cessans*, or profit prevented.† But how far in each case the party is liable, when for *damnum emergens* only, when for *lucrum cessans*, and to what extent, the texts of the Roman Law leave us greatly in doubt. They inquire in each case whether the party is to be considered guilty of *dolus*, fraud or evil design, or of *culpa* only; if of *culpa*, whether *culpa lata*, or *culpa levis* merely; and the nice shades of distinction which they attempt to define, have at once excited and baffled the ingenuity of modern commentators. In all these questions the *Judex* appears to have exercised a very considerable discretion.‡

In the award of compensation, or damages, as we term it, the *litis æstimatio*, the *Judex* seems also to have been little bound by any settled rules. In cases of fraud or gross negligence, which is as near as we can render *dolus* and *culpa lata*, the plaintiff or *actor* was permitted himself to swear to the amount of
[25] injury sustained; and there seems originally to have been no check on this prerogative, *in infinitum jurari potuit;* but this license was restrained by positive provisions, which gave the power of assessment to the *Judex.*‖ To check still more effectually the abuses which would necessarily flow from such a state of things, various statutory provisions were introduced, and an effort was made to obviate the difficulty by fixed valuations not to be departed from.¶

An arbitrary rule of a very singular character was established by the *Lex Aquilia*,** which provided by its first chapter, that in case of the killing of any slave or cattle, unless by mere chance, the trespasser should pay the master as much as the

* Rat. Rem. Hab. Dig. 46, tit. viii. § 13.

† Dig. de Damno Inf. lib. 26 (39, 2).

‡ Ueber die Frage wie weit in einem jeden Falle das Interesse praestirt werde, ist in dem Römischen Rechte wenig vorhanden, woraus sich bestimmte Grundsätze ableiten liessen. Doch geht die gewöhnliche Meinung dahin, dass in Fallen, wo *Dolus* oder *Culpa lata* oder *Contumacia insignis* die Ursache des Schadens sey, so wohl *damnum* als *lucrum*, hingegen wo nur eine gewöhnliche culpa zum Grunde liege, bloss das *damnum emergens* vergütet werde.—Haenel, *vom Schadenersatze*, Leipzig, 1823, § 81. The books of the German scholars are numerous; one of the most recent is "Die Culpa des Römischen Rechts," von J. C. Hasse, edited by Bethmann Holweg, Bonn: 1838. But the writers of this class, though profound scholars and acute reasoners, appear to me to lose themselves in a maze of contradictory and obscure citations from the vast store-house of the Pandects, and in a perhaps still more hopeless metaphysical labyrinth of abstract discussions on the different shades of fraud and fault. Nothing do they less resemble than the clear and practical manner of our writers. The best manual of the subject that I have seen, is the work from which the above citation is made.

‖ D. de in Lit. Jur. l. 4, § 2 (12, 3); l. 5, § 1 cod. Haenel, § 95, p. 110.

¶ Rat. Rem. Hab. Dig. lib. 46, tit. viii. § 13.

** Inst. lib. iv. tit. iii. De Lege Aquiliâ, Dig. lib. ix. tit. ii. Ad Legem Aquiliam. This law is said to have been passed as early as 467 A. U. C.

property had been worth at any time within the year. *Damni injuriæ actio constituitur per legem Aquiliam; cujus primo capite cautum est, ut si quis alienum hominem, alienamve quadrupedem, quæ pecudum numero sit, injuriâ occiderit, quanti ea res en eo anno plurimi fuerit, tantum domino dare damnetur.** So that if a slave was killed who at the time of his death was a cripple, but within the year had been sound and valuable, his full value as sound was to be paid.

By the third chapter of this law, other kinds of intentional or negligent injury to property were punished; but in these cases, the estimate of damages was limited to the highest value of the thing injured within thirty days previous. *Non quanti in eo anno, sed quanti in diebus triginta proximis res fuerit, obligatur is, qui damnum dederit.*† The remedy given by the *Lex Aquilia* may be considered as very analogous to our actions of trespass and case;‡ but it was limited to wrongs actively perpetrated, and mere acts of nonfeasance did not come within its scope.‖ In consequence, other enactments were made and the same principle of arbitrary and fixed valuation was applied to matters of contract for sums certain,¶ in which cases [26] it was provided that damages should not be given beyond the double of the amount in question: *hoc quod interest dupli quantitatem minime excedere.***

CIVIL LAW.—The civil law, as introduced into modern Europe, seems to have retained the early features of its original, in the respect of which we are now speaking, and instead of laying down any fixed or arbitrary rule, to have left the matter very much to the discretionary consideration of the tribunal which has cognizance of the cause. So, under this system as established in France, and previous to the adoption of the Code Napoleon, damages were divided into interest and damages, *intérets* and *dommages-intérets*. *Intéret* answers precisely to our interest, and is the measure of damages inflicted for the breach of a mere pecuniary obligation, as in the common cases of bills

* See, on this subject, in the works of Molinæus (Dumoulin, ed. 1681, vol. iii. p. 422), his "Tractatus de eo quod interest." It is frequently referred to by Pothier, as one of the most valuable expositions of the civil law on the measure of damages.

† Inst. lib. iv. tit. iii. § 14.

‡ Inst. lib. iv. tit. iii. § 9; Brown's Civil and Admiralty Law, bk. iii. ch. i. vol. ii. p. 401; Cooper's Justinian, in notes; Hugo, § 238. The provisions of the law are very curious, and worthy of a more careful examination than the scope of this work permits.

‖ Zuvörderst waren alle Beschädigungen ausgeschlossen die in einem blossen Nichtthun bestehen.—Hasse, *Culpa des Römischen Rechts* § 6, p. 21.

¶ Code, lib. vii. tit. 46. De Sent. quæ pro eo quod int. prof.

** The original of this rule is, probably, to be found in the Twelve Tables. *Si quid endo deposito dolo malo factum escit, duplione luito. Si depositarius in re depositâ dolo quid fecerit, in duplum condemnetur.* See Pothier's Pandects, by Bréard Neuville, vol. i. pp. 332, 364, 366.

and notes. *Dommages-intérets* correspond with our term damages in its application to all other forms of action; and in this respect it is that the system appears loose and uncertain.*

After laying down the rule in regard to interest, which as with us is limited to a fixed rate, Domat says,† "The other kinds of damages, are undefined, and are increased or diminished, at the discretion of the judge, according to the facts and circumstances of the particular case; thus, in the case of a tenant who omits to make the repairs to which he is bound by his lease, or of a contractor who does not perform his [27] contract, or performs it ill,—in either case they owe an indefinite amount of damages resulting from the default, and these damages are differently regulated according to the diversity of the losses which happen, the nature of the facts, and the attendant circumstances." And he illustrates these rules by one or two cases as to profits claimed as loss, where he says, "It must be left to the discretion of the judge to arrive at some measure of compensation according to the circumstances and the particular usages, if there are any."‡ And again, ‖ "It results from all the preceding rules, that as questions of damages depend on the attendant facts and circumstances, they must be decided by a sound discretion, exercised as well with regard to the circumstances of the case as to general principles."

And so says Pothier:¶ "It is necessary to exercise a certain

* In addition to the two heads of Interest and Damage, Domat makes a third, of "Restitution des Fruits," which we shall consider under the head of Mesne Profits, it being fairly a branch of the great subject of Damages.

† Loix Civilles, part i. liv. 3, tit. v. vol. i. p. 259. Les autres sortes de dommages sont *indefinis*, et ils s'étendent ou se bornent différemment par la prudence du juge, à plus ou à moins selon la qualité du fait et des circonstances. Ainsi, un locataire qui manque aux réparations qu'il doit par son bail, un entrepreneur qui manque de faire l'ouvrage qu'il a entrepris, ou qui le fait mal, doivent *indefiniment* les dommages et les intérêts qui peuvent suivre du défaut d'avoir executé leur engagement; et on les régle différemment, selon la diversité des pertes qui arrivent, la qualité des faits qui les causent, et les autres circonstances.

‡ P. 262: Il doit dépendre de la prudence du juge d'arbitrer et de modérer quelque dédommagement, selon les circonstances et les usages particuliers, s'il y en avoit.

‖ Book iii. tit. v. sec. 2, § 13, vol. i. p. 270. Il résulte de toutes les régles précédentes, que comme les questions des dommages et intérêts naissent toujours des faits que les circonstances diversifient, c'est par la prudence du juge qu'elles se décident, en joignant aux lumières que les principes doivent donner, le discernement des circonstances et des égards qu'on doit y avoir. I find in an old French work, 1637, "Recueil des Arrests Notables," a curious illustration of the looseness of the old French law, in this respect. It says, En estimation des dommages et Intérêts quand les experts sont discordans, le juge d'office doit prendre un tiers, et s'ils ne s'accordent, le "juge ne doit suivre ni la haute ny la moindre estimation." So, again, in the Journal des Audiences, t. 6, p. 252, on the question whether a promise given by a female to marry under a *dédit*, or forfeit of a fixed sum, was to be regarded as liquidated damages: "La proposition *stipulatio pœnae in contractu sponsalium apposita improbatur*, est écrite dans tous nos livres qui ont traité de la matière—Dans la jurisprudence on ne s'arrête point à ces stipulations de peine—Les Dommages-intérêts ne sont adjugez que *ad arbitrium boni viri*—suivant que le meritent les cas de mauvaise foi, de la condition des personnes, de la dépense, perte, ou deshonneur.

¶ Traité des Obl. part i. ch. ii. art. 3, § 160. Il faut même, selon les differens cas,

degree of moderation in estimating the amount of damages, according to the particular case." And again,* "Damages are to be moderated where they would otherwise be excessive, by leaving the computation to the arbitrament of the judge." So, again,† "Where the damages are considerable in amount, they should not be rigorously assessed, but with a certain [28] degree of moderation." And again, even in cases of raud:‡ "It must be left to the discretion of the judge, even in cases of fraud, to exercise a certain degree of indulgence in fixing the amount of damages."

Merlin uses substantially the same language; he says,‖ "It is to be observed that the law of Justinian, so far as it limits exorbitant or excessive damages to precisely double the value of the thing in controversy, has not the force of law with us [and the Code has not incorporated it among its provisions]; but the principle on which it is founded, being one of natural equity, should be adhered to, by moderating the damages wherever they are too great, by leaving them to the arbitrament of the judge."

In the various systems of jurisprudence which we have thus cursorily examined, we see that the difficulty inherent in the subject is sought to be avoided, either by fixing on an arbitrary valuation of the loss sustained applicable to all cases, or by leaving the whole matter largely to the discretion of the tribunal which has cognizance of the subject.

THE COMMON LAW.—Our law differs very materially from all these systems. By it, in all cases of civil injury, or breach of contract,¶ with the exception of those cases of trespasses or torts, accompanied by oppression, fraud, malice, or negligence so gross as to raise a presumption of malice, where the jury have a discretion to award exemplary or vindictive damages,—in all other cases the declared object is to give *compensation* to

apporter une certaine modération à la taxation et estimation des dommages dont le débiteur est tenu.

* § 164, Nous devons modérer les dommages et intérêts, lorsqu'ils se trouvent excessifs, en laissant cette modération à l'arbitrage du juge.

† Quand les dommages et intérêts sont considérables, ils ne doivent pas etre taxés et liquidés en rigueur, mais avec une certaine modération.

‡ § 168. Il doit être laissé à la prudence du juge, même en cas de dol, d'user de quelque indulgence sur la taxation des dommages et intérêts.

‖ Repertoire; Dommages et Intérêts, vol. viii. Il faut observer que la loi de Justinien, en ce qu'elle réduit précisément au double de la valeur de la chose les dommages et intérêts exorbitans, n'a pas force de loi parmi nous [et le Code Civil ne l'a pas remise en vigueur]; mais le principe sur lequel elle ést fondée, étant un principe qui émane de l'équité naturelle, on doit s'y conformer, et en consqéuence, modérer les dommages et inétrêts lorsqu'ils se trouvent excessifs, en laissant cette modération à l'arbitrage du juge.

¶ There is a single exception in regard to contracts—that of promise of marriage, which, as we shall see, is left largely to the discretion of the jury.

the party injured, for the actual loss sustained.* And the amount of this compensation is a question of law, not governed by any arbitrary assessment, nor, on the other hand, left
[29] to the fluctuating discretion of either judge or jury. By the general system of our law, for every invasion of right there is a remedy, and that remedy is *compensation.* This compensation is furnished in the damages, which are awarded according to established rules; and these rules form what is called the Measure of Damages.

RULE OF COMPENSATION.—"Wherever," says Blackstone, "the common law gives a right, or prohibits an injury, it also gives a remedy by action."† "If a statute gives a right," said Lord Holt, "the common law will give a remedy to maintain that right; *a fortiori*, where the common law gives a right, it gives a remedy to assert it. This is an injury, and every injury imports a damage."‡ "It is the pride of the common law," says the Supreme Court of New York, "that wherever it recognizes or creates a private right, it gives a remedy for the wilful violation of it."‖ "Another species of property," says Blackstone,¶ "acquired and lost by suit and judgment at law, is that of damages, given to a man by a jury as a *compensation* and satisfaction for some injury sustained." "Every one," said Lord Holt,** "shall recover damages in proportion to the prejudice which he hath sustained." "Damages—*damna* in the common law," says Lord Coke,†† "hath a special signification for the *recompence* that is given by the jury to the plaintife, for the wrong the defendant hath done unto him." "It is a general and very sound rule of law," said Sedgwick, J., delivering the opinion of the Supreme Court of Massachusetts,‡‡ "that where an injury has been sustained, for which the law gives a remedy, that remedy shall be commensurate to the injury sustained." "It is a natural and legal principle," said Shippen, Chief Justice of the Supreme Court of Pennsylvania,‖‖ "that the compensation should be equivalent to the injury." "The general rule of law," said Story, J., to the jury on the Rhode Island cir-
[30] cuit,¶¶ "is this: whoever does *an injury* to another is liable in damages to the *extent of that injury.* It matters not

* Smith v. Sherwood, 2 Texas R. 460.
† Com. III, ch. viii, p. 123.
‡ Ashby v. White, 1 Salk. 19.
‖ Yates v. Joyce, 11 J. R. 136. See, also, Lamb v. Stone, 11 Pick. 527; Allison v. McCune, 15 Ohio, 726; and Webb v. Portland Manuf. Co. 3 Sum. 192.
¶ Com. II, ch. xxix, p. 438.
** Ferrer v. Beale, 1 Lord Raym. 692.
†† Co. Litt. 257*a*.
‡‡ Rockwood v. Allen, Ex'r. 7 Mass. 254.
‖‖ Bussy v. Donaldson, 4 Dallas, 206.
¶¶ Dexter v. Spear, 4 Mason, 115.

whether the injury is to the property, or the person, or the rights, or the reputation of another."

And this compensation is awarded, except in those cases to which we have referred, according to certain rules of law which the jury are not at liberty to disregard, and which equally control the conduct of the court. "In cases," said Washington, J., on the Pennsylvania circuit,* "where a rule can be discovered, the jury are bound to adopt it. That rule is, that the plaintiff should recover so much as will repair the injury sustained by the misconduct of the defendant." In regard to the rate of damages on a foreign bill of exchange, the New York Court of Errors said, "In this, as in other cases of contract, the rule by which the amount or extent of redress should be ascertained, is a question of law."† Thus it appears, that the amount of compensation, or in other words, the measure of damages is, as a general rule, matter of law to be disposed of by the court.

DAMNUM ABSQUE INJURIA.—It is not, however, to be understood that legal relief is to be had for every species of loss that individuals sustain by the acts of others. It is undoubtedly true that damage resulting from fraud, deceit, or malice, always furnishes a good cause of action.‡ "This principle," says the Supreme Court of Ohio, "is one of natural justice, long recognized in the law."‖ But where the injury is not to be traced to any evil motive, the rule is by no means universal that injury is always entitled to redress. In addition to the great class of moral rights and duties which the law does not attempt to protect or enforce,¶ there are many sufferings inflicted by human agency, where the immediate instruments of the injury are free from fault, or the act beyond their control.[1] In these cases the law does not seek to interfere.** It is only legal injury [31]

* Walker v. Smith, 1 Wash. C. C. R. 152.

† Graves v. Dash, 12 J. R. 17, and *vide post*, ch. vii.

‡ Pasley v. Freeman, 3 T. R. 51; Upton v. Vail, 6 J. R. 182; Barney v. Dewey, 13 J. R. 224.

‖ Bartholomew v. Bentley, 15 Ohio, 659, 666.

¶ Pasley v. Freeman, 3 T. R. 51.

** Such are the cases governed by the maxim, *Salus populi suprema lex.* "There are many cases," says Mr. Broom, in his recent interesting and valuable work on Legal Maxims, p. 1, "in which individuals sustain an injury for which the law gives no action, as where private houses are pulled down, or bulwarks raised on private property for the preservation and defence of the kingdom against the king's enemies." Such, again, are those which fall within the maxim *Necessitas inducit privilegium quod jura privata.* "As a general rule," says Mr. Broom, in his work above cited, p. 6, "the law

[1] So where a sheriff collected "*confederate*" money on a *fi.-fa.*, and deposited it in a safe, where without negligence on his part, it remained till it became valueless; *held*, that he was not liable for the face of the note in United States currency. Herdspeth v. Johnson, 34 Geo. 403.

that sets its machinery in operation; and this is meant by the maxim that *damnum absque injuriâ* gives no cause of action.* So, if in the prudent and reasonable exercise, by an owner of property, of his right of dominion, another sustains damage, it is *damnum absque injuriâ.*† So it is has been said in regard to a corporation charged with committing a nuisance, "If the defendants have only pursued the path presented for them by the laws from which they derive their existence, they have committed no wrongful act. Though the plaintiff may have sustained damage, it is *damnum absque injuriâ;* for the act of the law, like the act of God, works no wrong to any one."‡[1]

There must, too, not only be *loss*, but it must be injuriously brought about by a violation of the *legal rights* of others. "No one, legally speaking," says the Supreme Court of New York, "is injured or damnified unless some *right* is infringed. The refusal or discontinuance of a favor gives no cause of action.‖[2] The prosecution of this inquiry, however, would lead us directly into the great field of causes of action. Suffice it for our [32] present purposes to say that whenever loss is coupled with legal injury, the law gives compensation.

INJURIA SINE DAMNO.—It is further to be borne in mind, that if loss without legal injury goes unredressed, the correlative proposition is equally true, that the infringement of a legal right, when unattended by any positive injury, furnishes no

charges no man with default where the act done is compulsory and not voluntary, and where there is not a careful selection on his part; and, therefore, if either there be an impossibility for a man to do otherwise, or so great a perturbation of the judgment and reason, as in presumption of law man's nature cannot overcome, such necessity carries a privilege in itself." I beg leave very humbly to recommend Mr. Broom's work to those who desire to rivet in their minds, not only the rules but the reason of our jurisprudence.

* Ashby v. White, 1 Salk. 19; s. c. 2 Ld. Raym. 955; Lamb v. Stone, 11 Pick. 527; Broom's Legal Maxims, 93. "In point of law," said Rolfe, B. in Davies v. Jenkins, 11 Mees. & Wels. 755, where process had been by mistake served on the wrong person, "if the proceedings have been adopted purely through mistake, though injury may have resulted to the plaintiff, it is *damnum absque injuriâ*, and no action will lie." "This is one of those unfortunate cases," says the same learned judge, in Winterbottom v. Wright, 10 Mees. & Wels. 109,—a suit by a mail coachman against a contractor for supply of mail coaches for injury resulting from a coach breaking down,—"in which there certainly has been *damnum*, but it is *damnum absque injuriâ.*" So in Masachusetts, where the owner of land made an excavation therein near the street, and a person in the night-time fell in; held, that the owner was not liable. "Where neither party is in fault," said the Supreme Court, "and an accident takes place, it is *damnum absque injuriâ.*"—Howland v. Vincent, 10 Met. 371.

† Gardner v. Heartt, 2 Barb. (N. Y.) 168; and *vide post*, ch. iii.

‡ First Baptist Church v. Sch'y & Troy R. R. Co. 5 Barb. (N. Y.) 79.

‖ Mahan v. Brown, 13 Wend. 261, where it was held that an action will not lie for obstructing a neighbor's lights, if they be not ancient lights, and no right has been acquired by grant or occupation and acquiescence.

[1] Donavan v. The City of New Orleans, 11 La. An. R. 711.
[2] See Steuart v. State of Maryland, 20 Md. 97.

ground for other than nominal relief. It is not sufficient that an act unauthorized by law has been committed. For *Injuria sine damno* there is no compensation. Substantial loss to the party plaintiff must have ensued to entitle him to substantial relief. *De minimis non curat lex.*[*1] But of this we shall have occasion to take notice again when we come to consider the subject of nominal damages.

Public Wrongs.—To this general principle, that where loss and legal injury unite, relief will be given by suit, the law recognizes one exception, that where the wrong is on so great a scale that the whole community, or a large portion of them, suffer from it. "Here," says Blackstone, "I must premise that the law gives no *private* remedy for anything but a *private* wrong."† And so the law is laid down by Lord Coke, in regard to nuisances on the highway: "A man shall not have an action on the case for a nuisance done in the highway, for it is a common nuisance, and then it is not reasonable that a particular person should have the action, for by the same reason that one person might have an action for it, by the same reason every one might have an action, and then he would be punished a hundred times for one and the same cause." In such case the remedy is by indictment.

Particular Damage.—But Coke goes on immediately to make this distinction: "But if any particular person afterwards, by the nuisance done, has more particular damage than any other, then for that particular injury he shall have an action on the case." ‡ The rule and the exception have both been repeatedly recognized in England and in the courts of this country, though there has been much controversy as to the nature and amount of the "particular damage" that will support the action. It has been held in England, that an obstruction of a navigable creek, by which the plaintiff's vessel was arrested in her course, was sufficient to maintain a suit; ‖ and where a [33] corporation bound to repair certain banks, mounds, seashores and piers, neglected to do so, in consequence of which

* Paul v. Slason, 22 Verm. R. 231.

† Com. III. ch. 13, p. 219; IV. ch. 13, 167; Broom's Legal Maxims, 4.

‡ Williams's case, 5 Rep. 72.

‖ Rose v. Miles, 4 Maule & Sel. 101, which virtually overruled Hubert v. Groves, 1 Esp. R. 148, and Paine v. Partrich, Carth. 191; and the doctrine of Rose v. Miles was affirmed in Greasly v. Codling, 2 Bing. R. 263, as to a highway. The authority of Hubert v. Groves has also been denied in this country. Lansing v. Wiswall, 5 Denio, 213.

[1] See, however, Fullam v. Stearns, 30 Vt. 443, *post* 53.

the plaintiff's house was injured, it was also held that the action lay.* So, again, where a bookseller, having a shop by the side of a public thoroughfare, suffered loss in his business in consequence of passengers having been diverted from the thoroughfare by the defendant's continuing an unauthorized obstruction across it for an unreasonable time, this was held a sufficient particular damage to be the foundation of an action.† The doctrine of these cases has been substantially adopted in this country, as we shall have occasion to see when we come to treat of trespasses to real estate.‡

[34] We shall be obliged to make a more minute examination of this subject when we come to speak particularly of the subject of Nuisances; ‖ but we should not omit to notice here that in cases like these, in which the right to relief depends upon the amount of injury, we may be said to approach a vanishing point, where all distinctions between the cause of action and the rule of compensation are confounded and lost.

Composition of Offences.—It is proper here to call attention to the distinction maintained between those cases of a criminal character which can be compromised by the parties themselves, and those in which no such private interference is permitted. It was early held, that a contract to withdraw a prosecution for

* The Mayor and Burgesses of Lyme Regis v. Henly, 1 Bing. N. C. 222.

† Wikes v. Hungerford Market Company, 2 Bing. N. C. 281, where the authority of Hubert v. Groves was again denied.

‡ Pierce v. Dart, 7 Cowan R. 609; Lansing v. Smith, 8 Cowen, 146; s. c. 4 Wend. 9; Mills v. Hall, 9 Wend. 315; The Mayor, &c. v. Furze, 3 Hill, 612, and Myers v. Malcolm, 6 Hill, 292; Hay v. Cohoes Co. 3 Barb. S. C. (N. Y.) 42; Lansing v. Wiswall, 5 Denio, 213; First Baptist Church v. Sch'y & Troy R. R. Co. 5 Barb. S. C. (N. Y.) 79; Baxter v. Winooski Turnpike Co. 22 Vermont, 114; Stetson v. Faxon, 19 Pick. 147. In the Proprietors of the Quincy Canal v. Newcomb (7 Met. 276), it was said, "that if a party had suffered damage from the filling up of a canal and want of cleansing, by means of which he was unable to enter it, it would have been a damage suffered in common with all other members of the community, and therefore redress must be sought by a public prosecution. Where one suffers in common with all the public, although from his proximity to the obstructed way, or otherwise, from his more frequent occasion to use it he may suffer in a greater degree than others, still he cannot have an action, because it would cause such multiplicity of suits as to be itself an intolerable evil. But when he sustains a special damage differing in kind from that which is common to others, as where he falls into a ditch unlawfully made in a highway, and hurts his horse, or sustains a personal damage, then he may bring his action."

In Pennsylvania, the rule has been applied to an obstruction in the Big Schuylkill, which prevented the plaintiff's rafts from descending. Heges v. Heiser, 1 Binney, 463. In that State, when a private person suffers some extraordinary damage beyond other citizens, by a public nuisance, he shall have a private satisfaction by action, even if his special damage be merely consequential. Pittsburgh v. Scott, 1 Barr, Penn. State, 309. In Kentucky, it has been said that it is not enough that one be turned out of the way. Barr v. Stevens, 1 Bibb (Kentucky), 292. In Connecticut, see Bigelow v. Hartford Bridge Co. 14 Conn. 565; and O'Brien v. Norwich & W. R. R. Co. 17 Conn. 372; and see *post*, ch. v. The doctrine is the same in regard to abatement: "The ordinary remedy for a public nuisance is itself public—that of indictment—and each individual who is only injured as one of the public, can no more proceed to abate than he can bring an action."—Mayor of Colchester v. Brooke, 7 Q. B. R. 339, 377.

‖ *Post*, ch. v.

perjury is founded on an unlawful consideration and void. If the party charged were innocent, the law was abused for the purpose of extortion; if guilty, it was eluded by a corrupt compromise, screening the criminal for a bribe.* The subject has been much considered in subsequent cases; and it seems now to be well settled that the right to compromise depends on the right to recover damages in a civil action. "The law permits a compromise of all offences, though made the subject of a criminal prosecution, for which offences the injured party might sue and recover damages in an action. It is often the only manner in which he can obtain redress. But if the offence is of a public nature only, no agreement can be valid that is founded on the consideration of stifling a prosecution for it." Therefore, although the party injured may lawfully compromise an indictment for a common assault, yet an agreement to pay the costs of a prosecution of an assault on the plaintiff and riot, and of an action for a wrongful levy under a *fi. fa.*, which agreement was founded partly on compromise of the prosecution, and partly on an undertaking to withdraw the execution, is altogether invalid as founded on an illegal consideration. †

There is, as has already been said, a large class of cases where the common law, in giving relief, loses sight of the principle of compensation, and gives damages by way of punishment for acts of malice, vexation, fraud, or oppression. In these [35] cases it has been found difficult to set any fixed or precise limits to the discretion of the jury, or, in fact, to prescribe any rule whatever. In other words, they are left to what Domat, speaking of the court, calls, as we have seen, *la prudence du juge*, reserving only to the bench the right of control over verdicts which bear the evident impress of prejudice, passion, or corruption. But before considering this branch of the subject minutely, it is necessary to have a more accurate idea of the legal meaning of the term compensation.

WHAT CONSTITUTES COMPENSATION.—It has been said that the effect of our law is to give in damages what it calls compensation. When, however, we come to analyze this phrase, we shall find its juridical interpretation a very restricted one. Injury resulting from the acts or omissions of others, free from any taint of fraud, malice, or wilful wrong, consists:—

First. Of the *actual pecuniary loss directly sustained;* as the amount of the note unpaid; the value of the property paid for, but not delivered.

* Collins v. Blantern, 2 Wils. 341, 349. † Keir v. Leeman, 6 Q. B. R. 308.

Second. Of the *indirect pecuniary loss* sustained in consequence of the primary loss; the profits that might have been made if the contract had been performed, the derangement and disturbance produced by the failure of others to comply with their engagements, and the consequent inability of those who depend on them to adhere to their own; loss of credit; loss of business; insolvency.

Third. Of the *mental suffering* produced by the act or omission in question; vexation; anxiety.

Fourth. The *value of the time* consumed in establishing the contested right by process of law, if suit become necessary.

Fifth. The *actual expenses* incurred to obtain the same end —costs and counsel fees.

To these one further element is to be added in those cases where the aggressor is animated by a fraudulent, a malicious, or an oppressive intention, and that is—

Sixth. The *sense of wrong or insult*, in the sufferer's breast, resulting from an act dictated by a spirit of wilful injustice, or by a deliberate intention to vex, degrade, or insult. This constitutes the difference, and the only difference between the injury produced by inability and that produced by design. All [36] the other constituents are the same. The pecuniary loss, direct and indirect, the anxiety, the time and expense, are the same whether a wrong be done through the honest inability the wilful fraud, or the deliberate malice of the offending party. But in the two latter cases, the last element is superadded; a sense of wrong or insult which does not exist in the former.*

All these items must, therefore, be taken into the account in any effort to make complete *compensation*, in the ordinary acceptation of the word. But we shall find that the legal meaning of the term is very different. We shall find that in cases of contract, as a general rule, the law takes no notice whatever of the motives of the defaulting party; that whether the engagement be broken through inability or design, the amount of remuneration is the same;† and that in these cases, as well as in those of torts or breach of duty of any kind, where there is no

* The Scotch law is the only one, so far as I am aware, which has endeavored practically to analyze the elements of injury. By the jurisprudence of Scotland, in actions for personal torts, the damages are divided into *special damages*, the actual pecuniary loss, and *solatium*, solace, or recompense for the wounded feelings. So in Forgie v. Henderson, 1 Murray, 410, in assault and battery, the Lord Chief Commissioner Adam said, "There are, first, *special damages*, consisting of the surgeon's account, and the person being kept from his work. Second, the *solatium*, which is peculiarly within the province of the jury." So in Cameron v. Cameron, 2 Murr. 232, "If no damages are proved, you cannot find them; but there is a claim for *solatium*, and you must consider what evidence there is of the injury to the mind and feelings."

† There is a single exception already noticed, the action for breach of promise of marriage, which we shall consider hereafter.

complaint of fraud, malice, nor wilful negligence, of all the heads of loss above enumerated, only the first and fifth are taken into consideration, and the latter but imperfectly.

LIMITS OF COMPENSATION.—In all cases growing out of the non-performance of contracts, and in those of infringement of rights, or non-performance of duties, created or imposed by the law, in which there is no element of fraud, wilful negligence, or malice, the *compensation* recovered in damages consists solely of the *direct pecuniary loss*, which includes, in mere money demands, interest for the detention of the amount claimed, and the *costs* of the suit brought for the recovery of the demand. No *indirect loss* is accounted for. No allowance is made for the *mental suffering* of the party who complains of the non-performance of his contract, or the infringement of his rights—which, in- [37] deed, it may be said, the law possesses no scale to measure. This, however, is not the reason, for as little does it take into consideration the *time actually consumed*, and the *fees actually paid to counsel* for the establishment of the demand in controversy. In this class of cases, the *direct pecuniary loss*, and the *costs of the suit*, are all that the law means when it speaks of *compensation*.[1] In fact, unless the word is used in a technical sense, it is altogether inaccurate to speak of damages as resulting in *compensation;* and whatever restricted meaning this term may be supposed to have technically acquired, it is at all events entirely incorrect to say in the language which we have above seen used by various eminent judges, that "*the remedy is commensurate to the injury.*"[2] This language attributes to legal relief a degree of perfection which it is very far from possessing. "It would be going a great way," said Chief Justice Marshall,* "to subject a debtor, who promises to pay a debt to *all the loss* consequent on his failure to fulfil his promise. The general policy of the law does not admit of such strictness; and although in morals a man may justly charge himself as the cause of any loss occasioned by the breach of his engagement, yet, in the course of human affairs, such breaches are so often occasioned by events which were unforeseen, and could not easily be prevented, that interest is generally considered as compensation which must content the injured." "It has been contended," said another

* Short *v.* Skipwith, 1 Brock. R. 103 and 115.

[1] "In general the law considers the taxed costs as the only damage which a party sustains by the defence of a suit against him, and these he recovers by the judgment in his favor." Young *v.* Courtney, 13 La. An. 193. See Osborn *v.* Moore, 12 La. An. 714.

[2] See Graham *v.* Roder, 5 Tex. 141.

eminent judge, "that the true measure of damages, in all actions of covenant, is the loss actually sustained. But this rule is laid down too generally. In an action of covenant for non-payment of money on a bond or mortgage, no more than the principal and legal interest of the debt can be recovered, although the plaintiff may have suffered to a much greater amount by the default of payment." *

In regard to the quantum of damages, instead of adhering to the term compensation, it would be far more accurate to say, in the language of Domat, which we have cited above, † "that the object is to discriminate between that portion of the loss which must be borne by the offending party, and that which [38] must be borne by the sufferer." The law, in fact, aims not at the satisfaction, but at a division of the loss.[1]

And it is to be borne in mind, that the same deficiency of compensation exists in the case of defendants as well as plaintiffs. If the party who receives the injury is obliged to bear his proportion of the loss—so, on the other hand, the party wrongfully charged recovers his costs only, and no allowance is made for his time, indirect loss, annoyance, or counsel fees. "Every defendant," says Mr. Broom, "against whom an action is brought, experiences some injury or inconvenience beyond what the costs will compensate him for." ‡

* Tilghman, C. J., in Bender *v.* Fronberger, 4 Dall. 436, 444.

† *Supra*, p. 4.

‡ Broom's Legal Maxims, 95; Davies *v.* Jenkins, 11 Mees. & Wels. 755, 756.

[1] This language has been questioned. Griffin *v.* Colver, 16 N. Y. 494; Allison *v.* Chandler, 11 Mich. 542. Perhaps it would be more correct to say, not that the law does not aim at the satisfaction of the loss, but that in practice it does not fully reach that aim. The suitor's failure to get complete compensation is rather an incident to the imperfection of human tribunals, than a consequence of the inadequacy of their ideal standard. And the difficulty suggested by Domat, as will be seen by reference to his reasoning and illustrations in support of the proposition cited, but which are too voluminous to quote, consists in the attempt to draw the line between what is solely the consequence of the offender's fault (and for which he must answer), and what is or may be in part the consequence of other circumstances (and which he ought not therefore in justice to answer for). That careful writer does not mean to impute to jurisprudence a deliberate intent to impose on the injured party the burden of any part of the consequence of the offender's wrong. Still we may be permitted to doubt whether the law, as a practical science, should be charged with endeavoring to obtain what it knows is beyond its reach. Compensation, in its legal and restricted sense, is, as we shall continually observe, its constant object, but strictly in that sense only. To say nothing of the anxiety and pain of mind which often result from a breach of contract, and which the law is powerless to assuage, all lawyers know that in most cases of the non-payment of money when due, where the creditor has no means of replacing it, and indeed, in a large proportion of all law suits, the mere delay in obtaining such redress as can be had, entails on the sufferer consequential damages often serious, sometimes ruinous, for which there is no legal compensation. In the language of the author, in an article entitled "The Rule of Damages in Actions ex delicto," published in the Law Reporter in June, 1847, "In the most ordinary case of a suit on a note of hand, the damages do not amount to compensation. Who pays the counsel fees? Who pays for the time of the plaintiff? Who pays for his annoyance and vexation? The most successful lawsuit is too often a Barmecide feast." The difference between the author and the critics is, after all, little more than a verbal one. See note 3, p. 39.

EXCEPTION IN THE CASE OF PATENTS.—The only considerable exception that can be said to exist to the general principle here stated, is that in regard to patents, where it has been held, in some cases in the United States, that the plaintiff may have such reasonable damages beyond his taxable costs as shall vindicate his right, and reimburse him for all the expenditures necessarily incurred in order to establish his right, provided the jury, in the exercise of a sound discretion, see fit to give them. We shall consider this exception more fully, when we come to treat of the question of the allowance of counsel fees. *[1] It grows to some extent out of the language of the Patent Act.

EXEMPLARY DAMAGES.—Thus far we have been speaking of the great class of cases where no question of fraud, malice, gross negligence, or oppression intervenes. Where either of these elements mingle in the controversy, the law, instead of adhering to the system, or even the language of compensation, adopts a wholly different rule. It permits the jury to give what it terms punitory, vindictive, or exemplary damages; in other words, blends together the interest of society and of the aggrieved individual, and gives damages not only to recompense the sufferer but to punish the offender. This rule, as we shall see hereafter more at large, † seems settled in England, and in the general jurisprudence of this country.

OTHER LIMITS OF COMPENSATION.—There are other considerations as to the limits or boundaries of compensation, to which we shall be obliged hereafter to call the reader's [39] attention, under the head of *Recoupment*, which embraces an interesting class of cases growing out of equitable deductions to be made from demands in specified cases; to this subject, or one closely connected with it, I shall now only very generally advert.‡

Suppose the case of a plaintiff who has sustained positive injury, but whose loss has been made good by charitable contribution: suppose a man beaten, and to incur a surgeon's bill, which is paid for him by some benevolent persons, can he still recover against the assailant? Cases of this kind have been put by eminent judges, in a manner which implied they entertained no doubt that the charitable relief would be altogether

* Pierson *v.* Eagle Screw Co. 3 Story, 402. See *post*, ch. iii.

† Ch. xviii.

‡ See *post*, ch. xvii.

[1] These are no longer allowed in the United States. *Vide* p. 573, note.

thrown out of view in determining the legal rights of the parties.*[1] And this seems the general rule in cases of tort. So in an action for collision, it was held in England that the defendant, by whose negligence the injury was sustained, could claim no deduction for the fact that the plaintiff had already recovered a large part of his claim from the underwriters.†[2] So in a case of false representation, the defendant is not allowed to defeat the action by showing that the plaintiff had obtained for the property what he had paid for it.‡ But, on the other hand, when we come to consider the subject of Recoupment, we shall see that in cases of contract, as a general rule, the plaintiff can only recover to the extent of his actual injury, and that if that injury has been made good in any way, such compensation goes to reduce his claim.‖

Upon the whole, in review of this branch of our subject, it must be considered inaccurate to say, that legal relief is commensurate with the injury sustained, or that the sole object is to furnish compensation. In ordinary cases of contract, the remuneration must be less; in cases of tort it may be more.[3]

* Tindal, J., and Park, J., Yates *v.* Whyte, 4 Bing. (N. C.) 472.

† Yates *v.* Whyte, 4 Bing. (N. C.) 472.

‡ Medbury *v.* Watson, 6 Met. 246. See to same point, Stiles *v.* White, 11 Met. 356.

‖ *Vide post*, ch. xvii.

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[1] See Norristown *v.* Moyer, 67 Penn. St. 365 (*post*, 552, n.).

[2] So in an action against a town for injuries received by reason of defects in a highway, the money collected by the plaintiff from an insurance company, on account of the accident, should not be deducted from the damages. Harding *v.* Town of Townshend, 43 Vt. 536. So again in an action for maliciously burning the plaintiff's building, the measure of the defendant's liability is not affected by the payment of a loss to the plaintiff by the insurers of the building. Hayward *v.* Cain, 105 Mass. 213.

[3] But with the single exception of those cases where damages may be inflicted for the sake of example or punishment, *compensation*, as legally understood, or as far as attainable, is always in theory the guiding principle in measuring the damages both for breaches of contract and for wrongs; although, as will be repeatedly shown in the text, owing to the imperfection of human laws and tribunals, as well as to the general inadequacy of a pecuniary standard, actual compensation precisely commensurate with the injury is in practice seldom, perhaps never, obtained. It is true that other apparent exceptions may exist. For instance: one in cases of contract arises from the rule hereafter noticed, that the contract itself furnishes the measure of the damages. The carrying out of an agreement would in many cases give the injured party more than he has lost by its breach. That is to say, he is to be compensated for what he would have made under the contract, and not merely for what he has actually lost independently of it. But this advantage he is entitled to—it is the breach of the contract which is to be made good to him. The rule referred t› is therefore an ancillary, not an exceptional one; and compensation, although measured by the contract, is still the object of the law.

The general theory of the measurement of damages is thus very plain and simple; and the student is at first inclined to be surprised at the remark of Mr. Baron Wilde, that "this question of the measure of damages has produced more difficulty than perhaps any branch of the law." Gee *v.* The Lancashire and Yorkshire Railway, 6 H. & N. 211. The difficulty encountered by the learned Baron nevertheless, it will be seen on investigation, exists to a very great degree; but it arises, not out of any doubt as to the general principle to be observed, but out of the further question, What is compensation in a given case? It is always something future, something to be estimated; and although the elements of the problem may be few and simple, they are never entirely certain, except by the aid of an arbitrary rule, such as that which awards interest at a certain rate for money due and unpaid, or on the

ARRANGEMENT OF SUBJECT.—Having thus exhibited the general principles on which the law of this matter is based, we shall proceed to examine more minutely the amount of compensation awarded in particular cases. In doing this, [40] very considerable difficulty will be found to stand in the way of our efforts to make any arrangement of the subject adapted to our system of jurisprudence, and at the same time logical and scientific.

In endeavoring to apply the rule of damages to the different actions used among us, one broad line of distinction presents itself—that between real and personal property. This distinction, deriving its origin from the feudal system, is so firmly established, and our rules of proceeding, and even the right itself, so dependent on it, that in no general consideration of our law can it be disregarded.

I have, therefore, first treated of actions for the recovery of real property—of suits to enforce remedies for the interruption or diminution of its enjoyment, and of those upon contracts relating to it. The first division embraces the action of ejectment, with its subsidiary trespass for mesne profits and dower. The second, actions for trespass to lands, including proceedings in regard to nuisances and waste. The third, real covenants and contracts to convey land.

FORMS OF ACTION.—When we approach the subject of personal property, new difficulties, which grow out of the *forms of action*, present themselves in the way of any methodical arrangement of the subject. These forms have long been firmly established in the law of England; they exist in most of the States of the Union, and the rules of pleading, evidence, and of dam-

value of property wrongfully withheld, are often seriously complex, and are generally liable to be affected by one or more, and sometimes by many contingencies. So again, two or more measures, both based on the principle of compensation, may be presented. Which shall be taken? A man has bought a field or a chattel for a certain price. The seller proves to have no title, or a defeasible one only, and the purchaser loses his bargain. The property, at the time of the vendee's deprivation of it, may be worth much more than the purchase money for various reasons. It may have been enhanced in intrinsic value since the purchase, either accidentally, or as the legitimate result of causes detected by the keen eye of the buyer at the time of making his bargain; or it may have been actually employed, or contracted to be employed, either alone or in combination with other property, in a manner more or less, or perhaps peculiarly profitable to the purchaser. Now, shall he recover the consideration money and interest, or the intrinsic value of the property, or its special, but to him not less actual value at the time of his deprivation of it? and if the latter rule be adopted, how shall such value be arrived at? All these measures, it is obvious, are alike based on the idea of compensation; and all may co-exist, so that any one can be applied. But they are all different. Thus the determination of the apparently simple question of the amount of compensation leads to the further inquiry, what damages sustained are sufficiently certain to be allowed, what advantage, possibly or probably lost, is so remote or so contingent a consequence of the breach or default as to be properly disregarded, and will be found in every part of the great field of our inquiry, to open paths of interest and intricacy to the explorer.

ages, have adapted themselves to their arbitrary and illog-
[41] ical arrangement.*[1] It is, therefore, impossible to disre-

* Great judges have pronounced themselves strongly in favor of maintaining the forms of action; Lord Kenyon, in Savignac *v.* Rome, 6 T. R. 125; Mr. J. Wilson, in Israel *v.* Douglass, 1 H. Bl. 243; Eyre, C. J. in Turner *v.* Hawkins, B. & Pull. 476; Abbott, C. J. in Orton *v.* Butler, 5 B. & Ald. 654. See also, Chitty's Pleadings, Vol. I, p. 110, in note. "Settled forms of actions," said Tindal, C. J. in Williams *v.* Holland, 10 Bing. 118, "adapted to different grievances, contribute much to the certain administration of justice." More valuable testimony was borne to their importance by the English common law commissioners; the great reforms effected by whom, bear witness that they were not afraid to innovate. They say, Third Report, p. 6, "We cannot persuade ourselves, that with respect to the forms now in common use (except that of ejectment), any considerable change would be expedient. It is not that we are insensible to certain imperfections and inconveniences incident to these forms, for we feel that their classification is arbitrary and otherwise defective. But in this, as in so many other cases, we are presented with a choice of difficulties. To those who have observed the inconveniencies which in other systems of judicature are found to flow from the want of fixed forms of action, it will be scarcely doubtful that they are an invention of real merit and importance. They tend most naturally to secure that certainty in the right of action itself, which is one of the chief objects of jurisprudence; they form a valuable check to vagueness and prolixity of statement, and in this and other respects, they are essential to the convenient application of the rules of pleading, a system the peculiar advantages of which we have elsewhere endeavored to illustrate."

With all that respect for the judgment of these commissioners, which their reputation as lawyers, and their still greater reputation as law-reformers, is calculated to excite, it is difficult to yield assent to this reasoning on the forms of action. Two similar contracts are made; one is sealed and the other not. It is evident that the right to relief, or in other words the *right of action*, is in both cases precisely the same. How, then, does it tend to secure "certainty in that right" to declare that on the sealed instrument covenant must be brought, while assumpsit only will lie on the other? The *right of action* against an agent is the same (provided fraud or malice do not intervene), whether considered as a breach of contract or a violation of duty; and yet how many judgments in such suits have been arrested, because a count in assumpsit was

[1] Since the third edition of this book, the work of simplifying legal practice by wholly or substantially abolishing forms of action and pleading, has gone on as predicted by the author. The States of California, Indiana, Missouri, Ohio, Iowa, Minnesota, Wisconsin, Oregon, Kansas, Kentucky, Alabama, North Carolina, Nebraska and Nevada; the Territories of Montana, Idaho, Dacotah, Wyoming and Arizona, have adopted codes or passed statutes effecting this change. Others, like Georgia, Tennessee, West Virginia and South Carolina have, at various times, codified the body of their laws, including in the codification, enactments simplifying the proceedings and practice of the courts. Not so much because "revolutions never go backwards," as because the present one keeps pace only with a corresponding progress in the minds of the profession, and because it is essentially wise and just, we think the old forms are destined, wherever the common law prevails, to give place to a simple, uniform and comprehensive mode of seeking and obtaining legal redress. The author's premature death would have prevented his recasting the work in conformity with this great change, as contemplated in his preface to the third edition, had the time arrived for doing so; and as the old forms are still retained in a majority of the States, it would seem premature for another, as well as rash for a far feebler hand, to attempt the task. For the present, therefore, the author's plan will remain unchanged.

Without enlarging on the advantages of a mode of statement intelligible to those out of the profession, of abolishing formal fictions not designed to deceive, of making the decision turn uniformly on the merits of the suitor's case instead of sometimes on the pleader's skill, and of the saving of that large portion of time which, under the old system, was taken from the substance of the law to be given to special demurrers, and other niceties of form, it is manifest that when the rule of damages in one form of action differs from that of another on the same facts, the distinction is worse than useless. There should be, and really can be, but one proper measure of damages for the same injury. Forms of action obstruct that measurement of justice which it is the object of this book to analyze. Take a few examples: in debt on bond the damages are limited by the penalty, but in the action of covenant for the same breach they may exceed it. Here are two measures, but one of which can be right. Where a recovery in trover for the full value of the thing is just, the object can be had by a true statement of the real cause of action; and where the plaintiff has a qualified interest only in the chattel, it would be obvious, if we were not prepossessed by habit, that a form of action which

gard them. At the same time, I have endeavored to adopt an order somewhat different and more reasonable than that which they suggest.

inadvertently joined with one in case! See Corbett *v.* Packington, 6 Barn. & Cres. 268; and Lovett *v.* Pell, 22 Wend. 369. As to "vagueness and prolixity," the former will always be checked by the fundamental rules of evidence, that the proofs must follow the allegations; and as to the latter, it never would exist, if not fostered by the pernicious system of taxing costs by the folio. Our chancery jurisprudence well illustrates this. A bill in equity is *prolix* because it is paid for by the folio. It is *not* vague; on the contrary, the precise grievance complained of can almost always be ascertained with infinitely more certainty than from a common law declaration. For after all, the proposed ends are not attained What more vague than a declaration in trover, or on the money counts? What more prolix than a declaration in covenant, with a dozen breaches and a count for every breach? As to the rules of pleading, the experience of the English system is itself proof that the forms of action are in no wise wanted to secure the logic of that system. The arbitrary pleadings for the *defence* are there entirely abandoned—the general issue has given way to rational and intelligible statements of the real cause of defence. When the forms of *pleas* are abandoned, why should the forms of *declarations* be retained? If the general issue is not essential to the rules of pleading, why are the forms of debt or trover? In fact, the forms of action are, in my humble judgment, the greatest barrier to the proper application of the best part of the science of pleading, that which is directed to the singleness and certainty of the issue. In regard to the rules of damage, the results of the system are eminently illogical; thus, for instance, take the case of a tortious removal, conversion,

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is designed to recover the whole value of the thing is absurd. The rule of mitigation which has then to be resorted to, is essentially in conflict with the theory of the action. Why should a carrier be liable to pay a certain sum for a lost article if he is sued *ex contractu*, and a different one for the same thing if he is sued *ex delicto?* Is there either right or reason in this? And why should a set-off be avoided by suing in trover, if it can be properly interposed to the same demand when the action is assumpsit? If a sheriff is sued by a judgment creditor for an escape in an action of debt, he cannot mitigate the recovery by showing the insolvency of the debtor; but if he is sued in case for damages for the same escape, he can reduce it to a nominal amount. A distinction so unreasonable—although by reason of certain special statutory provisions (2 R. S. 437, § 63) it has been maintained in New York since the Code of Procedure (McCreery *v.* Willett, 4 Bosw. 643; Renick *v.* Orser, 4 Bosw. 384; Barnes *v.* Willett, 35 Barb. 514; Daguerre *v.* Orser, 15 Ab. 113)—should manifestly be abolished, and the equitable rule adopted in the latter class of actions should be uniformly established.

One other consideration deserves mention. A cardinal principle of good pleading under the old system, notwithstanding the allowance of certain understood fictions, was *truth*. But this principle, though it cannot be strictly enforced under any system, is far more closely adhered to by one which requires facts to be stated as facts, and not according to what the pleader conceives or pretends to be their legal effect.

The objections of "vagueness and prolixity" are answered by the author in the preceding note, and we think his answer is confirmed by the subsequent experience of the New York practitioner. Under the present provisions for striking out irrelevant matter and sham defences, curtailing redundant pleadings and defining indefinite ones (N. Y. Code, §§ 152, 160), the new system, if it does not equal its venerable predecessor in logical beauty as a science, already, we venture to believe, surpasses it in practical utility. The conflict of decision on questions of practice under the Code of Procedure in New York, cannot fairly be objected to it. Such vacillations were necessarily incident to the development of a transition of entire novelty and vast importance, in the progress of which the Code has, since its adoption in 1848, been amended to a greater or less extent, by nearly every legislature. That system is still doubtless imperfect; but we think few practitioners, even among those who still cherish the attachment to special pleading which springs from early habit, and which is confirmed by the sad retrospect of long and patient, but now useless labor, would favor a return to the fictions and verbiage of a system to which, with all its beauty and after it is thoroughly learned, the great fault still belongs of too often failing to dispose in the same controversy of all the questions and equities growing out of one transaction between the same parties. Wherever it does so in the case of various issues of fact, it is by innovations and amendments, such as notices of special matter accompanying the plea, or by a judicial adaptation of the form of the action to the facts of the case, which are liable to all the objections urged against the new system. Nor from its inflexibility does it equal its successor as a means of exact justice.

The thing called in the common law a form of action is, strictly speaking, *a form of words made requisite to assert a right of action.* Thus, if the plaintiff held the mere *written* promise of

and sale of personal property—the plaintiff has three distinct remedies, and in each the rule of damages is different. If he adopt assumpsit, on the count for money had and received, he can only recover the amount of the actual proceeds of the property. If trover, he will be allowed the highest value at any time before trial; and if trespass, he can have vindictive damages for the wrong.—Greenleaf's *Evidence,* vol. ii. p. 218. Vide, *post* ch. xix. Trover.

It seems to me very plain, from the course of legal reform both in England and in this country, that we are rapidly tending towards the abolition of all arbitrary forms of action. Thus, in Massachusetts, by the provisions of a statute, 1836, ch. 273, § 3, the court has power to amend the plaintiff's proceedings, by giving him leave to change his form of action,—Wiley *v.* Yale, 1 Met. 553. What is this, however, but to leave the trap set for the unwary, to be opened or not, according to the discretion of the tribunal. And no one who ever has had his rights dependent on discretionary power, will forget Lord Camden's glowing words: "Discretion is the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends on constitution, temper, and passion. In the best it is oftentimes caprice; in the worst, every vice, folly, and passion, to which human nature is liable."—Argument in Hindson *v.* Kersey.

But the controversy is as old as the time of Cicero, no lawyer can be ignorant of the ridicule with which, in his oration for Murena, he overwhelms the verbiage and formulas of that day: *Hoc fieri bellissime posset; Fundus Sabinus meus est; immo meus; deinde judicium; noluerunt.—Nam cum permulta præclare legibus essent constituta, ea jurisconsultorum ingeniis pleraque corrupta ac depravata sunt. Iisdem ineptiis fucata sunt omnia—enunciatis vestris mysteriis totum est contemptum et abjectum.*—Orat. pro Murena.

Since the above was published in the first edition of this work, its prognostications have been justified in England and in at least two of the States of the Union. In New York, in April, 1848, an act was passed entitled "An Act to simplify and abridge the Practice, Pleadings, and Proceedings of the Courts of this State," the preamble of which is as follows: "Whereas, it is expedient that the present forms of actions and pleadings in cases at common law should be abolished, and that the distinction between legal and equitable remedies should no longer continue, and that a uniform course of proceeding in all cases should be established." And in accordance with this preamble, the act now known as the Code of Procedure goes on, in section 69 (62 of the Code of 1851), to enact that "the distinctions between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing are abolished, and there shall be in this State hereafter but one form of action for the enforcement or protection of private rights, and the redress of private wrongs, which shall be denominated a civil action." But though the forms of action are abolished, the distinction between legal and equitable remedies still remains. Linden *v.* Hepburn, 3 Sandford, S. R. C. 668. By § 140, all the forms of pleading heretofore existing are abolished, and "hereafter the forms of pleading in civil actions in courts of record, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed by this act." And the Code then goes on to define the functions and requisites of the new pleadings, the complaint, the demurrer, the answer, and the reply. § 156 provides that every pleading in a court of record must be subscribed by the party or his attorney; and when any pleading is verified (by oath), "every subsequent pleading except a demurrer must be verified." By § 168, every material allegation of the complaint not controverted by the answer as prescribed in § 149, and every material allegation of new matter in the answer constituting a counter-claim not controverted by the reply as prescribed in § 153, shall, for the purpose of the action, be taken as true. In regard to the subject of this treatise, the Code contains the following provision, § 276 (282 of the Code of 1848): "Whenever damages are recoverable, the plaintiff may claim and recover, if he show himself entitled thereto, any rate of damages which he might have heretofore recovered for the same cause of action." Under the system of the common law, as I have already said, and as we shall have frequent occasion to see in the progress of this work, the rule or measure of damages depends not only on the *cause,* but on the *form* of action—that is to say, the same right may be set up in different forms, and the amount of recovery will be dependent on the form employed. It will be necessary for the pleader to bear this in mind in setting out the relief he seeks under the new system.

In Massachusetts, too, an act passed on the 23d May, 1851, Sess. Laws of 1851, ch. 233 (R. S. 1860, p. 652), entitled, "An Act to amend some of the Proceedings, Practice, and Rules of Evidence of the Courts of this commonwealth," has wrought very material changes in the procedure of that State. Among the most prominent sections of the act are the following: § 1. "There shall be only

a defendant, it was made necessary by the common law, in setting out this cause of action in a shape fit to be considered by the court, to aver that the defaulting party "*undertook and promised*" to pay and perform. If, however, the written promise was clothed with the sanctity of a seal, then it became necessary to allege that the defendant "covenanted" to perform, etc. And if these phrases were not used in the instances where they were declared requisite, the cause could proceed no further till the error was amended. The expediency of these forms of action has been greatly discussed ever since the commencement of the efficient legal reforms which do honor to our century, and to the names of Bentham, Romilly, and Livingston.

ACTIONS FOR INDEFINITE DAMAGES.—One distinction pre- [42]
sents itself too plainly to be overlooked; that which sepa-
rates those cases where the damages are wholly at large,
and under the control of the tribunal, from those where, [43]
under the name of a penalty, or of liquidated damages,
the parties have endeavored either to fix the precise amount of compensation for the breach of contract, or at least to define

three divisions of *personal* actions. First, *Actions of Contract*, which shall include those now known as actions of Assumpsit, Covenant, and Debt, except for penalties. Second, *Actions of Tort*, which shall include those now known as actions of Trespass, trespass on the case, trover, and all actions for penalties. Third, *Actions of Replevin*." § 2 declares, among other things, that no averment shall be made which the law does not require to be proved, and that only the substantive facts necessary to constitute the cause of action shall be stated, without unnecessary verbiage and with substantial certainty; one count and no more to be inserted for each cause of action, but any number of breaches may be assigned in each count; and abolishes the action of trover. § 6. "None of the provisions herein contained shall be deemed to change any of the rules of evidence or the measure of damages." § 20. "The general issue, as heretofore used in all actions, except real and mixed actions, is abolished, and in place thereof the defendant shall file an answer to the declaration." § 22. The answer shall deny, in clear and positive terms, every substantive fact intended to be denied in each count of the declaration separately, "or shall declare the defendant's ignorance of the fact, so that he can neither admit nor deny, but leave the plaintiff to prove the same." § 28. Provides for a replication to the answer. § 36. Any substantive fact alleged with substantial precision and certainty, and not denied in clear and precise terms, shall be deemed to be admitted, but no party shall be required or permitted to state evidence. §§ 98, 99, 100, 101, and 102, provide for interrogatories to be administered by either plaintiff or defendant to the opposite party, to be answered under oath. There are other provisions in regard to real and mixed actions; and a schedule of forms for declarations and answers attached to the act.

Thus, in two considerable States of the Union the common forms of pleading may be said to be done away; while, at the same time, the rights of parties remain substantially as they are established and declared by that body of jurisprudence. Equitable relief is still to be given on the settled principles of equity law; and, therefore, we are still obliged to keep in mind and to understand the fundamental division between common law and equity.

Nor do any forms of action nor the distinction between law and equity, exist in Louisiana or Texas. In the latter State, in Robbins' Adm'r *v.* Walters, 2 Texas R. 130, the court says, "The common-law forms have never been observed in our courts, and with us suits are brought by petition and answer; we recognize no distinction between law and equity, and have no such actions as trover and detinue."—S. P. Carter *et al. v.* Wallace, 2 Texas R. 206.

In England, too, forms of action are completely abolished by the Common Law Procedure Acts of 30th June, 1852, and of 12th August, 1854. The Boston Law Reporter for February, 1856, contains a summary of these acts, written by the author of this work.

some limit beyond which that compensation shall not go. The first class comprehends the great heads of assumpsit and covenant, so far as neither liquidated damages nor penalty are named in the contract, because in no case of personal actions is the rule of damages affected by the mere addition or omission of the seal; and includes suits on notes and bills of exchange, policies of insurance, on contracts for the sale and warranty of chattels, actions against common carriers, by surety against prin-
[44] cipal, those growing out of the contract of agency, and generally all agreements, whether under seal or otherwise, which do not attempt to fix the damages for their violation.

A subordinate division of this class includes those cases where covenant (still without penalty or liquidated damages), must be brought, and where assumpsit will not lie, as on charter parties, assignments of judgments, and other sealed instruments.

Actions for Definite Damages.—The second class comprehends the cases coming under the head of the common-law actions of assumpsit, debt and covenant, as controlled by penalties or liquidated damages stated in the contract. In this branch of the subject I have treated first of the penalty and the weight given to it in fixing the measure of damages—where they fall short of it, and where they may exceed its amount; and secondly, of those cases where the agreement of the parties is conclusive on the quantum of compensation.

Torts.—This disposes of the subject of actions arising upon contracts; and the remainder of the work treats of torts to persons and personal property, the common-law actions of case, trover, replevin and detinue being included under this head. In this branch of the subject are embraced the actions of replevin, suits against sheriffs and public officers for breach of duty, and in general all those cases where, though the form of the action is in tort, a precise measure of damages has been adopted, or at least approached.

Different Actions.—It will be seen that this division is very far from being altogether satisfactory. Assumpsit and case proper, assumpsit and trover, are very often co-ordinate remedies. The same is true of debt and assumpsit, debt and covenant; trover and trespass may often be brought indifferently; and the rule of damages, as I shall have occasion to

show more fully hereafter, differs with the form of action adopted. I still hope that this arrangement will be found at once substantially convenient of reference, and adapted to the principles of the matter before us. The various heads of interest, when allowed as damages, recoupment, pleading, practice and evidence, with reference to the subject of this treatise, and damages with reference to special statutes, will be found separately discussed.*

NOMINAL DAMAGES.—Before entering, however, on the [45] examination of the measure of compensation in the various cases above referred to, it will be proper to obtain a general idea of the boundaries of this branch of our jurisprudence, by investigating the rules which govern the allowance of damages where the injury done is extremely trifling or merely nominal; and those which deny relief for injury remotely resulting from the principal illegal act. Having thus ascertained what damages are given in cases where no substantial injury is done, and the general limitations imposed on the right to relief where actual loss has been sustained, we shall be better able to enter upon the more minute inquiry which awaits us. We are, therefore, first to speak of the subject of NOMINAL DAMAGES.

* I have made one exception to the complete separation of actions affecting real and personal property; and in treating of actions for fraudulent representations on sales, have discussed both branches of the subject together.

CHAPTER II.

NOMINAL DAMAGES.

BEFORE proceeding to consider the measure of legal compensation in cases where actual loss is sustained, it will be proper to examine the rule of *Nominal* Damages as contra-distinguished from *substantial* Damages.

We shall have frequent occasion hereafter to notice that the common law, as a general rule, only gives actual compensation in cases of actual injury. The object of the suit is to obtain remuneration for loss actually sustained. If it appear that though the defendant is in fault, still that the plaintiff is not injured, he can have no relief. It is *injuria sine damno.* As far back as the Year Books it is said, "If a man forge a bond in my name, I can have no action on the case yet; but if I am sued, I may, for the wrong and damage, though I may avoid it by plea."* And so Lord Hobart, C. J., says, "There must be not only a thing done amisse, but also a damage either already fallen upon the party, or else inevitable."† Equity often proceeds, *quia timet,* in the exercise of her preventive powers to arrest the threatened injury, and there were some early and now obsolete proceedings of the same character at law;‡ but, as a general rule, it may at present be considered well settled that the relief of the common law is only to be obtained by those who have suffered actual injury. This proposition, is however, sub-
[47] ject to the modification which we shall now proceed to consider in relation to nominal damages.

Wherever the breach of an agreement, or the invasion of a right is established, the English law infers some damage to the plaintiff; and if no evidence is given of any particular amount of loss, it declares the right by awarding what it terms nominal

* 19 H. 6, 44.

† Waterer *v.* Freeman, Hobart, 266.

‡ "And note," says Lord Coke, "that there be six writs in law that may be maintained, *quia timet,* before any molestation, distresse or impleading, as 1. A man may have his writ of *mesne* (whereof Littleton here speaks), before he be distrayned. 2. A *Warrantia Cartæ* before he be impleaded. 3. A *Monstraverunt* before any distress or vexation. 4. An *Audita Querela* before any execution issued. 5. A *Curia Claudenda* before any default or molestation. 6. A *ne injuste vexes* before any distresse or molestation, and these be called *brevia anticipantia,* writs of prevention."—Coke, *Lit.* 100 *a.* Story's *Equity Jurisprudence,* §§ 730 and 825.

damages, being some very small sum, as a farthing, a penny, or sixpence—*Ubi jus, ibi remedium.* "Every injury," said Lord Holt, "imports a damage."*[1] So again, in the same case as elsewhere reported, his lordship said,—

"My brother Powell, indeed, thinks that an action upon the case is not maintainable, because here is no hurt or damage to the plaintiff; but surely, every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary, for a damage is not merely pecuniary; but an injury imports a damage, where a man is thereby hindered of his right. As in an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So if a man gives another a cuff on the ear, though it cost him nothing, no, not so much as a little *diachylon*, yet he shall have his action, for it is a personal injury. So a man shall have an action against another for riding over his ground, though it do him no damage, for it is an invasion of his property, and the other has no right to come there."†[2]

"Wherever," says Mr. Sergeant Williams, "any act injures another's right, and would be evidence in future in favor of the wrong-doer, an action may be maintained for an invasion of the right, without proof of any specific injury."‡

NOMINAL DAMAGES ESTABLISH TITLE.—In regard to the right invaded, a verdict and judgment for the smallest amount is as effectual as any sum, however large; for it establishes the fact of the plaintiff's title. And in the common case of trespass to lands, the main object usually being to determine the right, this principle becomes very important.[3] In many of these cases it

* Ashby *v.* White, 1 Salk. 19.
† 2 Lord. Raym. 955.
‡ 1 Saunders, 346*a*; Mellor *v.* Spateman.

[1] And where a right has been invaded or a covenant broken, even although the court may entertain the belief there was no actual damage, or may consider the evidence to that effect to preponderate over the proof of substantial damage, the Irish Court of Exchequer in such a case refused to restrict the jury by a direction to find nominal damages only. See Strong *v.* Kean, 13 Irish Law, 93.

[2] The following cases recognize the right, now well established, to recover nominal damages for the bare infringement of a right, or breach of contract, unaccompanied by any actual damage. Smith *v.* Whiting, 100 Mass. 122; Rosenbaum *v.* McThomas, 34 Ind. 331; Hutchinson *v.* Schimmelfelt, 40 Penn. 396; McConnell *v.* Kibbe, 33 Ill. 175; Burnap *v.* Wight, 14 Ill. 301; Shannon *v.* Burr, 1 Hilt. 39; Cowley *v.* Davidson, 10 Minn. 392; Quin *v.* Moore, 15 N. Y. (1 E. P. Smith), 432; Hope *v.* Alley, 9 Tex. 394; Bond *v.* Hilton, 2 Jones (N. C.) L. R. 149; Ledbetter *v.* Morris, 3 *Ibid.* 543; Kimel *v.* Kimel, 4 *Ibid.* 121; White *v.* Griffin, *Ibid.* 139. See, also, Amoskeag Manufacturing Co. *v.* Goodale, 46 N. H. 53; Dorman *v.* Ames, 12 Minn. 451; Nosotti *v.* Page, 10 C. B. R. 643; s. c. 2 Eng. Law & Eq. 326; with which last case compare Thame *v.* Boast, 12 Q. B. R. 808. But where the *gist* of the action is pecuniary damage, as in certain suits against officers for neglect of official duty, and no such damage has been, in fact, sustained by the plaintiff, it seems that, notwithstanding the neglect be proved, the verdict should be for the defendant, and not for nominal damages. See Commercial Bank *v.* Ten Eyck, 48 N. Y. 305; Hobson *v.* Thelluson, L. R. 2 Q. B. 642, and *post* 511*n*.

[3] Besides that wherever there is a wrong there should be a remedy, this rule of giving nominal damages for the breach of a contract may settle the question of title or determine rights of the greatest importance. Devendorf *v.* Wert, 42 Barb. (N. Y.) 227.

might seem at first sight that the maxim *injuria sine damno* applied, and that the law would refuse redress. But, as has been clearly said by the Supreme Court of Connecticut, in an action for flowing lands, "An act which occasions no other
[48] damage than putting at hazard those rights, which, if the act were acquiesced in, would be lost by lapse of time, is a sufficient ground of action."*[1]

So, again, it has been said in Maine, speaking of the flowage of lands, "Generally, when one encroaches on the inheritance of another, the law gives a right of action; and even if no actual damages are found, the action will be sustained and nominal damages recovered; because, unless that could be done, the encroachment acquiesced in might ripen into legal right, and the trespasser, by a continuance of his encroachments, acquire a perfect title."†[2]

So, in Pennsylvania, in trespass for flowing lands, it was held "that the law implies damage from flooding the ground of another, though it be in the least possible degree, and without actual prejudice. But where the law implies the injury, it also implies the lowest damage."‡ In the Maine Circuit, in an action on the case for flowing lands,‖ Mr. Justice Story also recognized the rule.[3]

Possible Injury.—In an early English case, well known as that of *The Tunbridge Wells Dippers*,¶ an action on the case was brought by the plaintiffs, who were dippers at Tunbridge Wells, against the defendants for dipping without being duly appointed; and on the subject of damage, "there was no proof

* Chapman *v.* Thames Manufacturing Co. 13 Conn. 269.

† Hathorne *v.* Stinson, 3 Fairf. 183; Seedensparger *v.* Spear, 17 Maine, 123.

‡ Pastorius *v.* Fisher, 1 Rawle, 27; affirmed, in Ripka *v.* Sergeant, 7 Watts & S. 9.

‖ Whipple *v.* Cumberland Manufacturing Company, 2 Story, 661. See also Crooker *v.* Bragg, 10 Wend. 260.

¶ Weller *v.* Baker, 2 Wils. 414, anno 1769.

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[1] To a like effect is Basset *v.* The Salisbury Manufacturing Company, 8 Fost. (N. H.) 438.

[2] See, in the same State, Munroe *v.* Gates, 48 Me. 463; so Graver *v.* Sholl, 42 Penn. St. 58; Del. and Hudson Canal Co. *v.* Torry, 33 Penn. St. 143. So the obstruction of a highway gives a right of action to one thereby prevented from passing, against the person who erected the obstruction. Brown *v.* Watson, 47 Maine, 161.

[3] So if a mill owner turn into his mill-pond a stream which does not naturally flow into it, the owner of the land below the mill is entitled to recover nominal damages, without proof of any specific damage, because it is an infringement of his right which might, by repetition, ripen into an easement. Tillotson *v.* Smith, 32 N. H. 90. So, if an owner of a mill cause the water upon a stream to be accumulated during the wet season, and draw it off in the summer, so as to cause a greater flow than usual, by means of which the banks of the proprietor below are washed away, his land drowned, and his grass depreciated, it is no impediment to an action for damages that the damage done is small. Gerrish *v.* The New Market Manufacturing Company, 10 Fost. (N. H.) 478.

The rule in the text was also recognized in Kimel *v.* Kimel, 4 Jones (N. C.) L. 121.

of the defendants having received any gratuity, other than general evidence that the employment of dipper is attended with profits which arise from the voluntary contribution of company resorting to Tunbridge Wells." The Court of Common Pleas, in noticing the objection, said, "There is a real damage to the dippers in depriving them of some gratuity which they would otherwise have received, perhaps more than they might truly deserve for their labor and pains. Besides, an action on the case will lie for a *possibility* of an injury; as for persuading A. not to come and sell his wares at the market of B., the lord of the market may have his action."

PROBABLE INJURY.—So, again, subsequently in an action on the case for a surcharge of common, it was held that the plaintiff need not show that he turned on any cattle of his own at the time of the surcharge, but only that he could not have enjoyed his common so beneficially as he might; and Nares, J., commenting on the Dippers' case, said it was there held [49] that a "*probable*" damage is a sufficient injury on which to ground an action.* And "probable" is, perhaps, the more correct phrase. An invasion of right being shown, the law holds injury to be a *probable* result, and therefore gives judgment against the wrong-doer. In other words, it presumes some damage to have resulted from the wrong. And the principle was adhered to by the King's Bench in an action on the case for injuries to a right of common, the jury having found a verdict of one farthing, and a motion to set aside the verdict and to enter a nonsuit being denied.†

But in a suit brought by the owner of a house against a lessee for opening a door without leave, the premises not being in any way injured or weakened by the opening, the court refused to allow nominal damages, and remitted the case to the jury to say whether the plaintiff's reversionary interest had, in point of fact, been prejudiced.‡ This case, however, does not present any exception to the general rule, for the court evidently considered that a verdict for nominal damages would have been right if there had been any proof of the plaintiff's *title* being affected. So, again, in the King's Bench, in an action on the

* Wells *v.* Watling, 2 W. Black. 1233, anno 1779. By this decision a dictum of Lord Coke, in Robert Mary's case, was overruled. 9 Co. 113. "So," says Lord Coke, "that if the trespass *be so small* that the commoner has not any loss, but sufficient in ample manner remains to him, he shall not have any action for it."

† Pindar *v.* Wadsworth, 2 East, 154. We shall hereafter see that this principle does not apply in cases of waste, and that if the damages there be purely nominal, the defendant may enter judgment. Harrow School *v.* Alderton, 2 Bos. & Pul. 86.

‡ Young *v.* Spencer, 10 B. & Cres. 145.

case for the fraudulent imitation of the plaintiff's trade-marks; the jury having found a verdict, with one farthing damages, a motion was made to enter a nonsuit; but the rule was refused, and Littledale, J., said, "The act of the defendants was a fraud against the plaintiff; and if it occasioned him no specific damage, it was still, to a certain extent, an injury to his right." * [1]

And in the same court, in an action on the case brought by a tenant against his landlord, for illegally distraining for more rent than was due, it appearing that the proceeds of the sale [50] were insufficient to satisfy the rent actually in arrears, the jury found a verdict for the plaintiff, with one shilling damages. A motion was made to enter a nonsuit, but it was denied, and Denman, C. J., said, "There was a wrongful act of the defendant, and though by reason of the value of the goods taken falling short of the actual rent due, no real damage was sustained, yet there was a legal damage and cause of action, for which the plaintiff was entitled to a verdict." † [2] This case carries the principle of the English law to its extreme limit; for so far from the plaintiff's having proved any damage, it was conclusively shown that he could not have suffered any; and on the contrary, the defendant was the real loser.

Thus, also, it has been recently held by the English Common Pleas in an action on the case for deceit against the secretary of an insurance company for false representations as to the management and affairs of the company, whereby the plaintiff was induced to effect an insurance with them, though it did not appear that he had sustained any positive loss, that he was entitled to nominal damages. ‡

The principle has been applied to the diversion of watercourses. It has been long held that the riparian proprietor of

* Blofeld *v.* Payne, 4 B. & Adol. 410; 24, E. C. L. R. 87.

† Taylor *v.* Henniker, Bart. 12 Ad. & Ellis, 488, which overruled the cases of Avenell *v.* Croker, Moo. & M. 172, and Wilkinson *v.* Terry, 1 M. & Rob. 377. See also, Butts *v.* Edwards, 2 Denio, 164, where it is said that in case for illegal distress, if no actual damage is sustained, the plaintiff could at most but recover nominal damages.

‡ Pontifex *v.* Bignold, 3 Scott N. R. 390. The text contains the substance of the marginal note, but it should be noticed that the question came up on demurrer to the plea, that the declaration alleged that the policy was of less value to the plaintiff than if the representations complained of had been true, and that Tindall, C. J., said: "This case ranges itself within Palsey *v.* Freeman, 3 T. R. 51, and Haycraft *v.* Creasy, 2 East. 92, and that class of cases where it was held, that a false affirmation made by the defendant with intent to defraud the plaintiff, whereby *the plaintiff receives damage*, is the ground of an action upon the case in the nature of a deceit."

[1] Compare a peculiar case, analogous to that of the infringement of a trade-mark. Marsh *v.* Billings, 7 Cush. (Mass.) 322. Also, Davis *v.* Kendall, 2 R. I. 566.

[2] And in a late case in the English Exchequer, in an action brought under the Statute of Marlbridge (52 Hen. III, c. 4) for excessive distress, the plaintiff was held entitled to nominal damages although he proved no actual damage. Chandler *v.* Doulton, 34 L. J. (N. S.) Exch. 89

a stream has a right to the use of its waters, but it has been doubted whether he could recover in an action for its diversion without showing actual damage.[1] It is now, however, well settled, in favor of the right; and if the infringement be established, nominal damages, at least, will in all cases be given. * [2]

PERSONAL ACTIONS.—The general rule has been recognized by the Supreme Court of New York, in relation to [51] personal actions as well as those affecting real property. In an action of trespass,† Bronson, J., said, "If the plaintiff succeeded in showing an unlawful entry upon his lands, or that his fences or any portion of them were improperly thrown down and his fields exposed, he was entitled to a verdict for *nominal damages* at the least. It was not necessary for him to prove a *sum*, or that any particular amount of damages had been sustained. Every unauthorized entry upon the land of another is a trespass, and whether the owner suffer much or little, he is entitled to a verdict for some damages." ‡ [3]

So in an action of trespass for false imprisonment. ‖ The plea containing an allegation that the trespass consisted in arresting the plaintiff on an execution on a judgment in trover, it was replied that the plaintiff had obtained his discharge from imprisonment, and that the defendant had notice of the discharge, to which a demurrer was put in; the court said, "Want of notice may indeed depress the damages to a mere nominal sum, but is never allowed absolutely to excuse a trespass;" and there was judgment for the plaintiff.

In a recent case, where fraud was charged, the same court was equally explicit. They said, "Actual damage is not necessary to an action. A violation of right, with a possibility of damage, forms the ground of an action. . . . Once establish, therefore, that in all matters of pecuniary dealing, in all matters

* Bowen *v.* Hill, 1 Bing. (N. C.) 549; Parker *v.* Griswold, 17 Conn. 288; Plumleigh *v.* Dawson, 1 Gilman, 544.

† Dixon *v.* Clow, 24 Wend. 188.

‡ And the same point has been ruled in Texas. Carter *et al. v.* Wallace, 2 Texas, 206.

‖ Deyo *v.* Van Valkenburgh *et al.* 5 Hill, 242.

[1] Cory *v.* Silcox, 6 Ind. 39. But compare Burden *v.* The Mayor, &c. of Mobile, 21 Ala. 309. Also, M'Elroy *v.* Goble (6 Ohio St. 187), where it is held that the damage must be "real, material, and substantial."

[2] Champion *v.* Vincent, 20 Texas, 811; Shannon *v.* Burr, 1 Hilton (N. Y. C. P.), 39 Tillotson *v.* Smith, 32 N. H. 90. And so in case of unlawful flowage of lands, Amoskeag Manufacturing Co. *v.* Goodale, 46 N. H. 53.

[3] Even if the result of the trespass benefits the plaintiff, instead of damnifying him, he is entitled to nominal damages. Jewett *v.* Whitney, 43 Me. 242. See the principle of the citation in the text asserted in regard to a trespass upon a vessel, in White *v.* Griffin, 4 Jones (N. C.) L. R. 139.

of contract, a man has a legal right to demand that his neighbor shall be honest, and the consequence follows, namely: if he be drawn into a contract by fraud, this is an injury actionable *per se*. Indeed, it would not be difficult in all such cases, to show the degree of actual damage. The time of the injured party has been consumed in doing a vain thing, or one comparatively vain; and time is money. Fraud is odious to the law; and fraud in a contract can hardly be conceived of without being attended with damage in fact."*

So in Connecticut, in an action of slander, for charging the plaintiff, a female, with want of chastity, the judge directed
[52] the jury "that if they should find that the plaintiff had so destroyed her character by her own lewd and dissolute conduct as to have sustained no injury from the words spoken by the defendant, they might give only nominal damages;"† and on review this was held correct.

PATENTS.—The general principle has been also laid down by Mr. Justice Story, in regard to patents. In an action for the infringement of a patent right by making a machine, it was argued for the defendant, that no action lay except for actual damage. "But," said Story, J., "we are of opinion that where the law gives an action for a particular act, the doing of that act imports of itself a damage to the party. Every violation of a right imports some damage; and if none other be proved, the law allows a nominal damage."‡

OFFICERS.—So it has been held in Massachusetts, in the case of a sheriff neglecting to return an execution. "The plaintiff is entitled," said Wilde, J., "to nominal damages for the officer's neglect, in not returning the execution till after the return-day. No actual damages are proved, but where there is a neglect of duty, the law presumes damages."‖

So where the sheriff does not return a *fi. fa.*, after being notified to do so, if the plaintiff has intermeddled with the execution of the writ so as to defeat its operation, he is still entitled to nominal damages.¶[1] We shall have occasion to consider

* Allaire *v.* Whitney, 1 Hill, 484. See Whitney *v.* Allaire, 4 Denio, 554.

† Flint *v.* Clark, 13 Conn. 361.

‡ Whittemore *v.* Cutter, 1 Gall. 429; and again, s. c. *Ibid.* 483.

‖ Laffin *v.* Willard, 16 Pick. 64. See also, Goodnow *v.* Willard, 5 Met. 517; and s. p. Lawrence *v.* Rice, 12 Met. 535.

¶ Mickles *v.* Hart, 1 Denio, 548.

[1] So in an action for breach of duty in the compromise by an attorney of a suit contrary to his client's express directions, although the compromise was a reasonable one and made in good faith, and there was no positive damage. Fray *v.* Voules, 1 Ellis & E. 839.

this branch of the subject more at large, when treating of damages in suits against sheriffs and other public officers.*

But, in Vermont, an able effort has been made to limit [53] nominal damages strictly to cases where some damage is the probable result of the defendant's act, or where the act would be evidence afterwards in favor of the wrong-doer, or where a right is wantonly invaded for the purpose of injury; and it is said, "that no case can be found where damages have been given for a trespass to personal property, when no unlawful intent or disturbance of a right or possession is shown, and where not only all *probable* but all *possible* damage is expressly disproved."†[1] I doubt if this doctrine can be sustained on the authorities; but it is founded in good sense and correct notions of justice.

In Massachusetts, though an officer who takes a bail-bond is liable to an action for not returning it with the writ, yet if he deliver or offer to deliver it to the plaintiff in season for him to prosecute a *scire facias* against the bail, he is liable for nominal damages only. ‡

So in New Hampshire, when the sheriff attaches property on mesne process, the return of the attachment and receipt taken for it should specify the articles attached; but neglect in this respect will subject the officer to nominal damages only, unless special damage is shown.‖

CONTRACTS.—The rule that the invasion of a right gives a claim in all cases to nominal damages, applies equally to matters of contract; and so it was held by the Court of King's Bench, in an action brought against a banker, for refusing payment of a check although in funds, no actual damage being sustained.¶[2]

But when the debt was paid, though after maturity, it was held to support a plea that it was paid in full satisfaction of debt and damage, and the plaintiff was not allowed to recover either

* *Post*, ch. xxi.

† Paul *v.* Slason, 22 Verm. 231, per Poland, J.

‡ Glezen *v.* Rood, 2 Met. 490.

‖ Bruce *v.* Pettengill, 12 N. H. R. 341.

¶ Marzetti *v.* Williams, 1 Barn. & Adol. 415. See also, Winterbottom *v.* Wright, 10 Mees. & Wels. 109. See, also, Rolin *v.* Steward (14 C. B. 595), where actual damages were given — an important case.

[1] Vermont, however, no longer obstructs the general current of decision. In Brown *v.* Richmond, 27 Vt. 583, it is held that if, during the pendency of an action against an officer for not keeping property attached so that the execution could be levied on it, the execution be paid and discharged, the plaintiff may recover nominal damages and costs, if he had a good cause of action at the commencement of the action. And in the same State it has been lately held that the maxim *de minimis non curat lex*, is never applied to a wrongful invasion of property from which result damages capable of estimation however small. Fullam *v.* Stearns, 30 Vt. 443. But see p. 513, note.

[2] But see Lane *v.* Hill, 18 Q. B. R. 252. When plaintiff in a suit for wages proves services, but fails to prove their value, he is entitled at least to a nominal sum. Owen *v.* O'Reilly, 20 Mo. 603.

interest or nominal damages.* And so, again, in assumpsit, where the defendant, on being applied to by the plaintiff for payment of interest, stated that he would bring her some on the following *Sunday*, it was held that though this was an admission that something was due, still, as it did not appear what the nature of the debt was, or that it was due to the plaintiff as executrix, or in her own right, or that it was a debt for which assumpsit would lie, the plaintiff was not entitled to recover even nominal damages, and a nonsuit was entered.†

OTHER CASES.—In an action brought to recover general average, the jury being about to pronounce a verdict for the defendant, because they could not ascertain any given sum to be the proportion due to the plaintiff, a nonsuit was taken, and on motion, the Court of Common Pleas ordered a verdict to be entered for the plaintiff, with sixpence damages.‡[1]

[54] In a recent cause in the Queen's Bench,‖ the power of the court over this subject was much considered in a mandamus case; and it was held that the judge who tried the cause might, from his recollection, order a verdict to be entered for nominal damages, though the entry at the time was only "verdict for the crown."

AMERICAN RECOGNITION OF THE PRINCIPLE.—The same principle in regard to contracts, as well as invasions of right in general, has been recognized in this country.[2] So, in an action

* Beaumont *v.* Greathead, 2 C. B. 494.

† Green *v.* Davies, 4 B. & Cres. 235; and also Teal *v.* Auty, 2 Bro. & Bing. 99. *Sed vide contra* at *nisi prius*, Dixon *v.* Deveridge, 2 Car. & P. 109.

‡ Feize *v.* Thompson, 1 Taunt. 121.

‖ Regina *v.* Fall, 1 Queen's Bench Reports, 636. See many cases cited by Sir J., now Lord Campbell, in his argument in this cause

[1] See Devendorf *v.* Wert, 42 Barb. (N. Y.) 227; Hagan *v.* Riley, 13 Gray (Mass.), 515; McCarty *v.* Beach, 10 Cal. 461. *Ante*, p. 47, n. 2.

[2] But it does not follow that because, as it turns out, a plaintiff sustains no pecuniary loss from a substantial breach of contract, his recovery must be restricted to nominal damages. So, in a late English case, where the defendant was lessee of a house under a lease containing covenants on his part to repair, and the plaintiff was one of the reversioners and lessors, and before the end of the lease the lessors verbally agreed with a third party that he should have a lease to begin at the end of the defendant's, he agreeing to pull down the house and rebuild, and the defendant left the house out of repair at the end of his lease, and the verbal agreement between the plaintiffs and the third party was put in writing, and the house pulled down accordingly, it was held by the English Common Pleas, in an action against the defendant on his covenant to repair, that the jury were not restricted to nominal damages. Rawlings *v.* Morgan, 34 L. J. (C. P. N. S.) 185; 18 Com. Bench (N. S.) 776; 11 Jur. (N. S.) 564; 12 L. T. (N. S.) 348. See also Matthews *v.* Discount Corporation, L. R. 4 C. P. 228; Smith *v.* Peat, 9 Exch. 161; and see Olmstead *v.* Brush, 27 Conn. 530, *infra*. As to nominal damages in actions of tort, see *post*, 552, n.

But it has been held in South Carolina that to entitle the party injured by the breach to substantial damages, there must be ascertainable and definable pecuniary loss. And where the defendant, having agreed to lease a house and lot for a term of years to the plaintiff, who designed to use the premises as a boarding school, sold them to a third party before the

of covenant, the Supreme Court of New York held that the plea of *non est factum* admits a breach on the part of the defendant, and throws on him the onus of showing the contrary, but that such admission only entitled the plaintiff to nominal damages.* And in an action on the common money counts,† the same court held that if in assumpsit an issue be joined on a plea of payment, and no evidence be given at the trial by either party, the plaintiff will be entitled to a verdict, but such verdict will be for nominal damages only.[1]

So in Massachusetts, it has been decided that the omission of an administrator to settle his account with the probate court, renders him at all events liable to nominal damages.‡[2] So in the same State, the damages in a suit on the covenant against incumbrances are merely nominal, if the plaintiff [55] has paid nothing towards the incumbrance. ‖[3]

So in Maine, in a suit growing out of an attachment the goods having been delivered to a receiptor, and he having failed to perform his duty, it was said that if there was a good cause of action, at the time of the commencement of the suit, but the right of action is lost by a neglect to take the necessary steps to preserve the attachment, nominal damages may be recovered.¶ So in the same State, in an action on a bond given to procure the release of a debtor from arrest, there being no evi-

* Goulding *v.* Hewitt, 2 Hill, 644.

† The New York Dry Dock Co. *v.* M'Intosh, 5 Hill, 290.

‡ Fay *v.* Haven, 3 Metcalf, 109.

‖ Tufts *v.* Adams, 8 Pick. 547.

¶ Moulton *v.* Chapin, 28 Maine, 505.

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day when possession was to have been given to the plaintiff, who was in consequence put to great trouble in procuring a suitable place for her school, and was not at last so conveniently situated as she would have been at the defendant's house, the Court of Appeals of that State set aside a verdict of $500 dollars as merely arbitrary, it not having appeared that she had been put to any expense, or incurred any loss which could be ascertained in money. Hunt *v.* D'Orval, Dudley, 180.

[1] And it is held that in an action upon an instrument under seal, a court of law will give *nominal* damages only, where the presumption of valuable consideration is negatived by something appearing on the face of the paper. Cox *v.* Sprigg, 6 Md. 274.

[2] In an action of debt, brought upon the bond of a guardian of a minor, and prosecuted by the ward after the determination of the guardianship, where it appears that the guardian received property of the ward and has rendered no account, and has not been required to settle his account in the probate court, the prosecutor is entitled to recover nominal damages and no more. Probate Court *v.* Slason, 23 Vt. 306. In Connecticut, in an action on a probate bond in the name of the judge of probate, nominal damages cannot be recovered for a technical breach of the bond when the party beneficially interested has suffered no loss. Olmstead *v.* Brush, 27 Conn. 530. In Maryland, in an action on a guardian's bond, where no loss had been suffered, but a substantial breach had occurred, it was held that nominal damages were recoverable. State, Use of Murray *v.* Bishop, 24 Md. 310. Upon a covenant to an attorney to pay him a reasonable fee for defending the defendant on a criminal charge, nothing more can be recovered than nominal damages, unless it be averred that he did defend, or special damages be alleged, and admitted or proved. Wilson *v.* Barnes, 13 B. Monr. (Ky.) 330.

[3] Nominal damages may be recovered in such an action, though the incumbrances are removed before the suit is brought. Smith *v.* Jefts, 44 N. H. 482. And generally, for the technical breach of a bond unattended by actual damages, the obligee is entitled to nominal damages, and no more. State v. Reinhardt, 31 Mo. 95. See Dent *v.* Davison, 52 Ill. 109.

dence of the loss sustained by the plaintiff, it was held that the execution could issue for nominal damages only.*[1]

So in Mississippi, in an action on a covenant to transfer to the plaintiff the defendant's *title* to a slave, it was held that the measure of damages was not the value of the slave, but of the defendant's title; and that appearing to be defective, it was considered a case for nominal damages.† So in Louisiana, in a suit against the sureties on a sequestration bond.‡

But in a somewhat peculiar case, in an action of debt where a nonsuit had been taken, although the Supreme Court of New-York were satisfied that the verdict should have been for the plaintiff, yet as no damages were shown, nor any mode of arriving at any, the court refused to set aside the nonsuit and grant a new trial in order to give the plaintiff an opportunity to obtain nominal damages‖.[2] In regard to the pecuniary result, the effect of an award of nominal damages depends on the statutes regulating costs, which are usually made to depend on the amount recovered, according to the nature of the action; but this branch of the subject will be found more particularly discussed in the treatises on costs.

Costs. — The importance of the principle of nominal damages is mainly its effect upon the costs.[3] Thus, in Massachusetts, a plaintiff is entitled to full costs in personal actions, in which the title to real estate may be concerned, if he recover any sum less than twenty dollars.¶ Its practical results, there-

* Waldron *v.* Berry, 22 Maine, 486.

† Whitehead *v.* Ducke, 11 Smedes & Marsh, 98.

‡ Clarke *v.* Scott, 2 La. Ann. R. 907.

‖ Brantingam *v.* Fay, 1 J. Cases, 255.

¶ Revised Statutes of Mass. ch. 121, §§ 3 and 4. Ryder *v.* Hathaway, 2 Met. 96.

[1] So in Iowa, in an action on a penal bond under the Code of that State (§ 1888), unless special damage is averred and proved, nominal damages only can be recovered. Linder *v.* Lake, 6 Iowa (Clarke), 164.

[2] In an action on a contract to sell specific stock which, without the owner's knowledge, has been already sold by his agent, it is held in Pennsylvania that the plaintiff can recover nominal damages only. Wilson *v.* Whitaker, 49 Penn. State, 114.

A motion for a nonsuit should be denied where the plaintiff is entitled to nominal damages. Quin *v.* Moore, 15 N. Y. (1 E. P. Smith) R. 432. But a new trial will not be granted to the plaintiff where, upon the whole case presented, it appears that he is entitled to nominal damages only. Jennings *v.* Loring, 5 Ind. R. 250; see also, Watson *v.* Hamilton, 6 Rich. (S. C.) Law, 75.

[3] In Admiralty, where costs are discretionary, the right to nominal damages seems to be regarded as less important than in the common-law courts; thus in Barnett *v.* Luther (1 Curtis' C. C. R. 434), Curtis J. said, "If it were admitted that in an action at law a seaman could recover nominal damages for a blow inflicted by the master, it does not follow that the admiralty will award him nominal damages. . . . . At the common law, the prevailing party having a legal right to costs, which is of itself a substantial right, it is necessary to decide claims to nominal damages upon strict legal principles, even where nothing but a question of costs is involved. But in the Admiralty, the costs are in the discretion of the court, and do not depend upon the question whether the libellant recovers one dollar or nothing."

fore, can only be understood by a careful analysis of the statutes of costs, of the details of which, being matters of local legislation, this work cannot properly treat.[1]

Where the action is brought to prevent trespasses, to [56] try titles to land, or to determine rights of any kind, it is very equitable that the party in the wrong should bear the expense of the controversy; but in most other cases, the rule of nominal damages, provided they carry costs, only tends to engender litigation.[2] We shall have occasion hereafter to notice this more particularly; but it should be borne in mind, that the rule of nominal damages, unless carefully limited to cases where a right is necessarily litigated, results in gross injustice. It is of no consequence whether a claim to real or to personal prop-

[1] Some of the late decisions *restricting* the recovery to nominal damages will be found of interest. Where one had borrowed money from another on mortgage on his land, at the same time covenanting for the security of the mortgagee that certain improvements should be erected by a stipulated time and in a certain manner, which owing to the default of the contractor who was to erect the buildings were not completed by the precise time nor in the exact manner agreed, so that the mortgagee was subjected to extra expense for insurance, but some extra work was done on the buildings which increased the value of the mortgagee's security to an extent more than equivalent to the loss and additional expense, it was held that the mortgagee was entitled to nominal damages only. Pond *v.* Merrifield, 12 Cush. (Mass.) 181.

The defendant having mortgaged his life interest in certain property to secure a loan of £12,500, which was further secured by a conveyance of the reversion in fee and of a policy for £13,000, payable within three months after the death of the defendant, in case he should "leave issue male by his then present wife living at his death," covenanted that he would during his life, and so long as the £12,500 or any part thereof remained due, continue to pay the premiums on the policy. The mortgage deed also provided that the plaintiffs might pay the premiums if the defendant neglected to do so, and charge such payments against the mortgaged premises, but contained no covenant on the part of the defendant to repay the premiums so paid. The defendant, after paying the premiums for a time, discontinued doing so, after there was no further possibility of issue by his then wife. The subsequent premiums were regularly debited year by year by the office to the mortgage account of the defendant, but the defendant had no notice of this course of dealing. In an action brought against the defendant on his covenant to pay the premiums, it was held, assuming the plaintiffs to have paid the premiums, they were not entitled to more than nominal damages. Browne *v.* Price, 4 C. B. (N. S.) 598.

And where the assignee of a mortgage had paid the assignor part of the amount and given his bond conditioned to collect the balance by foreclosure or otherwise and pay it over, or after foreclosure sell the land by auction and pay the assignor the proceeds, deducting the amount paid and the costs and interest, and afterwards assigned the mortgage to another person, who entered on the land for the purpose of foreclosure, but subsequently instead purchased the equity of redemption and sold the land at auction within three years for $1,500, it was held that although there was a technical breach of the bond, as the mortgage was not foreclosed, the plaintiff, in the absence of proof of actual damage from the mode of sale, was entitled to nominal damages only. Pollard *v.* Porter, 3 Gray, 312.

In an action to recover private letters written to the intestate, in the absence of proof of their having a pecuniary value, nominal damages only can be recovered. Donohue *v.* Henry, 4 E. D. S. (N. Y.) 162.

Where judgment is given by the court on agreed facts but no damages are agreed by the parties, the judgment for the plaintiff will be for nominal damages only. McAneany *v.* Jewett, 10 Allen (Mass.) 151. See Lawrence *v.* Kemp, 1 Duer, 363.

[2] It is provided by statute in England, and generally in the different States of the Union, that in actions at law for the recovery of money, a recovery to a certain amount beyond nominal damages shall be necessary to carry costs. And where a jury, acting on the information of the plaintiff's counsel in his summing up, that a verdict for less than £5 would not carry costs, found that amount for a trifling assault, the court granted a new trial. Poole *v.* Whitcomb, 12 C. B. 770.

erty is in question, the defendant ought not to be charged with the costs of the proceeding, if the suit be either malicious or unnecessary. The law should hold out no inducement to useless or vindictive litigation.*[1]

Having thus stated the rule of damages where no actual loss is sustained, we now proceed to ascertain the extreme limits of legal relief where positive injury is done; and for that purpose shall next examine the subject of REMOTE AND CONSEQUENTIAL DAMAGES.

* I am happy to find this language cited with approbation in Vermont, in Paul *v.* Slason, 22 Verm. 231, per Poland, J.

The case of Hall, App't. *v.* Ross, Resp't, 1 Dow, 201, presents, in a striking point of view, the difference between the Scotch and English law, on the subject of nominal damages. It was a suit growing out of a lease of certain salmon-fishing stations, which had been disturbed by the erection of a dock. In the Scotch court, the judges (fourteen in number) were equally divided. Of the seven who decided against the claim, four were satisfied that the appellant had sustained damage, but apparently thought the damage could not be ascertained; and judgment was given against the party claiming, with costs. The Lord President, however, said that in several actions usual in Scotland, they were under the necessity of "conjecturing the damages."

On appeal to the House of Lords, Lord Eldon said, "If, in England, a majority of the judges had been of opinion that some damages were due, their Lordships would never have heard of the decision being against the person who had made out his claim to damages. Too much might be given him, or too little; but he could never, under such circumstances, be dismissed out of court, with the additional loss of having to pay the expenses of the suit. It might be very difficult to ascertain the amount of the damage; and in this country there were two modes of proceeding in such cases, viz.: to prove the amount by the testimony of competent witnesses; or, when there was no ground or criterion to estimate the damage, they were in the habit of giving nominal damages; but they never dismissed the claim altogether, when it appeared that there was some damage." And the judgment was reversed, with instructions: *First*, that if damages had been sustained, compensation was due. *Second*, that the party should furnish further proof; and if not, that the court should ascertain the amount of damages by such other means as their practice should authorize, and then to do what was fit and just.

[1] The general principle in regard to nominal damages in cases of tort seems to be this: If a trespass is committed, that is, if a right is invaded or interfered with, although without any actual damage resulting, the person to whom the right belongs may maintain an action and recover nominal damages. But where a person is directly using or confines his operations to his own property only, although the doing so may inconvenience another, there is no right of action, and no damages whatever can be recovered, so long as the damage is not appreciable. St. Helens Smelting Company *v.* Tipping, H. H. L. C. 642. The wise saw, *Sic utere tuo ut alienum non lædas*, does not here apply to the extent of giving a right of action. The law, in such case, no longer distinguishes between no "appreciable damage" and no damage at all. See Smith *v.* Thackerah, L. R. 1 C. P. 564.

CHAPTER III.

REMOTE AND CONSEQUENTIAL DAMAGES.

No Compensation allowed in Damages, but for the direct and immediate Consequences of the Act complained of.—French Law on this Subject.—Scotch Law.—The Common Law.—What are considered Direct and Immediate Consequences.—Loss of Profits.—As between Principal and Surety.—Statutes.—Counsel Fees.—Damages arising after Suit brought.—Prospective Damages.—Liability of Grantees of Franchises for Consequential Damages.

HAVING in the last chapter stated the measure of damages where no actual loss is sustained, I now proceed to exhibit the general rule which fixes the limit of compensation in cases where positive injury results from the alleged wrong. That rule is the one which prohibits any allowance for damages remotely resulting from the principal illegal act. Such damages are frequently termed *remote damages* and sometimes *consequential damages.* These terms are not, however, necessarily synonymous, or to be indifferently used. All remote damages are consequential, but all consequential damages are by no means remote.

We shall have frequent occasion to notice the existence of this principle hereafter, when examining more minutely the rules of damages in particular cases; but it is proper before entering on that part of our subject, to have an idea of the general boundaries of this branch of our jurisprudence.

It has already been stated that the law does not aim at complete compensation for the injury sustained; that it seeks rather to divide than to satisfy the loss;[1] and that in cases of contract, as well as of tort, where no question arises of fraud, malice, or oppression, the direct pecuniary damage with the costs of the litigation form the measure of relief. In other words, the law refuses to take into consideration any damages remotely resulting from the act complained of. This proposition, or [58] one correlative to it, is expressed in the maxim *Causa proxima, non remota, spectatur;* or, in the language of Lord Bacon, "It were infinite for the law to judge the causes of causes, and their

[1] See note 1, *ante*, p. 38.

impulsion one on another. Therefore, it contenteth itself with the immediate cause, and judgeth of acts by that without looking to any further degree." *

CIVIL LAW.—This general principle pervades the civil as well as the common law, and applies equally to cases of breach of contract, and of violation of duty; to all cases, in short, where no complaint is made of any deliberate intention to injure. In these latter cases we have seen that our law does not pause at the line of mere compensation, but proceeds to punish the offender. The language, however, held on this subject, and the reasons assigned for the disregard of remote damages, are far from being uniform. In regard to contracts, it is sometimes said that the defendant shall be held liable for those damages only which both parties may be fairly supposed to have contemplated at the time they entered into the agreement, as likely to result from it; and this appears to be the rule adopted by the writers of the modern civil law.[1] Thus Pothier † puts the case of an agreement for the sale of a horse, and failure to deliver. If in this instance horses have risen in price, the purchaser has a claim for what he has been obliged to give for a similar animal, over and above the price at which he was to have that of the seller; and this, in the language of the Roman Law, he terms the damages *propter rem ipsam non habitam.* But on the other hand, if the purchaser were a canon of the church, and by reason of the non-delivery of the horse could not arrive at his residence in season to receive his *gros fruits* (or tithes), the seller is not liable for the loss of those *gros fruits*, because this accident was not foreseen at the time of the contract.

So, in case of a letting of a house for a given term, say eighteen years, which the letter in good faith supposes his, and if at the end of ten or twelve years the lessee is evicted by the true owner, the lessor is liable for the damages resulting from the expense of moving, and the rise of the rent of similar
[59] tenements; these are *propter rem ipsam non habitam.* But he is not liable for an injury done to a business established in the house by the lessee subsequent to the letting, nor for furniture injured in the removal;[2] this is damage that could not

* Maxims of the Law, Regula 1.

† Traité des Obligations, part i, ch. ii, art. iii, § 160, *et seq.*

[1] See *post*, 76, note.

[2] Moreover, it is the carelessness of the people whom the lessee employed which is the *cause* of the damage to the furniture, and not the eviction which is merely the *occasion* of it. *Ibid.*

have been contemplated at the time of the contract. But if, on the other hand, the horse above referred to had been sold for the express object of enabling the canon to arrive in time for his *gros fruits*, or the building had been let for the express object of carrying on a particular business, then the injuries,[1] which otherwise would be too remote, become direct and immediate, and constitute a valid claim, as forming part of the contract between the parties. So if one, not a carpenter, sell timber which the purchaser uses to prop up his building, and by reason of the timber being defective, the building fall and be destroyed,—if the seller acted in good faith, and was ignorant of the defect, he will only be liable for the difference in price between good timber and that sold. If, however, the seller was a carpenter who sold the timber for the express purpose of propping up the house, then he shall be held liable for all damage done the building. But again, if the timber be sold to be used in reference to a particular building, and it be used for one larger and more valuable,—even if it were insufficient for a smaller one, the seller shall be liable only for the value of the smaller building. So, again, in the second case, the seller of the timber is only liable for the building itself, and not for furniture in it at the time of its destruction. But if an architect contract to erect a dwelling-house, and by reason of his negligence it fall, he shall be liable for the furniture as well as the building, because it is to be considered that the architect must have been aware that the house would be used for holding furniture. But he is not liable for jewelry and manuscripts of great and extraordinary value.

In cases of fraud, the civil law made a broad distinction. In such cases the debtor was liable for all the consequences of his fraud, not only of those *propter rem ipsam*, but all others; for he who commits a fraud is bound, *velit nolit*, to repair the wrong caused thereby. For instance, if a cow tainted with an infectious malady, is fraudulently sold, the seller will be liable, not only for the animal itself, but for the others destroyed [60] by the spread of the contagion.[2] But Pothier is of opinion that there is still a limit to this liability; and he puts the case of a similar contagious disease, and supposes that in consequence thereof the purchaser is prevented from cultivating his lands, by means whereof his payments are suspended, his property is seized, and he is thrown into prison; he considers it

[1] That is, from his loss of the tithes or the business.

[2] The rule of our law is the same. See Mullet *v.* Mason, 1 L. R. (C. P.) 559; *post*, 90, note; 295 note; Bradley *v.* Rea, 14 Allen, 20.

clear in this case, that the seizure of property is not to be charged to the fraudulent sale,—doubts, also, if the being prevented from cultivating the property should enter into the consideration of damages, and thinks, at all events, it should only do so in part.

CODE NAPOLEON.—The modern French law, as declared in the Napoleon Code, contains the recognition of the same general principles. "The damages due the creditor consist in general of the loss that he has sustained, and the profit which he has been prevented from acquiring, subject to the modifications hereinafter contained."

"The debtor is liable only for the damages foreseen, or which might have been foreseen at the time of the execution of the contract, when it is not owing to his fraud that the agreement has been violated."

"Even in the case of non-performance of the contract, resulting from the fraud of the debtor, the damages comprise only so much of the loss sustained by the creditor, and so much of the profit which he has been prevented from acquiring, as directly and immediately result from the non-performance of the contract."*

DIFFERENCE BETWEEN CIVIL AND COMMON LAW.—Two prominent points of difference will be borne in mind, between the principles of the modern civil system as thus laid down, and those of the common law, which arise mainly from the arbitrary character of the forms of action as they originally existed
[61] at Common Law. By those forms of action, contracts and wrongs are intended to be kept wholly distinct. In case of a breach of contract (with the single exception of promises to marry), the animus or intention of the party in default, as a general rule, is entirely immaterial, and whether the non-performance of the agreement result from inability or deliberate malice, the rule of damages is the same. On the other hand, in cases of fraud or vexation, as has been already repeatedly said, compensation is blended with punishment, and the jury left largely to their discretion.

* The language of the Code is as follows: Les dommages et intérêts dus au créancier sont, en général, de la perte qu'il a faite, et du gain dont il a été privé, sauf les exceptions. et modifications ci-après.

Le débiteur n'est tenu que des dommages et intérêts qui ont été prévus ou qu'on a pu prévoir lors du contrat, lorsque ce n'est point, par son dol que l'obligation n'est point exécutée.

Dans les cas même où l'inexécution de la convention résulte du dol du debiteur, les dommages et intérêts ne doivent comprendre à l'égard de la perte éprouvée par le créancier, et du gain dont il a été privé, que ce que est une suite immédiate et directe de l'inexécution de la convention.—*Code Civil*, liv. iii. tit. iii. sec. 1149, 1150, 1151.

It will be perceived that the above provisions of the French Code recognize the same principles as those which we have illustrated by the extracts from Pothier, and which are, in fact, nothing else as to the leading principle, than a repetition of the general language of the Roman law: *quantum mea interfuit; id est, quantum mihi abest, quantumque lucrari potui.** It is difficult, however, to understand practically what rules the civil or the French law intends to lay down; as they are subject to the arbitrary discretion already often noticed. A recent, and very able commentator on the Code, holds this language:

"There is nothing more abstract than the subject of damages; the law, therefore, has only been able to lay down general principles, leaving the wisdom of the tribunals to apply them according to the circumstances and the facts of the case; and though it establishes that, in general, damages consist of the loss which the creditor has suffered, and the profit of which he has been deprived, nevertheless the judge should be more moderate in granting large damages for profits prevented than for loss actually sustained: the *lucrum cessans* is generally less calculated to excite the solicitude of the judge, than the *damnum emergens;* and too much rigour on this branch of the subject would degenerate into injustice. *Summum jus summa injuria.* Such is the general opinion of our authors."†

Another very eminent commentator on the Code, in [62] order to illustrate the general principle in regard to remoteness of damage, puts the case of a contract by which Titius is to let a sufficient number of vehicles on a given day, for the vintage of a certain vineyard remote from my domicil, and whither I have proceeded to prepare for the work, and hired my hands. Titius failing to furnish the vehicles, I am compelled to dismiss my hands and postpone the vintage. A day or two after a hailstorm takes place and destroys the whole crop which I have sold to pay my creditors; owing to their not being paid, my property is seized and I am driven into bankruptcy. The question is then asked, What does Titius owe; does he owe me the value of my crop in whole or in part?

* L. 13, ff. *ratem rem hab.;* and see *supra*, p. 24.

† Il n'est pas de matière plus abstraite que celle relative aux dommages-intérêts; aussi la loi n'a t'elle pu tracer que des principes généraux en s'en remettant à la sagesse des tribunaux pour leur application selon les circonstances et les faites de la cause. Et quoiqu'elle établisse que less dommages-intérêts sont en général la perte que le créancier a éprouvée et le gain dont il a été privé, néanmoins le juge doit être plus réservé à en accorder de considérables pour le gain manqué qué pour la perte réellement éprouvé: le *lucrum cessans* est généralement moins susceptible d'exciter sa solicitude que le *damnum emergens.* Et c'est en cette matière que trop de rigeur dégénérerait souvent en injustice. *Summum jus summa injuria.* Tel est le sentiment commun des auteurs. Duranton, *Cours de Troit Français*, vol. x. n. 480 and 481.

Should he indemnify me for the loss of my property and my consequent insolvency? And the learned writer decides as to the latter head of damage, that Titius is not responsible. He pronounces it too remote a loss. It is the direct and immediate result of the bad state of my pecuniary affairs, which Titius had no means to foresee, and which he was not bound to consider. As to the loss of the crop, he proceeds to distinguish between bad faith (*dol, mauvaise foi*) and inability. If the failure to perform the contract was owing to the latter, then, though Titius is in fault, still, as it is not in consequence of his bad faith that the contract has been broken, he is, by the provisions of the code above cited, liable only for the damages which were foreseen, or which might have been foreseen at the time; and it could not be anticipated that the day after that fixed upon, a hailstorm would destroy my crop.

But on the contrary, if the non-performance was owing to bad faith, then the same author considers Titius liable for the loss of the crop; because it cannot reasonably be denied that this loss is an immediate and direct result of the non-performance of the contract. If it be said that the immediate and direct *cause* of the loss of my crop was the storm, and not the fault of Titius, the answer is, that to render the debtor acting in bad faith responsible for damages, the Code (Art. 1151) [63] does not require that the non-performance of the contract should be the *immediate and direct cause* of the damage, but only that the damage should be the *immediate and direct result* (*suite*) of its violation, which is a very different thing.*

This case, again, well illustrates the difference between the French system and our own in regard to damages. With us, as a general rule, no discrimination is made in regard to contracts, as to the motive which produces their non-performance.[1] So in this instance, whether Titius was actuated by a fraudulent or a malicious purpose, no action could be maintained but for a breach of contract; and in that action, I apprehend that the damage resulting from an extraordinary hailstorm would be considered altogether too remote to be allowed as damages. On the other hand, however, if Titius, instead of violating an agreement, had committed a malicious trespass, as by removing the vehicles prepared for the vintage, the jury might give damages in their discretion to punish the offence.[2]

* Toullier, Droit Civil, liv. iii, tit. iii, ch. iii. De l'effet des Obligations, § 284, *et seq.*; vol. vi, p. 290, *et seq.*

[1] See *post*, p. 206, note.

[2] Nor is our law otherwise. Where the jury found that in consequence of the wrongful

Another case from the same commentator will illustrate the extent to which the civil law goes in quest of resulting damage. If, for instance, an architect who has contracted to build a house by a given time for a given tenant, constructs it so ill that a part of it falls down, this causes three sorts of loss,—the expense of rebuilding, the rent that the proprietor might have received, the damage done the tenant; and though the second and third class appear remote, yet, as they are caused by the act of the contractor, they should be charged to him. And there is even a fourth class of loss for which he should answer, that of the furniture in the house, and which could not be saved, for the architect must be presumed to know that the house would contain furniture; but he is not responsible for jewelry, or things of extraordinary value, unless, indeed, there was a deliberate design to injure. Toullier proceeds to say that in this case, and in many others, the damages might be so enormous as to ruin the party charged, although he was acting in entire good faith; and that hence Domat has been induced to adopt the principle that the *architects able to meet these losses* should be charged with them, but that inasmuch as con- [64] tractors have not always the means to make such complete remuneration, and as humanity should moderate the rigour of extreme justice, this kind of damages should be regulated by discretion. Toullier, however, vigorously combats what he pronounces a false and dangerous doctrine, and which, he says with extreme good sense, would result in different judgments of the same cause, according to the fortune of the debtor. The discussion is curious as going to illustrate the apparent absence of any fixed measure of damages in the French law,* and the cau-

* The vagueness of the French system in this respect dates, as we have already seen, from an early period of our jurisprudence. One of the best authors of their ante-revolutionary laws says, "Nothing is more arbitrary than the amount of damages." But the whole clause is worth extracting:—

Pour les dommages et intérêts, ils dependent toujours des circonstances du fait; c'est pourquoi il n-y a rien de plus arbitraire, et l'on voit très souvent de juges que les fixent à une somme si modique qu'ils ne vont pas à recompenser la dixième partie de ceux qui ont été soufferts par la partie à laquelle ils sont adjudgés; ces sortes d'indulgences ne sont pas seulement contraires au bien des particuliers, mais elles nuisent encore davantage au bien public, puisqu'elles fomentent les violences et la mauvaise foi par l'espérance d'impunité. Argou, *Institution au Droit François*, Paris, 1787, liv. iv, ch. 17.

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abduction of the plaintiff's slaves, the cattle of the neighbours destroyed his corn, and a flood in the river swept away a quantity of his wood, it was *held*, that it was not erroneous to include the value of these things in the damages, in an action of trespass for carrying away the slaves. McAfee *v.* Crofford, 13 How. 447. See also Parmalee *v.* Wilks, 22 Barb. (N. Y.) 539; Goodloe *v.* Rogers, 10 La. Ann. 631. But where a bridge over a slough became impassable for want of repairs, by reason of which the plaintiff could not transport over it a lot of wood collected for that purpose, and the wood, while awaiting transportation, was washed away by a freshet, the loss was held too remote for recovery. Dubuque Wood and Coal Association *v.* Dubuque, 30 Iowa, 176. See also Walker *v.* Goe, 3 H. and N. 395; 4 H. and N. 350. See *post*, 67, n.

tion with which its authors should be consulted on questions connected with this branch of jurisprudence.

Having thus rapidly exhibited the rules of the French and Modern Civil law as to remote and consequential damages, we turn to other systems.

SCOTCH RULES.—One of the most eminent authors of the Scotch jurisprudence,* divides resulting damage into *certain* and *uncertain:* certain, as the loss of rent consequent on the destruction of a house; uncertain, as the profit that might have been made upon property of which the owner has been robbed.

Certain consequential damage is, he says, always allowed by a court of law. Uncertain damage will be allowed by a court of equity, where a criminal act is the cause of the loss; and this, because the criminality throws the burden of proof on the delinquent, and he is charged with every probable item of profit, unless he can give conclusive evidence that no profit could have been made. But I apprehend that with us no
[65] distinction exists between the rules of equity and law on this subject.†

In regard to acts merely culpable and not criminal, or when fault exists without malice, the same writer declares that uncertain consequential damages cannot be allowed.‡

So of the *pretium affectionis*, or value set upon the injured property by its owner, over and above its intrinsic or market value, he holds that it is not to be allowed unless the injury is intentional.

ANGLO-SAXON JURISPRUDENCE.—The general principles of the civil law have been repeatedly recognized in our own jurisprudence, though the language employed to define the limits of damage has not been uniform. It has been sometimes said by the courts which follow the course of the common law, that no allowance could be made for *remote* or *consequential* loss;[1] sometimes that the damages to be compensated must be the *proximate* and *natural* consequences of the act complained of.[2]

* Lord Kaims' Principles of Equity, 2d ed. 1767, p. 77, book i. part i. ch. i. § v.

† The question whether, in awarding damages, there be any difference between a court of equity and a court of common law, is considered by Lord Kaims, book i. part i. ch. iv. § v. p. 159.

‡ Book i. part i. ch. iv. § v. p. 160.

[1] See Ohio and Mississippi R. R. Co. *v.* Dunbar, 20 Ill. 623.

[2] It is a familiar principle elsewhere stated in reference to promissory notes (*post*, p. 234), that where the failure to perform a contract consists in the non-payment of a sum of money at an agreed time, such sum with the interest usually furnish the measure of the damages, and not the consequences of the non-payment, however disastrous. And where the payment of a

DEFINITIONS OF RULE.—"Where the action," says the Supreme Court of New York,* "is for the breach of a contract, and no special damages are stated in the declaration, the plaintiff is confined in his recovery to such only as naturally arise from the breach complained of; but if the damage claimed do not *naturally* arise from that fact, they cannot be recovered *unless they are particularly stated in the declaration*, and not then *if they are not proximate*. Consequential damages may naturally arise from the mere breach of a contract, but they often depend on the peculiar circumstances of the case. Such are allowed without being stated in the pleadings, as *are the fair, legal and natural result of* the breach of the defendant's agreement; if they *do not thus result*, the jury cannot allow them, unless they are stated in the declaration, and established by proofs."[1] Here it is said that damages not "*naturally*" arising from the defendant's act can be recovered, provided they be "*proximate*," and that though such damages be not the "fair, legal and natural" result of the breach of contract, still, they can be allowed for if alleged and proved. It may be well doubted, whether any damages not "naturally" resulting from the alleged grievance can [66] ever be considered *proximate*, or whether they can be taken into consideration at all by the tribunal.

The rule is not much more definite when it is said that the damages must be the *legal and natural* consequence of the act complained of. As in a case,† in which the defendant had slandered the plaintiff—who was employed by one J. O. as a jour-

* Marcy, J. in Armstrong *v.* Percy, 5 Wend. 535, 538.

† Vicars *v.* Wilcocks, 8 East. 1.

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sum of money by a party to a contract, although wrongfully demanded by a third party, or by a superior power, would enable him to avoid damages beyond such payment, the other party to the contract cannot ordinarily be held for the damages that might have been thus avoided, notwithstanding he had undertaken to make good any damage the other might sustain. See Hayden *v.* Cabot, 17 Mass. 169 (*infra*, 77); Miller *v.* Mariners' Church, 7 Greenl. 51 (*infra*, 94). The following late case in the English Court of Exchequer appears to carry this principle to a severe extent. The defendant, having chartered the plaintiff's vessel from Liverpool to Puerto Cabello at a stipulated freight, a clause was afterwards added to the charter party allowing the plaintiff to send on a part of the cargo to Maracaibo, with the proviso that any expense incurred by so doing should be borne by the charterer. The charterer having accordingly shipped a part of the cargo for Maracaibo, the custom-house authorities at Puerto Cabello, under pretense of an attempt by the master to evade customs on the part so shipped, wrongfully imposed a fine of $500 on the master and detained the vessel for some months, but would have permitted her departure if the fine had been paid, which the master had not the means to do, and did not do; and the government afterwards agreed to pay the master $5,000 for the wrongful detention, but did not pay it.

It was held that the owner of the vessel could recover from the charterer neither the loss sustained by the detention at Puerto Cabello, nor the expenses incurred in repairing the damage to the ship in consequence of such detention, nor for the costs and legal proceedings taken by him in respect of the ship, nor for the fine. Sully *v.* Duranty, 33 L. J. N. S. Exch. 319. See, however, Green *v.* Mann, 11 Illinois, 613 (*post*, 198).

[1] No damages can be claimed for the loss of a contract collateral to the one broken. Bridges *v.* Stickney, 38 Me. 361.

neyman for a year, at certain wages—by saying that he had cut certain flocking cord, and the plaintiff claimed special damages for his discharge by J. O., in consequence of the slander, before the expiration of the year, it was held by Lord Ellenborough, that the discharge of the plaintiff by J. O. was a mere wrongful act, and not "the legal and natural consequence of the slander complained of."*[1]

Mr. Greenleaf has said with more accuracy,† "The damage to be recovered must always be the *natural and proximate* consequence of the act complained of."[2] But it is far easier to lay down a general proposition, than to apply it to a particular case. When we come to analyze causes and effects, and undertake to decide what is the natural result of a given act, and what is to be regarded as unnatural—what is proximate and what remote, we shall find ourselves involved in serious difficulty. Many things are perfectly natural, and yet very remote consequences of a particular act; many other results are proximate, nay, immediate, and yet so little to be expected that they can scarcely be pronounced natural.‡ Nor does the requirement that the damage be both natural and proximate, relieve us from the difficulty.‖

DAMAGES CONTEMPLATED BY THE PARTIES.—In Lousiana the subject of damages is regulated by the Code of that State (Arts. 1928, 2294, 2295), and it is declared in reference to our present subject, "that when the object of the contract is anything but

* In Kelly *v.* Partington, 5 B. & Adol. 645, an action of slander for words of ambiguous meaning, and to which no interpretation was given by innuendo, it was said, by Taunton, J., "In order to make the words actionable, they must be such that special damage may be the *fair and natural result* of them;" and by Patterson, J., "I have always understood that the special damage must be the *natural* result of the thing done. (Similar language is used by the Supreme Court of New York, in Crain *v.* Petrie, 6 Hill, 522.—Ed.)

† Evidence, vol. ii. p. 210.

‡ The Bishop of Durham, in his admirable Treatise on the Analogy of Religion (too little studied in our time), in the first chapter, on a Future Life, discusses the meaning of the word *natural*, and defines it as *stated, fixed*, or *settled, similar*, or *uniform*. But he has, in his contemplation the whole course of God's dealings with his creation, as far as known to us; and this definition will not answer for the novel and constantly changing phases which the relations of men in the business of life assume, and out of which claims for compensation spring.

‖ In Alabama, the phrase "natural and proximate consequence," has been cited with approbation in a case of malicious prosecution. Donnell *v.* Jones, 13 Alabama (N. S.), 490. But in truth the question of the remoteness or consequentiality of damage often loses itself in the most metaphysical regions of cause and effect. The reader of Plutarch will remember the charge brought against Pericles by his son Xanthippus, who said "that Epitimius, the Pharsalian, having undesignedly killed a horse with a javelin that he threw at the public games, his father spent a whole day in disputing with Protagoras, which might be properly deemed the cause of his death, the javelin, or the man that threw it, or the president of the games."

[1] See Moore *v.* Davis, 49 N. H. 45; Clark *v.* Boardman, 42 Vt. 667, 677: Lynch *v.* Knight, 5 L. T. R. (N. S.) 291; *post*, 83, note.

[2] Vedder *v.* Hildreth, 2 Wis. 427; Walker *v.* Ellis, 1 Sneed (Tenn.), 515.

the payment of money, where the debtor has been guilty of no fraud or bad faith, he is liable only for such damages as were contemplated, or may reasonably be supposed to have entered into the contemplation of the parties, at the time of the contract;" and this principle has frequently been carried out by the courts of that State.* So, in a case where it might be inferred to be in the contemplation of the parties to a contract that a sugar-mill and engine, which the manufacturer undertook to put up within a given time, was for the purpose of getting a certain crop, it was held that a failure to put it up in time entitled the plaintiff to recover for the loss of crop and extra wages caused by the delay. †

These cases have been cited with approbation, and their principle recognized by the Supreme Court of Texas; and they express, perhaps, the clearest and most definite rule [67] that can be framed in this perplexing matter.‡[1]

Having thus briefly stated the general principles of the civil law, and of those systems of jurisprudence which recognize the authority of the same rules, a more accurate notion of our own law will be had by a review of some of the decided cases; first grouping together those cases where damages have been denied, as being too remote and indirect; and secondly, examining those cases where more liberal allowances have been made.

* Williams *v.* Barton, 13 Louisiana, 404.
† Goodloe *v.* Rogers, 10 La. Ann. Rep. 631.
‡ Calvit *v.* McFadden, 13 Texas, 324, per Wheeler, J.

[1] In the late case of Duckworth *v.* Ewart, 33 L. J. Rep. N. S. Exch. 24 (2 Hurlst & Colt, Exch. 129), Messrs. Rutledge, the owners of building land on which they were erecting houses, having become unable to proceed with the building, and having mortgaged it to a building society for £4,300, and in lesser amounts to three other mortgagees, of whom the plaintiff was one, entered into an indenture with the plaintiff and the other mortgagees and other creditors, in which it was agreed the plaintiff should have power to sell the land, subject to the mortgage to the building society, and out of the proceeds pay the expenses of the trust and the other mortgages and the surplus to the owners, and which empowered the plaintiff to enter on the land and finish the buildings, and also to raise any sum not exceeding £5,000 for carrying into effect the trust of the indenture by a mortgage on the premises which should have priority over all the other mortgages except that to the building society. In the same instrument the defendant covenanted to execute all assurances for enabling the plaintiff to execute the trusts of the deed. The plaintiff entered on the execution of the trusts and incurred an expense of £1,100 on the land. He also arranged with the building society to accept £4,100 in satisfaction of their debt, and contracted with certain persons for a loan of £5,000 on the land, by a mortgage which was prepared, and was agreed to by all parties. At the last moment, when the parties had met to close the transaction, the defendant refused to execute the mortgage; whereupon the building society, acting on a power of sale contained in their mortgage, foreclosed it, and sold the property at a forced sale, for £4,510, which was exhausted in paying their debt and expenses.

Martin, B., was of opinion that, in addition to the costs of the proposed mortgage, the defendant was liable for the difference between £5,000 and the value of the land as building land, such as it was contemplated as being by the indenture, or at all events that he was entitled to £900, the residue of £5,000, after paying £4,100, agreed to be taken for the first mortgage.

But the majority of the court, per Pollock, C. B., and Bramwell, B., held that the plaintiff was entitled to recover only the costs of the abortive mortgage.

Distinction between Trespass and Case.—In England, the subject seems to have been first examined in connection with the forms of action. The original distinction between trespass and case was, that where the injury was immediate the former would lie, where consequential, case only; and hence it often became indispensable to determine to which class particular kinds of damage should be held to belong. So in the famous squib case,[1] where the defendant threw a squib into the market-house, which fell on the stall of a ginger-bread seller; he, to save himself, threw it on another stall; the proprietor of the second stall also threw it off, and in so doing struck the plaintiff and put out his eye; here it was held that the injury was the direct and immediate act of the defendant, and that trespass would lie.*[2] We are now to examine an analogous class of questions, but without reference to any technical form of action.

Pleadings.—A preliminary question arises on the pleadings,

* Scott *v.* Shepherd, 2 W. Black. 892; Vandenburgh *v.* Truax, 4 Denio, 464.

[1] In this leading case perhaps the exact conclusions of the four judges may well be stated somewhat more at large than in the text.

Nares, J., held that trespass would lie because the natural and probable consequence of the defendant's act was injury to somebody, and therefore the act was unlawful; and being unlawful, the defendant was answerable for its consequences, whether the injury were *mediate* or *immediate*.

In this opinion Gould, J., concurred, expressing further the opinion that trespass would lie for the mischievous consequences of another's act, whether lawful or not.

Blackstone, J., dissenting, held that the injury being *consequential* only, and *not immediate*, the action could not be maintained, but that case should have been brought.

Grey, C. J., alone expressed the opinion stated in the text, that the injury was the direct and immediate act of the defendant.

[2] The rule cited from Mr. Greenleaf (*ante*, 65), that "the damage to be recovered must always be the natural and proximate consequence of the act complained of," admits, perhaps, of the further qualification that the proximateness required is not the greatest possible, but that the *causa causans* to which the responsibility attaches, may sometimes concur with or precede other agencies in producing the loss. For instance, in a case where the defendants negligently moored their boats in the channel and entrance to the locks at a dam on a river, so that the plaintiffs' boats, without fault of theirs, were stopped outside and exposed to the rapidly rising current till forced by it over the dam and lost, the defendants were held responsible, although the obstruction of the locks and channel was a more remote cause of the accident than the flood. Scott *v.* Hunter, 46 Penn. 192. See City of Brooklyn *v.* Brooklyn City R. R. Co. 57 Barb. (N. Y.) 497; The Lords Bailiff of Romney Marsh *v.* The Corporation of Trinity House, L. R. 7 Exch. 247. But where the State, in enlarging an opening into a canal basin, pursuant to an act of the legislature, had cut away a pier belonging to private owners, and the defendants were bound to pay all damage caused by the improvement, and about a year after the enlargement, the water broke through an ice dam which had formed above the enlarged part, and undermined the pier, causing the walls of some buildings on it to fall, it was held, in an action brought by the people in behalf of the owners of the injured property, that although the injuries would not have happened but for the enlargement, the damages were too remote to be recovered. People of the State of New York *v.* The Mayor, &c. of Albany, 5 Lansing (N. Y.) 524. So where the defendant's servant having, contrary to the statute, washed a van in a public highway, and the waste water had run down the gutter leading to a grating twenty-five yards distant, through which it would ordinarily have gone into the sewer, but from the circumstance that the sewer was obstructed with ice, had spread over the paving, which was out of repair, and so frozen; and in consequence, the plaintiff's horse slipped on the ice and broke his leg, it was held, that the injury was not such as the defendant could have foreseen as the ordinary or likely consequence of washing the van in the public street, and the nonsuit granted at the trial was sustained. Sharp *v.* Powell, L. R. 7 C. P. 253. Compare Collins *v.* Middle Level Commissioners, 38 L. J. C. P. 296; 20 L. T.

because in many cases the recovery of special or resulting damages depends on the proper averments in the declaration. This is a branch of our subject which will be treated of more fully hereafter, under the head of Pleading.* Mr. Chitty says,† "Such damages as may be presumed necessarily to result [68] from the breach of contract, need not be stated with any great particularity in the declaration. But in other cases it is necessary to state the damages resulting from the breach of contract specially and circumstantially, in order to apprise the defendant of the facts intended to be proved, or the plaintiff will not be permitted to give evidence of such damages on the trial."‡

So in an action for a nuisance, resulting from an obstruction to a water-course, caused by the erection of a mound of earth, it appearing that the defendants did not erect the mound in a way to obstruct the course, but that the earth had mouldered and been trodden down by third persons so as to intercept the water, the court said that the evidence did not support the declaration. "The statement in the declaration is, that the rubbish itself was placed by the company in a situation such as to obstruct the ditch. It is, however, the elements and the boys which have changed its position and caused it to obstruct the ditch. It was not the immediate act of the defendants, but a consequential injury that occasioned the obstruction."‖

But supposing the damages properly and completely averred, the question yet remains; for though fully alleged, the right to recover is still to be determined.

PROFITS.—It is very difficult to group the cases together, as each turns generally on its own merits; but we will first examine to what extent the loss of prospective profits is considered a subject of compensation.[1] In the civil law, we have seen

* *Vide post*, ch. xxiv.

† Pleadings, i, 371.

‡ See, to same point, Deforest *v.* Leete, 16 Johns. 122.

‖ Fitzsimons *v.* Inglis, 5 Taunt. 534.

N. S. 442; L. R. 4 C. P. 279. See, also, Tinsman *v.* The Belvidere Del. R. R. Co. 2 Dutch. (N. J.) 148.

Where the loss of an eye was the direct and immediate consequence of exposure to which the plaintiff was subjected by removing the roof of his house, it was *held* that it might be considered by the jury in aggravation of damages in the action of trespass *quare clausum fregit*. Hatchell *v.* Kimbrough, 4 Jones (N. C.) L. 163.

In New York it has been held that a dealer in drugs, who carelessly labels a deadly poison as a harmless medicine, and sends it so labeled into market, is liable to all persons who, without fault on their part, are injured by using it as such medicine, in consequence of the false label. His liability arises out of the duty which the law imposes upon him to avoid acts in their nature dangerous to the lives of others. He is liable, therefore, though the drug with such label may have passed through many intermediate sales before it reached the hands of the person injured. Thomas *v.* Winchester, 2 Seld. (N. Y.) 397. See, also, Fleet *v.* Hollenkemp, 13 B. Monr. (Ky.) 219. Piper *v.* Menifee, 12 *Ibid.* 465; Hope *v.* Alley, 9 Tex. 394.

[1] It may be generally observed, in reference to the loss of profits claimed as damages, both in tort and contract, what will be repeatedly seen in special classes of actions, such as those

that they are generally allowed; but the tendency of our law is to a contrary result, though this is by no means a rule without exception.[1]

Where the plaintiff bought the unexpired term of a lease for £270, and paid a deposit of £54, the title proving defective, the plaintiff insisted on recovering as damages, not only his deposit, but damages sustained by the loss of the bargain, and also by reason of his having sold out stocks to pay the purchase money; and the jury gave a verdict for £74 15*s.* 6*d.*, being the de-
[69] posit with interest, and £20 extra damages. But on motion a new trial was ordered as to the loss of the bargain; and De Grey, C. J., said, "Upon a contract for a purchase, if the title proves bad, and the vendor is, without fraud, incapable of making a good one, I do not think that the purchaser can be entitled to any damages for the fancied goodness of the bargain which he supposes he has lost." And as to the sale of the stocks, Blackstone, J., after remarking that the facts did not show any loss, said, "Not that it is material; for the plaintiff had a chance of gaining as well as losing by a fluctuation of the prices." * This case has frequently been referred to as amounting to a general denial of a right to recover profits. But it is not an authority to that extent; it is put by Mr. J. Blackstone, in his opinion, on the ground that "contracts of this kind are merely upon condition, frequently expressed, but always implied, that the vendor has a good title."[2] And where the grantor in such case has full knowledge that he has not title, damages resulting from the loss of the bargain have been allowed.†[3]

Early Cases.—The early cases, in both the English and American Courts, generally concurred in denying profits as any part of the damages to be compensated, and that, whether in cases of contract or of tort. So in a case of illegal capture, Mr. Justice Story rejected the item of profits on the voyage,

* Flureau *v.* Thornhill, 2 W. Black. 1078.
† Robinson *v.* Harman, 1 Exchequer Reports, 850; and see Bitner *v.* Brough, 11 Penn. State R. 127.

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against carriers and those between vendor and vendee, that in some cases the market value of the property as to which the claim is made includes and represents the profit, but in other cases, the profit is the expected gain from a particular bargain or adventure which is frustrated by the breach or default complained of. When the liability for profits is established, the standard for their measurement is in the former case comparatively uniform, in the latter it will depend greatly on the circumstances.

[1] Where damages are claimed for loss of profits on a contract, the plaintiff "is as much bound to prove them as he is to prove the contract itself. The jury cannot be asked to guess. They are to try the case on evidence, not upon conjecture." Lentz *v.* Choteau, 42 Penn. 435. (Opinion of the Court per Strong, J.)

[2] The rule in this case does not apply to an executed contract. Lock *v.* Furze, 1 L. R. (C. P.) 441.

[3] See *post*, ch vi.

and held this general language: "Independent, however, of all authority, I am satisfied upon principle that an allowance of damages upon the basis of a calculation of profits, is inadmissible. The rule would be in the highest degree unfavorable to the interests of the community. The subject would be involved in utter uncertainty. The calculation would proceed upon contingencies, and would require a knowledge of foreign markets to an exactness, in point of time and value, which would sometimes present embarrassing obstacles. Much would depend upon the length of the voyage and the season of the arrival, much upon the vigilance and activity of the master, and much upon the momentary demand. After all it would be a calculation upon conjectures, and not upon facts. Such a rule, therefore, has been rejected by courts of law in ordinary cases; and instead of deciding upon the gains or losses of [70] parties in particular cases, a uniform interest has been applied as the measure of damages for the detention of property." * [1]

So where a privateer had improperly detained a merchant vessel, and taken out her crew, in consequence of which she was lost,—it was held by the Supreme Court of the United States, that the owners of the privateer were liable only for the value of the vessel, the prime cost of the cargo, with all charges, and the premium of insurance.† [2]

So in the same court, where a privateer had improperly boarded a vessel and taken away her papers, in consequence of which her voyage was broken up, it was held that the owners were not liable for the loss of profits on the intended voyage, nor for loss by deterioration of the cargo which was not caused by the improper conduct of the captors; and it was said, "The prime cost or value of the property lost at the time of the loss, and, in case of injury, the diminution in value by reason of such injury, with interest upon such valuation, afford the true measure of damages. This rule may not seem a complete indemnity for all possible injuries; but it has certainly a general applicability to recommend it, and in almost all cases will give a fair and just recompense." The suit was against the owners, who were constructively liable; and it was admitted "that if it

* The Schooner Lively, 1 Gallison, 314 and 325.

† The Anna Maria, 2 Wheat. 327. See also, Delcol *v.* Arnold, 3 Dall. 333.

[1] See Fleming *v.* Beck, 48 Penn. St. 309, where the language of the text is cited and approved.

[2] So in an action against the master of a vessel for breaking up a whaling voyage and disposing of her, the possible profits of the voyage cannot be considered. Brown *v.* Smith, 12 Cush. (Mass.) 366.

had been against the original wrong-doers, it might be proper to go yet further, and visit upon them, in the shape of exemplary damages, the proper punishment which belongs to lawless misconduct." * And in a similar case, † the same principle was applied to a claim for damages for loss of a market.

So in Massachusetts, in an action of trespass against a deputy sheriff, for taking a schooner of the plaintiff under an attachment against a third party, there being some evidence that she was preparing for a voyage, and there being no malice on the part of the defendant, the jury were instructed to estimate her value at the time of taking, and "the additional damage [71] sustained, if any." But it was held by the Supreme Court, that this would not justify the jury in assessing damages for the breaking up of the voyage.‡[1]

So in a case of collision between vessels, it has been held that the owner of the injured vessel cannot recover for profits on the voyage broken up by the accident. In such a case the Supreme Court of the United States said, "It has been repeatedly decided in cases of insurance, that the insured cannot recover for the loss of probable profits at the port of destination, and that the value of the goods at the place of shipment is the measure of compensation. There can be no good reason for establishing a different rule in cases of loss by collision. It is the actual damage sustained by the party *at the time and place of injury* that is the measure of damages."‖[2]

Contingent Profits not allowed.—And the same general language, denying the admissibility of profits, was held by the Supreme Court of New York in an action brought for the price of a steamboat. The defendant showed that part of the machinery was unsound, and proved other imperfections by which considerable delay was caused; and claimed to deduct from the contract price of the boat, not only the sum necessary to remedy the actual defects, but also loss of profits upon the trips that

* The Amiable Nancy, 3 Wheat. 546 and 558.

† La Amistad de Rues, 5 Wheat. 385.

‡ Boyd *v.* Brown, 17 Pick. 453.

‖ Smith *v.* Condry, 1 Howard, 28.

[1] So in the same State, in an action by the charterer of a vessel against a gas company for laying a gas pipe by which the navigation of the river was unlawfully obstructed to his damage, the damages were restricted to his expenses in getting over the obstruction, and did not include the delay in his business or other consequential damages. Benson *v.* Malden and Mel. Gas-light Co. 6 Allen, 149. See Hunt *v.* The Hoboken Land and Improvement Co. 3 E. D. Smith's (N. Y.) C. P. R. 144.

[2] So in Minor *v.* Steamboat Picayune No. 2, 13 La. Ann. 564. But late decisions tend to include profits lost as a necessary consequence of the collision in the damages for which the offending party is liable. Heard *v.* Holman, 19 C. B. (N. S.) 1; Steamboat Narragansett, Olcott, 388. See McKnight *v.* Ratcliffe, 44 Penn. 156; and see *post*, 469, note 1.

might have been run during the time the vessel was delayed on account of the imperfections in the construction, having proved that each trip would bring one hundred dollars net profits. But it was disallowed; and the court, citing the language of Pothier, said, "In short, it will be seen that on the subject in question, our courts are more and more falling into the track of the civil law."*[1]

It has been heretofore stated that profits are by no means uniformly denied by the civil law; and, for the reasons which I have already given, I very much doubt whether a resort to either the civil or the French law will tend to facilitate our efforts to reduce our measure of damages to fixed rules, unless care is had to keep in mind the arbitrary discretion by which their sagacious principles are often controlled and broken down.

In a recent case in New York, where the defendant had contracted to furnish a steam-engine for the plaintiffs, who were makers of oil, and failed to comply with his contract, [72] the plaintiffs sought to recover as consequential damages, the profits they could have made in the manufacture of oil, had the machinery been completed and put up within the time limited by the contract. But the claim was disallowed: and the recovery was limited to *the loss of the use of the plaintiff's*

* Blanchard *v.* Ely, 21 Wendell, 342.

[1] "Had the defendants in the case of Blanchard *v.* Ely taken the ground that they were entitled to recoup, not the uncertain and contingent profits of the trips lost, but such sum as they could have realized by chartering the boat for those trips, I think their claim must have been sustained. The loss of the trips which had certainly occurred, was not only the direct but the immediate and necessary result of the breach of the plaintiff's contract." Griffin *v.* Colver, 16 N. Y. 496, per Seldon, J. See Redon *v.* Caffin, 11 La. Ann. 695.

Where, in an action on a bond given to obtain the discharge of a vessel attached under a lien for repairs, the defendants sought to recoup the damages sustained by them from the plaintiff's delay in completing the contract, it was held, following this authority, that the rent of the property, that is the price which would have to be paid for the charter of a similar boat during the period of unnecessary detention, afforded the true measure of damages, and that the probable earnings or profits of the vessel were too uncertain to form a rule of damages. Rogers *v.* Beard, 36 Barb. 31; 20 How. Pr. R. 98.

So where the action was for the seizure and detention of a steamboat by an attachment which was discharged, the measure of damages was held to be the actual damage only sustained by the seizure. The jury could not be permitted to speculate as to what might or might not have been the earnings of the boat during the period of the seizure. Callaway Mining and Manufacturing Co. *v.* Clark, 32 Mo. 305.

Although subordinate considerations may require to be referred to in many cases, the essential idea of compensation will always be found to furnish a general or fundamental rule in reference to profits, as it does to all other questions of damage, except such as are exemplary. Thus, in an action to recover money for work on a building contract, if the building was erected for the defendant's own use, or if it was intended to be rented, and in the one case the defendant was deprived of its occupation, and in the other of its rents, he was held entitled to recoup accordingly, in the one case what its use would have been worth, measured by the standard of rents of such buildings, or in the other what it could actually have been rented for. But in the latter case, if he did not in fact lose any opportunity of renting in consequence of the delay, he could not recoup any loss of rent. Wagner *v.* Corkhill, 40 Barb. 175. See Berry *v.* Dwinel, 44 Maine, 255; Red *v.* City Council of Augusta, 25 Geo. 387; Sherman *v.* Roberts, 1 Grant's Cases (Penn.), 261.

mill and other machinery, the fuel consumed, the delay of the working men employed for the purpose of carrying on the business, and the interest on the amount expended in purchasing stock for the mill.*[1]

So in an action brought on a covenant to keep a mill-dam in repair, it was held in Massachusetts that the plaintiff was entitled to recover the expense incurred in repairing the dam, but not loss of profits in business." †[2]

Loss in Market, etc., Value Compensated.—It is clear, however, that future profits are sometimes allowed by our law,[3] as will be seen hereafter, in regard to contracts to transport goods to a particular place,‡ as well as in actions brought on agreements for the sale and delivery of chattels. In the former case, the difference in value between the price at the point where the goods are and the place where they were to be delivered, is taken as the measure of damages, which, in fact, amounts to an allowance of profits;[4] and in the latter case, a similar result is had by the application of the rule which gives the vendee the benefit of the rise of the market price. And so, as we shall see hereafter, in an action by a principal against an agent for not shipping goods to a particular port, their value at that port has been held the measure of remuneration.‖ Nor would it seem proper that the question should be governed by the analogies

* Freeman *v.* Clute, 3 Barb. S. C. R. 424. But what is meant by "the loss of the use of the plaintiff's mill and other machinery?" Is it interest on the investment? See this case commented on in Davis *v.* Talcott, 14 Barb. S. C. R. 611, where profits were allowed.

† Thompson *v.* Shattuck, 2 Met. 615.

‡ Bracket *v.* McNair, 14 J. R. 170.

‖ Bell *v.* Cunningham, 3 Peters, 69.

[1] So also Taylor *v.* Maguire, 13 Mo. 517; 12 Mo. 313; *post*, 76, note. See Horner *v.* Wood, 16 Barb. (N. Y.) 386. And where one had agreed to furnish a steam-engine by a certain day to drive a planing and sawing mill, and through his default the mill was at a stand-still for a time for want of the engine after the stipulated day, a fair price for the use of the engine *and machinery* during the time lost was allowed, though a claim for loss of net profits calculated from the amount of lumber the mill might have cut and planed, taking into account the usual prices for planing over running expenses and wear and tear, was rejected as too uncertain. Griffin *v.* Colver, 16 N. Y. 489. In this case the rule was succinctly declared that "profits which would have been realized but for the defendant's default are recoverable, those which are speculative or contingent are not." *Ibid.* 491. See *post*, 76, note.

[2] In an action for breach of covenant in evicting the plaintiff, the loss of probable profits of crops which might have been raised but had not been planted are quite too remote. Olmstead *v.* Burke, 25 Ill. 86. See Shaw *v.* Wallace, 1 Dutch. (N. J.) 453, where profits were disallowed in an action for violation of a mining license. But for breach of a covenant to keep a mill in good repair, the tenant is entitled to remuneration for all expenditures of money, time, and labor made in repairing the mill, also for the loss of the use of the premises during the making of the repairs necessary to put them in the condition in which the landlord should have kept them, and for all direct damages resulting from the neglect of the lessor to make such repairs, and which it was not in the power of the tenant easily to have avoided. Middlekauff *v.* Smith, 1 Md. 343.

[3] See Waters *v.* Towers, 8 Exch. 401.

[4] See *post*, 76, note 1.

of the law of insurance. It is very reasonable that an insurance on cargo should not usurp the office of an insurance on profits.

Under a policy on the plaintiff's interest in an inn and offices, he cannot, on the inn and offices being partly burned, recover against the insurers for loss sustained by his hiring other premises while his own are being repaired, and by the refusal of persons to go to the inn while under repair, [73] the insurers having reinstated the premises in proper time;* the court saying, "If a party would recover such profits as these, he must insure them *qua profits*." But this does not touch the question we are now considering. The denial of profits by way of damages must evidently be taken with limitations. Chancellor Kent says, in his excellent Commentaries,† that *speculative* profits are not allowed. It is difficult to say precisely what is meant by this phrase. The whole subject has been recently considered by the Supreme Court of New York, and an able attempt made to draw the true line between those profits which are to be allowed, and those which must be rejected.

DIRECT PROFITS ALLOWED.—In an action of covenant brought against the authorities of the city of Brooklyn, it appeared that in January, 1836, an agreement was entered into between the defendants and the plaintiffs, by which the latter agreed to furnish and deliver marble to build a City Hall in Brooklyn, from Kain & Morgan's quarry, in Eastchester. The defendants were to pay $271,600 in different sums, as the work proceeded. In March, 1836, the plaintiffs entered into a covenant with Kain & Morgan, by which the latter were to furnish the marble in question, for which the plaintiffs were to pay them $112,395 at the same time that the plaintiffs were to receive their payments from the defendants, and in the proportion which the above principal sums bore to each other. The plaintiffs proved the delivery of the marble under their contract with the defendants, till July, 1837; when the latter refused to receive any more marble, although the plaintiffs were ready to proceed. The entire quantity of marble necessary to fulfil the plaintiff's contract was 88,819 feet. At the time the work was suspended, the plaintiffs had delivered 14,779 feet, for which the contract price was paid. The plaintiffs then had on hand at Kain & Morgan's quarry, about 3,308 feet, ready for delivery; but this was not of much value for other buildings, and would probably not bring over two shillings per foot. It was proved that had

* *In re* Wright, 1 Ad. & El. 621.

† Vol. II, 5th ed. p. 480, in notes.

the work progressed with ordinary diligence, it would have taken the plaintiffs about five years to complete their con-
[74] tract; and they then proved that the difference between the cost of the marble to them, and the price to be paid for it in 1836, was about 20 per cent.; and that it fluctuated between that rate and 40 per cent. during the four successive years to 1840. That the ordinary profit calculated on by master stone-cutters, was from 10 to 20 per cent.; and that 15 per cent. was a fair living profit. All this evidence as to profits was objected to, but admitted by the circuit judge (Kent), under exceptions. The defendants requested the circuit judge to instruct the jury that no damages "should be allowed on account of any supposed profits which the plaintiffs might have made out of the unfinished work, and that the damages allowed should be confined to the actual loss which the plaintiffs had sustained." This the circuit judge refused to do; and he charged,—

"That the jury should allow the plaintiffs as much as the performance of the contract would have benefited them; that the plaintiffs were entitled to recover for the unfinished marble not accepted, subject to a deduction of what should be deemed its fair market value; that the jury should confine the damages to the loss of the plaintiffs, but that the benefit or profits which they would have received from the actual performance constituted such loss. That the defendants ought to be allowed what the jury should think just as to interest on the outlays of the plaintiffs, also what the jury might think just for the risk of transportation, and the reasonable value of the marble unaccepted and unquarried. As to damages on the rough marble, to be delivered by Kain & Morgan, it appears by the contract, that the plaintiffs were obliged to purchase it from this quarry. The plaintiffs' contract with Kain & Morgan, if made in good faith, was entered into as a reasonable part of the performance by the plaintiffs of their own contract; and if the defendants by stopping the work, obliged the plaintiffs to break their contract with Kain & Morgan, then the damages on the latter ought to be allowed to the plaintiffs, who would be responsible to Kain & Morgan for the same. The jury are to give the difference between the contract price, and what it would cost Kain & Morgan to deliver the article, deducting the value of it to them, and making all proper allowances, as in the case of the principal contract. In fixing the damages to be allowed the plaintiffs, the jury are to take things as they were at the time the work was suspended, and not allow for any increased benefits they would have received from the subsequent fall of wages, or subsequent circumstances."

The jury found a verdict in favor of the plaintiffs for $72,999. The defendants moved for a new trial; and Nelson, C. J., deliv-
ering the opinion of the Court, after noticing that the
[75] damages for marble on hand, ready to be delivered, were

not made a matter of discussion on the argument—as to the claim for damages in respect to the remainder of the marble which the plaintiffs had agreed to furnish, but which they were prevented from furnishing by the suspension of the work in July, 1837, and as to the claim for profits—said,—

"It is not to be denied that there are profits or gains derivable from a contract, which are uniformly rejected as too contingent and speculative in their nature, and too dependent upon the fluctuation of markets and the chances of business, to enter into a safe or reasonable estimate of damage. Thus, any supposed successful operation the party might have made, if he had not been prevented from realizing the proceeds of the contract, at the time stipulated, is a consideration not to be taken into the estimate. Besides the uncertain and contingent issue of such an operation, in itself considered, it has no legal or necessary connection with the stipulations between the parties, and cannot, therefore, be presumed to have entered into their consideration at the time of contracting. . . . . When the books and cases speak of the profits anticipated from a good bargain, as matters too remote and uncertain to be taken into the account in ascertaining the true measure of damages, they usually have reference to dependent and collateral engagements entered into on the faith and in expectation of the performance of the principal contract." [1]

"But profits or advantages which are the direct and immediate fruits of the contract entered into between the parties, stand upon a different footing. These are part and parcel of the contract itself—entering into and constituting a portion of its very elements, something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfilment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon, before the contract was made, and formed, perhaps, the only inducement to the arrangement." * "If there was a market value of the article in this case, the question would be a simple one. As there is none, however, the parties will be obliged to go into an inquiry as to the actual cost of furnishing the article at the place of delivery, and the court and jury should see that in estimating this amount, it be made on a substantial basis, and not left to rest on the loose and speculative opinions of witnesses." And Bronson, J., said, "As the marble had no market value, the question of profits involves an inquiry into the cost of the rough material in the quarry, and the expense of raising, delivering and transporting it to the place of delivery."

And the learned chief justice fortified this allowance of profits, by reference to the civil law, and the analogies derived from the cases in our own law, which we shall hereafter have occasion to consider, where upon non-performance [76] of contracts for the sale and delivery of chattels, the

* See this language cited with approbation in Lawrence *v.* Wardwell, 6 Barb. S. C. R. 423.

[1] See Lowenstein *v.* Chappell, 30 Barb. (N. Y.) 241.

market price, which of course includes profits, is made the measure of compensation.*[1]

So in a recent and similar case, the plaintiffs, contractors, were held entitled to recover from the defendants the profits on the construction of a section of an aqueduct, the work having been stopped by the defendants.† And again, when a mill was prevented from being run by reason of a steam-engine not being furnished for it according to contract, the profits which the mill would have earned during the time of its being stopped were held to be rightly included in the damages.‡[2] And I think it may well be doubted whether the language of some of the ear-

* He further said, that where the contract, as in this case, is broken before the arrival of the time for full performance, and the opposite party elects to consider it in that light, the market price on the day of the breach is to govern the assessment of damages—that they should be settled and ascertained according to the existing state of the market at the time the cause of action arose, and not at the time fixed for full performance. And the subcontract with Kain & Morgan was laid wholly out of view, as one in or over which the defendants had neither participation nor control, and which they should not be compelled to assume, if improvidently entered into; and on this latter point a new trial was ordered. We shall have occasion to consider these parts of this decision when we come to the subject of continuing agreements, and evidence with reference to damages. Mr. Justice Beardsley dissented, holding that the fluctuations in price during the five years which the contract was to run, should be taken into account. He concurred as to the allowance of profits, and as to the disregard of the sub-contract of Kain & Morgan. Masterton *v.* Mayor of Brooklyn, 7 Hill, 62. See also N. Y. & H. R. R. Co. *v.* Story, 6 Barb. S. C. R. 419, and Seaton *v.* Second Municipality, 3 La. Ann. R. 45, where the authority of this decision is recognized.

† Clark *v.* The Mayor, 3 Barb. S. C. R. 288; reversed in error on another point, 4 Comstock, 338. *Vide post*, ch. vii.

‡ Davis *v.* Tallcot, 14 Barb. S. C. R. 611. There was in this case a special agreement to pay the specific damages claimed; but the opinion of Taggart, J., covers the whole ground. (This case was also reversed, on appeal, on another ground. 12 N.Y. 184.—Ed.)

[1] The principles of this case as to the allowance of profits are now well established. United States *v.* Speed, 8 Wall. 77; Wallace *v.* Tumlin, 42 Geo. 462; Shepard *v.* Milwaukee Gas-light Co. 15 Wis. 318; Hinckley *v.* Beckwith, 13 Wis. 31; Story *v.* The New York & Harlem R. R. Co. 6 N. Y. 85; Fox *v.* Harding, 7 Cush. (Mass.) 516; The Philadelphia, Wilmington, & Baltimore R. R. Co. *v.* Howard, 13 How. 307; Thompson *v.* Jackson, 14 B. Monroe (Ky.) 114; Cook *v.* Commissioners of Hamilton, 6 McLean's C. C. R. 612; Hoy *v.* Gronoble, 34 Penn. St. 9. See, also, as to what consequential damages are recoverable for breach of contract, Chapin *v.* Norton, 6 McLean's C. C. R. 500; The Coweta Falls Manufacturing Co. *v.* Rogers, 19 Ga. 417; McKnight *v.* Ratcliffe, 44 Penn. St. 156. In a late case in Ohio, the defendant had agreed to make to the plaintiff, for the term of ten years, a lease of certain lands on which to plant and cultivate a peach orchard. The plaintiff took possession of the land, but the defendant failed to make the lease, and within two years from the time of the plaintiff's occupation of the premises caused him to be evicted. Evidence of the probable future profits of the lease was held incompetent in determining the plaintiff's damages. To the extent that they depended on the loss of the lease, its market value at the time of the eviction, subject to the performance of the contract on the plaintiff's part, furnished the standard for their assessment. If it had no general market value, its value should be ascertained from the opinions of qualified witnesses, in view of the hazards of the business. Rhodes *v.* Baird, 16 O. St. 573.

[2] Strawn *v.* Cogswell, 28 Ill. 457. In adjusting the damages against the official liquidator of a ship-building company for delaying the repairs of a ship beyond the time agreed, the Lord Chancellor observed that "he had proceeded on the principle that if a profit would arise from a chattel, and it is left with a tradesman to repair, and detained by him beyond the stipulated time, the measure of damages is *prima facie* the sum which would have been earned in the ordinary course of employment of the chattel in the time." *In re* Trent and Lumber Co. L. R. 4 Ch. App. 112, 117. See Burrell *v.* New York & Saginaw Solar Salt Co. 14 Mich. 34; Shepard *v.* Milwaukee Gas-light Co. 15 Wis. 318, and Hinckley *v.* Beckwith, 13 Wis. 31; Dean *v.* White, 5 Iowa, 266. For the application of the rule to breaches of partnership agreements, see *post*, 95, note.

lier American cases which I have cited has not pushed the rule beyond the true line.*[1] The analogies of the law have certainly not been regarded. If on a contract to deliver goods at a distant point, their value at the place of delivery is the true criterion; if on a contract for the sale of chattels, the market price on the day fixed for delivery is the true measure of damage, it is difficult to assign a reason why the same rule should not be applied to the breaking up of a voyage actually commenced, nor why the victim of an illegal capture should be limited to the prime cost of his cargo.

DAMAGES CONTEMPLATED BY BOTH PARTIES.—Indeed, on reviewing the whole subject, it seems to me that the language of the Louisiana Code above cited expresses the true rule; and that it is no more than justice that a defendant in default should be compelled to make good the damages sustained by his breach of contract, "which were contemplated, or may reasonably be supposed to have entered into the contemplation of the parties, at the time of the contract." Such, too, are the recent English decisions. So in a case in the Court of Exchequer,† where the facts were as follows:—

The plaintiffs were owners of a steam mill. The shaft was broken, and they gave it to the defendant, a carrier, to bring to an engineer, to serve as a model for a new one. On making the contract, the defendant's clerk was informed that the mill was stopped, and that the shaft must be sent immediately. He delayed its delivery; the shaft was kept back in consequence; and in an action for breach of contract, they claimed, as specific damages, the loss of profits while the mill was kept idle. It was held that if the carrier had been made aware that a loss of profits would result from delay on his part, he would have been answerable. But as it did not appear he knew that the want of the shaft was the only thing which was keeping the mill idle, he could not be made responsible to such an extent. The court said,—

"We think the proper rule in such a case as the present is this: where two parties have made a contract which one of them has broken, the damages which

* I am gratified to find this remark cited with approbation by the Supreme Court of Alabama, per Chilton, J., in Donnell *v.* Jones, 17 Ala. 689.

† Hadley *v.* Baxendale, 9 Exch. 341; s. c. 26 Eng. L. & E. 398.

[1] The plaintiffs can recover for prospective profits only where they have been prevented from going on either by some affirmative act of the defendant, as by being ordered to desist from the work, or by the omission to perform some condition precedent to its further prosecution, as to furnish or do something necessary to its further progress. The County of Christian *v.* Overholt, 18 Ill. 223; Palm *v.* The Ohio & Mississippi R. R. Co. 18 Ill. 217.

the other party ought to receive in respect of such breach of contract should be either such as may fairly and substantially be considered as arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if those special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases, not affected by any special circumstances, for such a breach of contract. For had the special circumstances been known, the parties might have expressly provided for the breach of contract by special terms as to the damage in that case, and of this advantage it would be very unjust to deprive them. The above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract."

The rule laid down in Hadley *v.* Baxendale was again acted upon in a very recent case. The defendant had contracted to build a ship, which was to be delivered to the plaintiff on the 1st of August, 1854. It was not delivered till March, 1855. The vessel was intended by the plaintiffs—and from the nature of her fittings the defendants must have known the fact—for a passenger ship in the Australian trade. Evidence was given that freights to Australia were very high in July, August and September, but fell in October, and continued low till May, when the vessel sailed; and that had she been delivered on the day named, she could have earned £2,750 more than she did. On the other hand it was shown that the plaintiffs would have extended the time for delivery till the first of October, if the defendants would have bound themselves to that day under a demurrage (which, however, was refused), and that they had stated as their reason for wishing to have the ship then, "that after that time the days would be shortening so fast that they would be seriously inconvenienced and prejudiced in fitting the vessel out." The judge charged in the words of Hadley *v.* Baxendale, and the jury found a verdict of £2,750. An attempt was made to set aside the verdict for excess of damages, on the ground that if the plaintiff's offer had been complied with, the loss of freight would have been suffered, and that the damages should be measured rather by the species of loss which they

had themselves pointed out, than by that which they afterwards set up. The rule was refused.* [1]

We turn now to other cases connected with our subject.

* Fletcher *v.* Tayleur, 17 C. B. 21.

[1] The rule adopted in Hadley *v.* Baxendale, and which is an affirmation of the doctrine of the text, has been much discussed since the decision in that case. In the leading American case of Griffen *v.* Colver, 16 N. Y. 489, the same general rule, with the limitations it prescribes to the allowance of consequential damages in cases of breach of contract, is thus carefully stated by Selden, J.: "The party injured is entitled to recover all his damages, including gains prevented as well as losses sustained, and this rule is subject to but two conditions: the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract—that is, they must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed." It will be observed that there is an apparent difference in one respect between the English and the American authority. In the English case the rule by which the damages are to be ascertained in cases of breach of contract is divided into two alternative heads. Under the one, those damages are to be allowed which would arise naturally, or according to the usual course of things, from the breach of the contract, and under the other, those which may fairly be supposed to have been contemplated by the parties as the probable result of such breach. In the American case this distinction is not observed, for the reason apparently that the two heads are regarded as equivalent to each other, or indeed as identical; and the damages, which may properly be supposed as having entered into the contemplation of the parties in making the contract, are considered to be the same with those which would naturally or usually follow its violation. In most instances this is so. But cases may sometimes arise in which the parties would be aware beforehand that a breach of the contract would probably result in certain ill consequences which might, nevertheless, be unusual, and would not have been anticipated but for special circumstances or means of information. In citing the authority of Hadley *v.* Baxendale, the second head of the rule there stated is perhaps all that is commonly understood; and to this head, with the addition of a more express recognition of the certainty to be required in the damages allowed, the American rule, as laid down in Griffen *v.* Colver, is equivalent. The same rule thus substantially identical in England and this country, was followed by the Court of Queen's Bench in the case of a carrier, in Le Peintur *v.* The South-eastern Railway Co. 2 L. T. (N. S.) 170, and has been recognized or applied in the following cases: Great Western R. Co. *v.* Redmayne, (L. R. 1 C. P.) 329; Hamilton *v.* M'Pherson, 28 N. Y. 72; Krom *v.* Levy, 48 N. Y. 679; Crater *v.* Bininger, 33 N. J. (4 Vroom) 512; Richardson *v.* Chynoweth, 26 Wis. 656; Shepard *v.* Milwaukee Gas-light Co. 15 Wis. 318; Hinckley *v.* Beckwith, 13 Wis. 31; Abbott *v.* Gatch, 13 Md. 314; Copper Co. *v.* Copper Mining Co. 33 Vt. 92; Ashe *v.* De Rossett, 5 Jones (N. C.), 299; Meade *v.* Rutledge, 11 Tex. 44; Baldwin *v.* Bennett, 4 Cal. 392; Cunningham *v.* Dorsey, 6 Cal. 19; Page *v.* Ford, 12 Ind. 46; Fessler *v.* Love, 43 Penn. St. 313; Adams Express Co. *v.* Egbert, 36 Penn. St. 360; Pittsburgh Coal Co. *v.* Foster, 59 Penn. St. 365; Wolf *v.* Studebaker, 65 Penn. St. 459; Phelan *v.* Andrews, 52 Ill. 486.

The same rule and its limitations are defined by the Court of Queen's Bench in Smead *v.* Foord, 1 Ellis & Ellis, 602; 28 L. J. (N. S.) 178, where the defendant, who had contracted to deliver a threshing machine to a farmer within three weeks, knowing it was needed to thresh wheat in the field, did not deliver it within the time. The farmer, having failed in an effort to stack his wheat, it was in consequence injured by the rain, and he sustained a further loss from a fall in the market, which occurred before the grain could be kiln-dried and got ready for sale. He was held entitled to recover the damage to the wheat, since that might well have been anticipated by the parties as a consequence of the breach of the contract, but not to compensation for the loss from the change of the market, since that was not considered to have been contemplated. Mr. Justice Crompton remarked in this case, that the doctrine of Hadley *v.* Baxendale should not be extended. The same principles were maintained by the same court in Prior *v.* Wilson, 1 L. T. (N. S.) 549. So in Haven *v.* Wakefield, 39 Ill. 509, where the defendant failed to fulfil his contract for building the plaintiff's warehouse in time to store a crop of broom-corn, the damage so occasioned was recovered.

In a late case the plaintiffs bought caustic soda of the defendant, part to be shipped in June, part in July, and the rest in August, and the defendant knew at the time of the sale that the plaintiffs bought it for shipment and resale abroad, but not that it was for Russia, although he learned this also before the end of August. He neglected to deliver any of the soda until September, in which month and in October he delivered a portion. There was then no market for the soda, and the plaintiffs, who had contracted for its resale to one Heitman in Russia, lost the profit of the resale on what was not delivered, and by reason of the approach of winter in the Baltic, were obliged to pay increased rates of freight and insurance for what was delivered. It was held by the English Court of Common Pleas, that the plaintiffs were entitled to recover the loss of profit on the resale to Heitman and the additional cost of freight and insurance, but not the damages paid by the plaintiff to Heitman in respect of a

PRINCIPAL AND SURETY.—The general principle in regard to remoteness of damage, has been applied in Massachusetts to a case of surety. The defendant had executed an instrument by

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sub-sale made by the latter. These last were held to be too remote, and not within either branch of the rule in Hadley *v.* Baxendale. Borries *v.* Hutchinson, 18 C. B. (N. S.) 445; s. c. 34 L. J. (N. S.) C. P. 169. So it is held by the court of last resort in New York, that where it is known to a vendor that his vendee's purchase is made to fulfil an existing contract for resale, the profits which would have accrued to the purchaser on such resale may be recovered by him of the vendor for a breach of the contract. Messmore *v.* The N. Y. Shot and Lead Co. 40 N. Y. 422.

But where one had contracted to build a boat hull and deliver it to another by a certain day, but delivered it two months later, in an action for a part of the stipulated price, the loss of profits thereby sustained was not allowed in bar of the claim, the court observing that it was "scarcely possible that the damages claimed by the defendant could have been in the contemplation of either party," and certainly were not in that "of the plaintiff at the time of entering into the contract." Taylor *v.* Maguire, 12 Mo. 313; 13 Mo. 517. So where the defendant, a woollen manufacturer, bought of the plaintiff an engine and boilers, which the plaintiff, without stipulating as to their use for any special purpose, agreed should be of the best material and in perfect running order, the defendant, in an action brought by the plaintiff for their price, could not have recouped as damages the difference between what he might have earned by the use of his machinery with the engine and boilers in operation during the time lost, and what might have been so earned during the same time without them. Such damages were held to be too contingent, and depended upon circumstances independent of the contract. The defendant, however, on proper pleadings and proofs might have recouped the loss of rental value of the machinery, sustained in consequence of the defects. Cassidy *v.* Lefevre, 45 N. Y. 562.

And, in the case of the Great Western Railway Co. *v.* Redmayne, Law Rep. (1 C. P.) 329, where the plaintiff lost the profits of the sale of his goods through the negligent delay of the carrier, who had, however, received no notice of the object for which the goods were sent, the English Common Pleas, standing firm on the doctrine of Hadley *v.* Baxendale, disallowed the recovery of the profits.

In the case of Wilson *v.* The Newport Dock Co. Law Rep. (1 Exch. 177), it appeared that in pursuance of the defendants' agreement to admit the plaintiffs' ship into the dock at a certain time, and of notice to the plaintiffs to bring her at that time, they did so; but on the arrival of the ship she could not be admitted, owing to the dock chain being out of order. The day was stormy, and the captain who was ignorant of the river, after a discussion as to what should be done, with the pilot, who thought he might take the ship into a place of safety, anchored her immediately outside the dock, where she grounded, and in consequence was much damaged. The jury found neither the captain nor pilot in fault, but disagreed as to whether the vessel might in fact have been taken to a place of safety.

Mr. Baron Martin held, on the authority of Jones *v.* Boyce, 1 Stark. 493, that the damage was not too remote. The learned Baron considered the decision in Hadley *v.* Baxendale, in which he had participated, as no authority in the case, as no loss of profits was claimed; and he took occasion to say that the remark of Mr. Baron Alderson, that "the damages to be recovered by the plaintiff were such as might reasonably be supposed to have been in contemplation of both parties at the time they made the contract as the probable result of the breach of it," although proper to be taken into consideration by carriers and their customers, in the bulk of broken contracts, had no application. "Parties," said the learned judge, "entering into contracts, contemplate that they will be performed, not broken, and in the infinite majority of instances, the damages to arise from their breach never enter into their contemplation at all." The ship remaining where she did, the case was, in contemplation of law, the same as if she "had been compelled to remain there by *a vis major*." The Lord Chief Baron, however, in an opinion in which the remaining judges concurred, held that the facts found did not enable him to determine whether, within the rule in Hadley *v.* Baxendale, the defendants should be held liable.

In the case of Gee *et al. v.* The Lancashire and Yorkshire Railway, 6 H. & N. 211; 30 L. J. (N. S.) Exch. 11; 3 L. T. R. (N. S.) 328, the plaintiffs, who were cotton spinners, having rented a new mill which was in readiness to begin working, and engaged a number of hands for it, caused to be delivered to the defendants, to be carried from Liverpool to Oldham, some bales of cotton, which were, through the negligence of the carriers, delayed in the delivery for some days beyond the usual time. In consequence of the delay, the plaintiffs having no other cotton to work, the mill was kept idle, and the work people were unemployed. The necessity of cotton to enable the plaintiff to work these mills, was not communicated to the defendants at the time of its delivery for freight, but was so communicated immediately on its non-arrival at the proper time, after which there was still an unreasonable delay in the delivery on the part of the carrier. The Court of Exchequer, reversing the judgment of the

which he promised to hold the plaintiff harmless against any loss he might sustain by signing a certain bond for duties at the Passamaquoddy custom-house. The plaintiff showed, [77] that in 1814 the British captured Eastport, got possession

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county court, held that the carrier, not having had notice when the cotton was delivered, that the mill was waiting for it, was not liable for the expenses caused by the stoppage of work, and that the wages paid and loss of profit incurred by the mill owners were not the measure of damages. The rule under consideration was adhered to. But Mr. Baron Wilde observed, "This question of the measure of damages is one that has produced more difficulty than perhaps any branch of the law; and I rather agree with an observation made by my brother Martin, that although a very excellent attempt was made in Hadley *v.* Baxendale to lay down a rule of practice, it is found that that rule will not meet all cases, and it will probably be found practically, when the matter comes to be more solemnly discussed, that in this, as in many other cases of contract, there is no measure of damages at all, and that we are seeking to find a rule where a rule cannot be made." Again, where several cases containing machinery intended for the erection of a saw-mill at Vancouver's island were delivered to the defendant's servants at Glasgow for transportation to that place, and the defendant knew generally of what the shipment consisted, but had no further or particular information on the subject, the measure of damages for the loss of one of the cases was held to be the cost of replacing the missing articles at the island, including freight and interest on the amount during the time the plaintiffs were deprived of them. British Columbia Saw Mill Co. *v.* Nettleship, L. R. 3 C. P. 499; 37 L. J. C. P. 235; 16 W. R. 1046.

And, to make a party to a contract responsible in case of its non-fulfilment by him for ulterior consequences involving the payment of extraordinary damages, he should be *distinctly*, and with reasonable preciseness, informed of the purpose for which the subject of the contract is intended by the other party. That purpose should be brought fairly within the "contemplation" of the one who is to be charged. Moreover, as it can no longer be questioned that all contracting parties, including carriers and telegraphers, may, within reasonable limits, restrict by special agreement the common law or ordinary liability attaching to the breach of their proposed engagement, he should usually, independently of statutory provisions, such as the English legislation restricting the carrier's common law liability (1 William 4, c. 68), be entitled to further compensation for the additional responsibility. Any obligation in reference to property beyond paying, if it should be lost or destroyed, what he knew or might have known to be its value, or beyond the expense of repairing it, if it should be merely injured, with the interest on such value or expense, should be *accepted*, not thrust upon him *nolens volens;* and where, from the public nature of his office, liberty to decline a contract cannot be allowed him, he should not be held to extraordinary damages from the breach of it from causes not resulting from his own wilful default or palpable neglect, except for an adequate consideration. See the observations of the late Mr. Justice Willes in the case last cited; also Taylor *v.* Maguire, 12 Mo. 313; *supra*, pp. 318, 319; Baldwin *v.* U. S. Tel. Co. 45 N. Y. 744, and other cases cited *post*, 362, in note on telegraphs. In Anderson *v.* The Northeastern Railway Company (4 L. T. R. (N. S.) 216), the Court of Exchequer refused to apply the rule in Hadley *v.* Baxendale to a railway company sued as warehousemen only, so as to imply any notice from the mere deposit of the parcel which should affect the warehouseman beyond the value of the article. The question how to determine the value of the property which is the subject of the contract, when such value is affected by the condition of the market, and the cases where a rise in value is allowed, are considered elsewhere. *Post* 260, n. 1; 261, 278, 279, n. 1; 355, 356, 477 *et seq.* And see the next paragraph.

We have cited these cases somewhat at length, both because the question is one of much nicety and importance, and because hereafter, in considering the loss of profits as an item of damage in actions of contract against carriers, we shall sometimes find the distinction between the cases where profits are withheld under the second head of the rule, and those where they are allowed under the first, exceedingly thin. Indeed, it will occasionally be hard to reconcile the decisions. Those of the Great Western Railway Co. *v.* Redmayne (*supra*), and of Gee *v.* The Lancashire and Yorkshire Railway Company, for instance, can only be made to consist with Wilson *v.* The Lancashire and Yorkshire R. R. Co. 30 L. J. C. P. (N. S.) 232; or Collard *v.* The Southeastern Railway Co. 7 H. & N. 79 (30 L. J. N. S. Exch. 393), cited *post*, 359, note, by observing closely the difference relied on, which is this: In the former cases the loss of profits is a secondary or consequential damage, the responsibility for which can be charged on the carrier only by bringing his attention to it as a possible result of his neglect of duty at the time of delivering to him the goods for conveyance, or of his agreement to carry them, so that he may be considered as having accepted such responsibility. In the latter class of cases the loss of profits is a legitimate or natural and direct result of the breach. Where such a consequence is shown, no actual notice beforehand is necessary to charge the one in default. The law intends him to have foreseen the consequence of his negligent or wrongful act. And

of the custom-house and bond in question; that they issued a writ against the plaintiff as obligor, that the plaintiff was obliged to fly to avoid arrest, and that his business was greatly injured

in cases where a loss to the owner or consignee of goods results simply from the carrier's delay, the extent of compensation is arrived at by ascertaining their diminution in value in the general market at the place of destination, without taking into account the failure of any particular sale or other disposition of them which had been intended. (See *ante*, 68, note 1: 72.) But, in other cases, what is natural and what accidental, what is immediate and what is consequential, are inquiries so dependent on the facts of each case that we shall find ourselves, if not inclined to acquiesce in Mr. Baron Wilde's belief, that there is in this class of cases "no measure of damages at all," at least to conclude, that though there are clear general principles to guide us, there is no *rule* of certain and uniform application.

It does not follow within the rule in Hadley *v.* Baxendale, that because the seller of a thing does not know the purpose to which the buyer intends to apply it, but believes he is to apply it to some other purpose, that the buyer cannot receive a substantial recovery for damages sustained by its non-delivery. Although the seller cannot be called upon to make good the loss of all the profits which would have arisen from the special purpose to him unknown, for which the buyer intended the thing sold, he may recover within that limit to the extent of the profit which would have been derived from the use for which the seller supposed it was designed.

So, where the defendants agreed to sell and deliver to the plaintiffs within a certain time the hull of a floating boom derrick, supposing the plaintiffs intended to use it as a coal store, but the plaintiffs intended to apply it to the purpose of transhipping coals direct from colliers to barges without the necessity of an intermediate landing,—a purpose which was unprecedented, unknown to the defendants, and which would have produced a much larger profit than would have been derived from the use of the derrick as a coal store, it was held that the plaintiffs could recover damages to the extent of the profits which would have resulted from its use as a coal store. Cory *v.* The Thames Iron Works and Ship-building Co. limited, L. R. 3, Q. B. 181. See *in re* Trent Lumber Co. *ex parte* Cambrian Steam Packet Co. L. R. 6 Eq. Cas. 396.

Although if, through the negligence of one party to the contract, some damages are sustained by the other, within the rule in Hadley *v.* Baxendale, yet if, through neglect of the duty which the law imposes on the injured party of making reasonable exertions to render the injury as light as possible, the damages are unnecessarily enhanced, the increased loss falls on him. Hamilton *v.* McPherson, 28 N. Y. 72.

The non-payment of a sum of money at the time agreed is generally treated as an exception to the general rule of damages for breaches of contract, and as governed by a conventional rule. But it is observed by Baron Alderson, in Hadley *v.* Baxendale, that these cases, as well as cases of breaches of contract in not making good title to land, may properly come within the general rule, because both parties may reasonably be presumed to contemplate the estimation of the amount of damages according to the conventional rule. Whether or not this view be correct, it cannot be doubted that in cases of the non-payment of money due by contract, where the situation of the plaintiff precluded and was known to the other party to preclude his having or supplying himself from another source with the funds which the other was to have paid, or to involve extraordinary expense in procuring them, and where in reliance on such payment he has, independently of the loss of interest, been consequently subjected to damage or loss of a kind which both parties must have known beforehand would be the necessary, probable, or natural result of the breach, the course of recent decisions tends to place such contracts on the same legal footing with contracts in general as regards the extent of redress for the breach of them. It seems that the rule in Hadley *v.* Baxendale applies to such cases, and that the party injured by the breach will be entitled to recover his actual damages within the limits above mentioned. In the case of Marzetti *v.* Williams, 1 B. and Ad. 415 (*ante*, 53), it was, as we have seen, held that a dealer with a bank, whose cheque was not paid by the bank within a reasonable time after it had received sufficient funds for the purpose, might, without having sustained actual damage, maintain an action of tort against the banker. In the case of Rolin *v.* Steward, 14 C. B. 595 (*ante*, 53 n.), this principle was carried to its legitimate consequences. There the plaintiff sued bankers for the non-payment of three cheques to the amount of £111 14s. and an acceptance of the plaintiff for £48. Notwithstanding there was no proof of special damage, the plaintiff's right to a substantial recovery was maintained. On the intimation of the court, however, that the amount found by the jury, which was £500, was too large, the award was reduced to £200.

In the case of Boyd *v.* Fitt, 14 Irish Com. Law Rep. 43, the defendant having agreed as agent in Glasgow of the plaintiffs in Dublin, to have funds in bank continually on hand to the extent of £500 to meet drafts of the plaintiffs, and having cash in bank to the required amount, absented himself from the city on a day on which fell due a cash order for £250, which was returned to Dublin dishonored, in consequence of which the plaintiffs' business in Glasgow was suspended, and in Dublin much injured, and they lost the agency of an Australian firm.

thereby. But it was held that he could claim no remuneration for any such injury, and Parker, C. J., delivering the opinion of the court, said,—

"The common construction of such a contract is, that if the surety is obliged to pay the bond by suit, or otherwise, the principal shall pay him the sum he has been obliged to advance, together with all such reasonable expenses as he may have been obliged to incur, and which may be considered as the necessary

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The jury having given damages on each of these three heads, the verdict was sustained; the Lord Chief Baron, who delivered the opinion of the court, holding that the suspension of the Glasgow trade was within both branches of the rule in Hadley *v.* Baxendale, and that the damages sustained under the other two heads of loss were, within the rule in Rolin *v.* Steward, 14 C. B. 595, *supra*), the natural result of the defendant's breach of contract. The extent of these damages it was for the jury to say. His lordship remarked that he concurred in what seemed to have been the opinion of Mr. Justice Crompton, in Smeed *v.* Foord, and of Mr. Baron Wilde in Gee *v.* The Lancashire and Yorkshire Railway Co. (*supra*), that the rule professed to be laid down in Hadley *v.* Baxendale is not capable of meeting all the cases."

In the late case of Prehn *v.* Royal Bank of Liverpool, L. R. 5 Exch. 92, the defendants, who were bankers at Liverpool, agreed with the plaintiffs, who were bankers doing business in that city and also at Alexandria, to accept drafts of their Alexandria firm, the plaintiffs undertaking to put the defendants in funds to meet the bills at maturity, and the defendants receiving one-half per cent. for the accommodation. Under this arrangement the defendants accepted bills, and were duly provided by the plaintiffs with funds exceeding the amount of the acceptances. Before the bills came due, however, the defendants' bank stopped, and they notified the plaintiffs that they should not be enabled to meet their engagement. The plaintiffs in consequence arranged with another house in Liverpool to take up the bills, paying two and a half per cent. commission to that house. They were also obliged to pay the expenses of protesting the bills at Liverpool and Alexandria, and were besides subjected to expense for telegraphic communications between those places. A verdict for the whole amount paid by the plaintiffs for the commission and for the telegraphic and notarial expenses was sustained.

In a late case in the circuit court of the United States for the sixth circuit, the subject was elaborately considered. In that case more than a half million dollars was due from the city of Memphis to the plaintiffs, who were contractors for paving the city streets, and a question having arisen, as to whether the adjoining lot owners or the city should pay this amount, the city lent the contractors its thirty year coupon bonds to the par value of $240,000. These bonds were to be returned in eighteen months, the interest meantime to be paid by the plaintiffs. The city also agreed to pay for a portion of the work in the same description of bonds, and to provide for payment of them by setting apart a sinking fund for the purpose. This it did not do, nor did it pay the interest on the bonds. They were received by the plaintiffs and were sold by them, to enable them to carry on the work, at their market value, which was fifty per cent. below par. The plaintiffs sued to recover the difference between the actual and the par value of the bonds.

In a very full opinion delivered by Emmons, J., it was held that the case came within the principle of the rule in the case of the non-delivery of personal property, and that the measure of the plaintiff's damages should be what it would have been in the ordinary case of chattels, that is the difference between those agreed to be delivered and those in fact furnished. The court held that "no distinction should be made between the contract in controversy and one between the same parties, for the same work payable in the public bonds of another corporation, where there had been a refusal to deliver those of the kind sued for." Brown and Company *v.* The City of Memphis, 7 Am. Law R. 67.

Among cases of contract, the actions in which, according to the principles we have been considering, consequential damages are allowed (and of which those brought in this form against carriers just referred to constitute a distinguished class), peculiarly illustrate the advantage (which also belongs to most actions of tort), of that venerable system of trial by jury, which many lawyers of the present day are inclined to disparage, except as a bulwark against oppression. It is, of course, the duty of the court in these, as in all cases, to see that nothing go to the jury not pertinent to the issue. But this precaution being taken, the filtering through twelve minds untrained to concert of judgment, each having its own habit of observation and investigation, and each, while acting for itself, bringing new modes of thought to its chance associates—the filtering, by this process, of the material facts—the facts tending to show how far the damage was the result of the defendant's fault, how far other facts enhanced the loss, and what that loss amounts to under all the circumstances of the case, will ordinarily leave a residuum of truth as to what should be the compensation in a particular case, more nearly unalloyed than can result from the limitation or complication of the process by an abstract

consequences of the neglect of the principal to discharge his own debt. But extraordinary expenses which might have been avoided by payment of the money, or remote or unexpected consequences, are never considered as coming within the contract. Thus, if a surety, by reason of being obliged to pay money for his principal, becomes embarrassed in business, and is finally obliged to abandon it, it is not expected that the principal will be held to indemnify him for this consequential misfortune. It is not the natural and necessary effect of his becoming a surety, but is occasioned by his undertaking to do what he was not in a condition to perform. So, flight to avoid payment of his debt is an accident wholly unforeseen, and its consequences cannot be considered as provided for."*

So in New York, the plaintiff sued the defendant on a contract, by which the defendant, in consideration of $5 paid him, agreed to take a note executed by the plaintiff and a surety, payable the first of May, and to forbear prosecution of the note for nine months; and it was alleged that the defendant did not forbear, but sued on the note, by which the plaintiff lost $500. The plaintiff offered to prove, to enhance the damages, that when he was sued he was engaged in his harvest, and that for the purpose of raising money to satisfy the demand he was obliged to quit his work and thresh his grain, and that he was put to great trouble in raising the money. But on certiorari to the Supreme Court, Woodworth, J., said, "It appears to me that this could not form a ground of damages, although the plaintiff might have suffered inconvenience and loss by the failure to fulfil the contract. Such remote consequences cannot be taken into consideration in estimating the damages;" which was qualified by this remark, "Besides, there does not appear any necessity that the plaintiff, at the moment the writ was served, should quit his harvest and make sacrifices to raise the money."†[1]

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LESSOR AND LESSEE.—So, again, where, in a lease of a dairy

* Hayden *v.* Cabot, 17 Mass. 169. See also, Bishop *v.* Williamson, 2 Fairfield, 495.

† Deyo *v.* Waggoner, 19 J. R. 241.

rule of law. Indeed, it is not too much to say, that in these cases, a rule at once definite and unformly applicable cannot be adopted in advance by the court without invading the realm of the jury.

As to the application of the rule in Hadley *v.* Baxendale to a warranty, see *post*, 293, note; to real covenants, 152, note; to contracts with carriers, 359, note; with telegraph companies, 362, note; to sales, 260, note.

†[1] See Carland *v.* Cunningham, 37 Penn. 232. So in Texas, where the defendant had sued the plaintiff in his absence from the State, by publication, and the plaintiff's agent, seeing the advertisement in the paper, got the plaintiff to promise to discontinue the suit, which he failed to do, and judgment having been obtained in it, a tract of the plaintiff's land, worth about $5,000 was sold, under an execution on the judgment, to a purchaser in good faith, without notice, for $150—it was held that if the defendant were liable at all for his failure to dismiss the suit, the loss of the tract of land, if a consequence of such failure, was too remote to make him responsible for it. Travis *v.* Duffau, 20 Texas, 49.

Where one had wrongfully delayed delivering a conveyance of land on which was a barn, but afterwards conveyed the premises, the expense incurred by the plaintiff in preparing to

farm for five years, the lessor agreed to put the barns on the premises in a good state of repair, but neglected to do so; it was held that the lessee could recover the amount it would cost to put the barns in repair, but not the damage sustained by injuries to the cows and young cattle, the increase of food and the decrease of produce resulting from the state of the barns; these damages being "altogether too remote and contingent."*[1]

WARRANTY.—In a case in New York, where the plaintiff sued the defendant for the breach of an implied warranty in the sale of a horse which had been recovered from him at the suit of a third party; it was held by the Supreme Court that the measure of damages was the price paid by the purchaser, with interest, and the costs recovered against him; and that the costs incurred by him in the defence of the action brought by the real owner were not allowable.†[2]

* Dorwin *v.* Potter, 5 Denio, 306. † Armstrong *v.* Percy, 5 Wend. 535.

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build another barn on his own ground during the period of the defendant's refusal, was held too remote. Warner *v.* Bacon, 8 Gray, 397.

Expenses incurred by the plaintiffs in altering the works of their mill, in consequence of their apprehensions founded on a trespass of the defendant, which in fact caused nominal damages only, but was accompanied by threats on his part, the carrying out of which would render them necessary, were held too remote. Sibley *v.* Hoar, 4 Gray, 222.

[1] Where the lessors of a saw-mill broke their contract to repair the mill, the lessees, who had a large stock of logs in the mill yard, were held entitled to recover the expenses of hauling them to another mill, and the cost of getting them sawed there beyond what such expenses would have been in their own mill; also the profits they would have made from sawing the lumber during the time thus lost, deducting the time that would have been required to saw the logs hauled to the other mill, in addition to which interest might be allowed as damages in the discretion of the jury. Hinckley *v.* Beckwith, 13 Wis. 31. But where the defendants offered to saw the logs in their mill yard at the same price they could have been sawed for at the leased mill, the expense of hauling to the distant mill was needless, and the plaintiffs were not entitled to recover it. S. C. 17 Wis. 413. As to consequential damages to mills and to lands from flowages, see *post*, 137, note.

[2] The question whether one who makes a false representation, or who makes and breaks a warranty, is liable for the costs of a litigation which another engaged in, relying on such warranty or representation, will usually be determined by the fact whether the litigation was or not the legitimate consequence of the false statement. Notwithstanding that if the statement had been true, the latter would not have brought or would have successfully defended a suit which he in fact, relying on the truth of the statement, brought or defended unsuccessfully, yet if his doing so was not a necessary or judicious proceeding, he cannot impose the expense thus incurred on the maker of the representation or warranty.

Thus where the defendant falsely represented that he was informed by the keeper of a public house that it produced certain average daily returns, and the plaintiff, after having bought the good-will of the house on the faith of such representation, discovered that its value was much less than was thus pretended, and without further inquiry sued the vendor for false representations and failed in the action, because, as it proved, no such representation had been made by him, it was held, in an action by the purchaser against the defendant for his false representation as to what the vendor had said, that the plaintiff could not recover the costs of the action against the inn-keeper, as they were not the natural or proximate consequence of the representation. Richardson *v.* Dunn, 30 L. J. R. (N. S.) (C. P.) 44; 2 L. T. R. (N. S.) 430; 8 C. B. (N. S.) 655. See Merritt *v.* Nevin, 20 U. C. Q. B. 540, and *post*, 292 *et seq.*, 325 *et seq.*

So the allowance as consequential damages of the expense of a prior litigation, in other cases, depends on the same consideration. A vessel bound to Valparaiso, with liberty to touch at the Falkland Islands, had on board goods consigned to those islands and several hundred barrels of gunpowder for Valparaiso. At the islands, it having been necessary for her to unload the gunpowder before entering the harbor, the defendants furnished a vessel on

So, again, where the defendant sold the plaintiff certain cloths for the Mexican market, accompanied by an invoice specifying the contents of the bales, and warranted correct, but in which the number of yards was much over-stated; the goods, on being forwarded to Mexico by the plaintiff, were entered at the custom-house before the mistake in the invoice was discovered, and the duties paid upon the erroneous amount; the parties settled the difference between them amicably, so far as the price of the goods was concerned, and the action was brought to recover the excess of Mexican duties paid by the plaintiff, together with certain commissions in New York, in consequence of the erroneous valuation made by the defendants in their invoice. But the suit was successfully resisted, and the claim disallowed.*

Uncertain Loss.—In a recent case in England, where a prize had been offered for the best plan and model of a [79] machine, and plans and models were to be sent by a certain day, the plaintiff sent a plan and model accordingly, by a railway; but through the negligence of their agents it did not arrive at its destination till after the time appointed; it was considered that the proper measure of damages was the value of the labor and materials expended on the plan and model, and that the chance of obtaining the prize was too remote to be estimated.†[1]

* Hargous *v.* Ablon *et al.* 5 Hill, 473. See this case again, 3 Denio, 406. There are a number of analogous cases governed by the maxim *Non remota sed proxima causa spectatur.* Broom's Legal Maxims, 105.

† Watson *v.* Ambergate N. & B. Railway, 15 Jur. 448.

which the powder was stowed, but afterwards removed the powder to another vessel unfit for the purpose, which went down with it. The captain, after his arrival at Valparaiso, having been sued by the consignees, defended the action unsuccessfully. It was held that the defendants, although liable for the value of the gunpowder, were not liable for the costs of defending the action at Valparaiso, it not appearing that the conduct of the captain was prudent in so doing. Erie, C. J., also expressed the opinion that these damages were too remote. Ronneberg *v.* The Falkland Islands Company, 17 C. B. (N. S.) 1; 34 L. J. (N. S. C. P.) 34.

And the expenses of a litigation, as indeed may be said in general in regard to other expenses following upon a defendant's breach of contract or other default, can be allowed only where it is fairly the result of the breach or default, and not where it might have been avoided by proper diligence. So where the plaintiff had agreed with the owner of a threshing machine to repair it before harvest time, and employed and paid the defendant to make a fire-box needed for the repairs which the defendant agreed to have done in about a fortnight, but failed to do, and the plaintiff had to procure one elsewhere; which he might have done in time to fulfil his contract with the owner, but did not; and having been sued by the owner, paid £20 to settle the suit, it was held that he could recover the amount he had paid the defendant for the fire-box and his additional expense in procuring another, but not the amount paid in settlement of the suit. Portman *v.* Middleton, 4 C. B. (N. S.) 322. See Henderson *v.* Sevey, 2 Greenl. 139.

[1] But in a late and similar case in Pennsylvania, the rule adopted in Watson *v.* Ambergate N. & B. Railway was disapproved, the court holding that the value of the opportunity to compete for the premium furnished the measure of the plaintiff's damages. If the company were informed of the object of the transmission, the loss of the privilege of the competition was in view of both parties when they entered into the contract, and if not, the loss was still the result of the carrier's negligent breach. But it appearing from the evidence of one of the

ACTIONS OF TORT.—We turn now to actions of tort.[1] In regard to cases of deliberate or malicious wrong, we have already seen that the law applies very liberal relief. And in cases of reckless or mischievous acts injurious to others, even where exemplary damages are not claimed, the party in the wrong is often made answerable for consequences very remote from the original act. So in the famous squib case, the first thrower of the combustible was held responsible, though it had passed through the hands of two other parties.*[2] So where the defendant foolishly went up in a balloon, which descended into the plaintiff's garden and attracted a crowd, who trod down the plaintiff's vegetables and flowers, the original wrong-doer was held answerable for the injury done by the crowd as well as by himself.† So where the defendant having quarreled with a boy, pursued him with a pickaxe, and followed him into the plaintiff's store, where, in his effort at flight, he committed unintentional damage, the defendant was held responsible for the injury thus done.‡[3]

LOSS OF PROFITS IN TORT.—So in an action of trespass in Massachusetts, for breaking down and destroying part of a mill-dam, damages were assessed for the cost of repairing the dam, and also for interruption to the use of the mill, or diminution of profits occasioned by the water flowing through the break in the dam, and by that means falling too low for the working of the mill; it was objected that damages for the lat- [80]
ter cause could not be recovered in this action; but the Supreme Court said, "The interruption to the use of the mill and the diminution of the plaintiff's profits on that account, were alleged in the declaration and proved at the trial; and we think this was right. The plaintiffs are entitled to recover for all the damages they suffered by reason of the trespass." ‖[4]

* Scott *v.* Shepherd, 2 W. Black. 892.

† Guille *v.* Swan, 19 J. R. 381.

‡ Vandenburgh *v.* Truax, 4 Denio, 464. But the defendant, liable in an action of false imprisonment for an unfounded arrest, is not responsible for further damages resulting from the plaintiff's remand by a magistrate; that being a judicial act. Lock *v.* Ashton, 12 Q. B. R. 871.

‖ White *v.* Moseley, 8 Pick. 356.

committee by whom the prizes were awarded, that the plaintiff must at any rate have failed to obtain the prize, he was held entitled to nominal damages only. Adams Express Company *v.* Egbert, 36 Penn. St. 360.

[1] In actions of tort the rule in Hadley *v.* Baxendale (*ante*, 76), of course, as we shall see in reference to profits (*infra*, 80, note 1), does not obtain. The question then is, not whether the damage entered into the consideration of the parties in advance, but simply whether it is fairly and directly the result of the injurious act.

[2] *Ante*, 67.

[3] A passenger having been unjustifiably ordered out of a railway carriage, left a pair of race-glasses on his seat, and lost them in consequence. The loss was held not a natural result of the wrongful act, and the passenger could not recover for it. Glover *v.* London & South-western R. Co. 37 L. J. Q. B. 57; 17 L. T. 139; L. R. 3 Q. B. 25.

[4] It may now be assumed to be the general rule that in actions of tort, where the amount of profits of which the injured party is deprived, as a legitimate result of the trespass, can be

And in a case at Nisi Prius,* Lord Kenyon held that an action lay for firing on negroes on the coast of Africa, and thereby deterring them from trading with the plaintiff, so that the plaintiff lost their trade.†[1]

* Tarleton *v.* McGawley, Peake, N. P. Cases, 205.

† The case appears to come under the head of profits; whatever was lost must have been the profits of the trade. I may here remark that the doctrine of the denial of profits that might have been made in a business, was again affirmed in Giles *v.* O'Toole, 4 Barb. S. C. R. 261; while admitting that the plaintiff was entitled to the value of a bargain actually made. It was an action by lessee of a store against lessor, for a refusal to give possession of the demised property. The plaintiff was allowed his expenses in preparing to remove, but not the profits which he might have made in business on the premises.

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shown with reasonable certainty, such profits constitute to that extent a safe measure of damages. In these cases, the rule adopted with reference to certain breaches of contract which makes the offending party liable for the loss of profits, so far only as he foresaw, or should have foreseen that particular consequence of his act, does not apply. He who commits a trespass must be held to contemplate all the damage which may legitimately follow from his illegal act, whether he might have foreseen it or not; and so far as it is plainly traceable, he should make compensation for it. To this extent, the recovery of a sum equal to the profits lost, while fairly within the principle of compensation, is also within the limits which exclude remote consequences from the scale in which the wrong is weighed. See Chandler *v.* Allison, 10 Mich. 460; 11 Mich. 542; Jolly *v.* Single, 16 Wis. 280; Fultz *v.* Wyckoff, 25 Ind. 321; Simmons *v.* Brown, 5 R. I. 299; Dubois *v.* Glaub, 52 Penn. 238; Douty *v.* Bird, 60 Penn. St. 48; Hanover R. R. Co. *v.* Coyle, 55 Penn. 396; Chapman *v.* Kirby, 49 Ill. 211; and see the cases of collision cited *post*, 469, note. The rule in the case of torts and of those cases of contract where damages are claimed, not on the ground that they were or should have been foreseen, but simply as a direct result of the breach, is the same in this respect, the only difference being, as we think, that in the case of the contract it in a degree limits the extent of the damages, which in the case of the trespass or other tort are subject only to that limitation of the rule which requires such damages to be certain in their nature and extent. The injuries caused by a trespass are so various that there is no "usual course of things" which can be followed in estimating them according to the rule in Hadley *v.* Baxendale. But, if the profits claimed are to any reasonable degree uncertain, they cannot be recovered. Thus, the loss of profits sustained by a mercantile firm from the seizure of its goods, it is said in California, cannot be allowed. The recovery is necessarily limited to such damages as can be estimated by computation, and the effort to go beyond this would end in speculations founded to a great extent on conjecture. Selden *v.* Cashman, 20 Cal. 56. And in an action of trespass for damage to a store, this nice distinction has been taken. The injured party is entitled to damages for *the loss of the use of the property in addition to rent*, and for the injury to the premises, but not for the loss of the profits which might have been derived from his capital and personal services during the interruption. Cincinnati *v.* Evans, 5 Ohio St. (N. S.) 594. See, also, the cases cited at 69 *et seq.* In the effort to distinguish what is certain from what is uncertain, no mathematical test can be established, and the line between those profits which should be excluded, and those which should be allowed, is not always distinct. Some discrepancy, therefore, as we have seen and shall again observe, will be found in the cases. See *ante*, 76, note.

[1] In a case, we believe of new impression, in Minnesota, where the law allows any rate of interest that parties may agree on in writing, and in the absence of such agreement fixes the interest at seven per cent. per annum, the action was to recover damages for the negligent act of the defendant in satisfying of record a mortgage whereby a note of a third party bearing interest at four per cent. a month, which was secured by the mortgage, became valueless. The court held the measure of damages to be the "value" of the note, *i. e.*, the amount of principal and interest due on it at the time of the destruction of the mortgage, with interest from that date at seven per cent. only. The court say, "Had the property destroyed or rendered valueless been a house or a horse instead of a promissory note, the damages would not have been the value of the house or horse, with the amount added which the plaintiff would otherwise have received for rent or hire, but the value of the property destroyed, with seven per cent. per annum." Sanborn *v.* Webster, 2 Minn. 323.

With due submission to the learned court, the cases denying the right to recover profits, given in illustration, do not seem to us "the same in principle," and the rule adopted appears questionable as falling short of giving full compensation. The rate of interest which the note bore, having been as applied to such a note, a legal one in that State, the plaintiff would seem as much entitled to recover it, as he would have been entitled to recover what was lawful interest in a State where the legal rate was uniform. The injured party failed to receive the actual indemnity which the law aims to give. The loss of profit is a different question; but

INCIDENTAL EXPENSES.—So again, where the defendant [81] had taken a horse and wagon belonging to the plaintiffs. They spent four days in searching for the horse and wagon, and incurred other expenses in the search. A verdict was given for the time spent, and expenses incurred in the pursuit. It was objected that the damages were too remote; but the verdict was retained by the Supreme Court; and considerable stress was laid on the circumstance, that the damages were occasioned by the wrongful act of the defendant.*[1]

CIVIL LAW RULES.—In these cases the decisions appear to follow the analogy of the civil law, in which, as we have seen, the party suffering from *dolus* or *culpa lata*, was held entitled to more liberal remuneration than he who was injured by *culpa levis* only. "The better opinion is," says one of the German commentators on the Roman law, "that in cases where the injury is caused by fraud, gross negligence, or malice (*contumacia*), the plaintiff is entitled to reparation as well for the profit lost (*lucrum cessans*), as the actual injury done (*damnum emergens*); but that, on the contrary, where the defendant's illegal act does not rise beyond the grade of ordinary fault (*culpa*), he is only responsible for actual loss."† In other words, where the act complained of is one greatly to be censured, of evil example, and likely, from its very nature, to be fraught with injurious results, although not of so flagrant a character as to warrant vindictive damages, the law will not nicely attempt to limit the amount of reparation, but will pursue the wrong-doer with severity, and extend the line of relief, so as to embrace all the consequences of his conduct, although somewhat remote from the original transaction.[2]

* Bennett *v.* Lockwood, 20 Wend. 223.

† Haenel von Schadenersatze. The original citation will be found *supra*, at p. 24.

even regarding the case as one of the loss of profit simply, yet that loss having been as direct and certain a result of the wrong as the loss of the principal sum, it seems that it should have been allowed.

In an action of trespass on the case, diminution of the value of the property for purposes of renting, and the hindrance to the plaintiff's servants in performing their labor, and damage resulting from water passing through a hole in the roof, caused by an explosion from a neighboring quarry, are *consequential* damages, and as such are recoverable. Scott *v.* Bay, 3 Md. 431.

Where a municipal corporation had rendered themselves liable to the plaintiff for damages for injuries to his manufactory, occasioned by excavations in the course of street improvements, made under direction of the corporation, it was held that the plaintiff was entitled to compensation for the loss of profits during the suspension of his business as a manufacturer, it having been proved that the suspension was a necessary consequence of the injuries to his property, for which the defendants were liable, and that the profits claimed would certainly have been realized. Lacour *v.* The Mayor, &c. of New York, 2 Duer (N. Y.) 406. And where the plaintiff's toll-bridge was carried away, through the fault of the defendants, it was held that the damages recoverable would be the value of the superstructure destroyed, and the loss of the tolls during the time reasonably necessary to rebuild. Sewall's Falls Bridge *v.* Fisk, 3 Fost. (N. H.) 171. See Ludlow *v.* The Village of Yonkers, 43 Barb. (N. Y.) 493.

[1] See Miller *v.* Garling, 12 How. P. R. 203.

[2] But see *post*, 114, note.

[82] Limits of Remuneration.—But, as a general rule, it may be said that in cases of tort without aggravation, where the conduct of the defendant cannot be considered so morally wrong or grossly negligent as to give a right to exemplary or vindictive damages, the extent of remuneration is restricted, according to the principles which we have been considering, to the immediate consequence of the illegal act. "The rule of law is well established, that in cases of torts it is necessary for the party complaining to show that the particular damages in respect to which he proceeds are the legal and natural consequences of the wrongful act imputed to the defendant." * [1] This general principle has been recognized in a multitude of cases. Thus, where an action was brought by the proprietor of a theatre against the defendant for having written a libel upon one of the plaintiff's singers, by which she was deterred from appearing, and alleging that his profits were consequently lost, Lord Kenyon held the injury much too remote to be the foundation of an action, saying, that if an injury had been suffered, it was occasioned entirely by the vain fears or caprice of the actress.† [2]

* Clark *v.* Brown, 18 Wendell, 213–229.

† Ashley *v.* Harrison, Peake, N. P. Cases 194; s. c. 1 Esp. 48.

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[1] A publisher of a paper who merely by mistake neglects to insert an advertisement of the sale of real estate, is liable only for the amount paid for the advertisement, not for speculative damages. Eisenlohr *v.* Swain, 35 Penn. State, 107.

[2] Nor are the profits expected from a singer's performances certain enough to be recovered in an action by the lessee of an opera-house against the lessor for breach of a contract to furnish it by a certain time for the lessee's use. Academy of Music *v.* Hackett, 2 Hilt. (N. Y.) 217.

The negligent burning of a building, the fire from which spreads to an adjoining house, is held in New York to be too remote to give the owner of the latter house a cause of action on the ground of the negligent act which originated the fire. Ryan *v.* The N. Y. Central R. R. Co. 35 N. Y. 210.

The same rule is held in Pennsylvania. Penn. R. Co. *v.* Kerr, 62 Penn. St. 313. But in Illinois, under similar circumstances, the question whether the loss was "too *remote*" for recovery was considered one of fact for a jury. Toledo, Peoria and Warsaw R. R. Co. *v.* Pindar, 53 Ill. 447. See also Ohio and Mississippi R. Co. *v.* Shanefelt, 47 Ill. 497; Ill. Cent. R. Co. *v.* Nunn, 51 Ill. 78. So in Wisconsin, where sparks from the defendants' engine set fire to dry grass, weeds and willows, which had been suffered to accumulate on the sides of a railway track, and on the plaintiff's land adjoining, and the fire, after having spread through adjacent stubble-fields, and from one haystack to another, reached and burned the plaintiff's house and stable, which were about a hundred and forty feet distant from where the fire started, it was held that the question of negligence was properly left to the jury. Kellogg *v.* The Chicago and Northwestern R. Co. 26 Wisc. 223. But the question of negligence on an established state of facts is usually one of law; and, with great deference to the Supreme Court of Illinois, we think, also, that it is for the court to say whether a defendant is or not responsible for a loss by reason of its relation to his antecedent act; and in such a case where there is conflicting evidence, if the whole question is left to the jury, it should be under distinct instructions in point of law as to the kind of connection, or the nature of the separation between the act and the alleged effect, which on the one hand entitle the plaintiff to recover, or on the other, shield the defendant from such a recovery. In Massachusetts, under a statute providing that railroad corporations shall be responsible for damage from fire communicated by their locomotive engines (Mass. Gen. Stat. c. 63, § 101), where fire coming in a direct line from the defendants' engine, about half

So where in an action for an assault, the plaintiff sought to prove as special damages, that by reason of the assault he was driven from Alicant, in Spain, where he had previously done business as a merchant, it was held by far too remote.*

So in case for seduction. The plaintiff's daughter was seduced and the connection broken off; in consequence of the distress of mind, occasioned by the desertion, the young woman became ill, and the loss of service resulted from the illness. The Lord Chief Baron of the Exchequer held at the trial that the damage was too remote, saying that it was caused by the abandonment, not by the seduction.†[1]

So in Alabama, in case for malicious prosecution, whereby the plaintiffs were driven to an assignment, the loss in the sale of the goods made under the assignment is not a proximate or natural consequence of the malicious prosecution.‡[2]

So in New York, in an action on the case against a rail- [83] road company, for injuries resulting from a collision, the plaintiff proved that his leg was broken, and that the oblique character of the fracture rendered it very probable that a second fracture would take place; but this the Supreme Court held too remote. The present and probable future condition of the limb were proper matters for inquiry; but the consequences of

* Moore *v.* Adams, 2 Chitty's R. 198.

† Boyle *v.* Brandon, 13 M. & W. 738. On argument this was thought doubtful, but the point was not decided.

‡ Donnell *v.* Jones, 13 Ala. 490.

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a mile across the land of three or four different persons, and fed on its way by grass, stubble and woodland, reached the plaintiff's land, where it burned large quantities of wood, the corporation was held for the damage. Chapman, C. J., who delivered the opinion of the court, did not concur in the reasoning of the case of Ryan *v.* New York Central Railroad, which is also disapproved in the cases in Illinois and Wisconsin, just cited. Perley *v.* Eastern R. Co. 98 Mass. 415. See also Ingersoll *v.* Stockbridge and Pittsfield R. Co. 8 Allen (Mass.), 438. And in New York, where coal carelessly dropped from the defendants' locomotive engine set fire to the ties under the railway track, and the fire spread thence to adjacent premises of the plaintiff, and burned wood thereon, it was held he could recover. Field *v.* The New York Central Railroad, 32 N. Y. 339; Webb *v.* The Rome, Watertown and Ogdensburg R. Co. 3 Lansing (N. Y.), 453. So in a recent case in the English Court of Exchequer Chamber, on appeal from the Common Pleas, where it appeared that the defendants' servants, after cutting the grass and trimming the banks and hedges at the sides of the railway line, and collecting the cut grass or rummage and hedge-trimmings into heaps, had allowed these heaps to remain during extremely hot weather fourteen days, at the end of which time they were ignited by sparks or cinders from a passing train, and the fire, after burning the adjoining hedge, and in spite of all the company's servants and others could do to subdue it, passed over a stubble field and public road, and communicating to the plaintiff's cottage, at a distance of 200 yards from the line, destroyed it, with the furniture it contained, it was held by a majority of the court that these facts constituted evidence of negligence to go to the jury. Smith *v.* London and Southwestern Railway Co. L. R. 5, C. P. 98.

[1] See Knight *v.* Wilcox, 14 N. Y. 413, where similar views were maintained by the New York Court of Appeals, reversing the judgment of the Supreme Court of that State. In an action for seduction, evidence of the probable expense of supporting the illegitimate child cannot be admitted to enhance the damages. Haynes *v.* Sinclair, 23 Vt. 108.

[2] The same rule was sternly maintained by a majority of the English Court of Common Bench in a case where the malicious prosecution involved wilful perjury, forgery, and a fraud on the court. Fitzjohn *v.* McKinder, 2 L. T. (N. S.) 374. Compare Burnap *v.* Wight, 14 Ill. 301.

a hypothetical second fracture were obviously beyond the range of it, and calculated to draw the minds of the jury into fanciful conjectures.* [1]

So in Massachusetts, where a contractor for the support of town poor, at a fixed sum per annum, was bound to support them in sickness and health, at his own risk, and the defendant committed an assault and battery on one of the paupers, by means of which he was hurt, and the plaintiff put to increased expense for his support, the damage was held too remote and indirect to sustain an action.†

So in slander, in an action for slanderous words not actionable in themselves, the plaintiff cannot prove that he sustained special damage by means of the repetition by a third person of the words uttered by the defendant.‡ So, also, in England, where in slander special damage was alleged from words spoken by the defendant, held that this allegation could not be supported by proof that the defendant had spoken the words to a third party, and that damage ensued in consequence of the third party repeating them, without authority, as the words of the defendant. And Tindal, C. J., said, "No effect whatever followed the first speaking of the words. Every man must be taken to be answerable for the necessary consequences of his own wrongful acts. But such a spontaneous and unauthorized communication cannot be considered as the necessary consequence of the uttering of the words." ‖ [2]

Where the defendants, after a will had been made and exe-

* Lincoln *v.* Saratoga and Schenectady R. R. Co. 23 Wend. 425.

† Anthony *v.* Slaid, 11 Met. 290.

‡ Stevens *v.* Hartwell, 11 Met. 542.

‖ Ward *v.* Weeks, 7 Bing. 211. According to Lord Northampton's Case, 12 Coke, 134, the repetition of slander might be justified by giving the original author of the slander; but this has long since been overruled. McPherson *v.* Daniels, 10 B. & Cres. 263.

[1] One action only can be maintained to recover damages for a personal injury (*post*, 109). Yet it is not necessary for the injured person to wait until all the consequences of the injury have become fully developed. He is entitled to sue whenever he thinks proper, and to recover damages for both past and future pain of body, as well as for past and future deprivation of health, or of any of his bodily powers. But in respect to all the subjects of damage, it is requisite that they should be the legal, direct and necessary results of the injury, and that those which at the time of the trial are prospective, should not be conjectural. Damages arising from bodily pain and suffering need not be alleged specially in the complaint. Curtiss *v.* The Rochester and Syracuse Railroad Company, 20 Barb. (N. Y.) 282; affirmed, 18 N. Y. 534. See Clarke *v.* The Nevada Land and Mining Co. 6 Nev. 203.

[2] In an action of slander for words spoken to the husband of the wife, which were highly defamatory, and in consequence of which he turned her out of doors, but which, under what Lord Brougham, intensifying Lord Campbell's language, with his accustomed vigor characterized as "the *barbarous* state of the English law, according to which the imputation, by words however gross, on an occasion however public, upon the chastity of a modest matron or pure virgin, is not actionable without proof that it has actually produced special temporal damages to her," were, as not imputing actual adultery, not actionable in themselves, it was lately held by the House of Lords, reversing the judgment of the Irish Exchequer, and affirming that of the Irish Queen's Bench, that the wife's loss of her husband's *consortium* was not

cuted devising certain real estate to the plaintiff, conspired with each other to induce the testator to revoke it, and [84] effected their object by means of false and fraudulent representations; held that the plaintiff could not maintain an action, as the damage which he sustained was merely by reason of being deprived of an expected gratuity, and not by an interference with any of his rights. "The plaintiff had no interest in the property of which he says he has been deprived by the fraudulent interference of the defendant, beyond a mere naked possibility; an interest altogether too shadowy and evanescent to be dealt with by courts of law." *

In an action for false imprisonment on board a ship, the plaintiff cannot recover as special damage the expense he incurred in leaving the ship and taking his passage on board another, unless the imprisonment continued to the moment of his transhipment, and was the immediate cause thereof; †[1] as, if he acted to save his life, or from a reasonable regard to his safety.[2]

* Hutchins *v.* Hutchins, 7 Hill, 104. So, case will not lie for a conspiracy to bring an unfounded suit in the name of a pauper, unless damage results. See Colleville *v.* Jones *et al.* 11 C. B. 712.

† Boyce *v.* Bayliffe, 1 Campb. 58, where, to show how far attempts of the kind might be carried, if the necessary connection were not insisted on, Lord Ellenborough alluded to a case which used to be cited by Lord Alvanley, where the plaintiff complained of false imprisonment, *per quod* being confined on shore he lost a lieutenancy.

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the natural and probable consequence of the slander, as the conduct of the credulous husband was unreasonable. Lynch *v.* Knight, 5 L. T. (N. S.) 291; 9 H. of L. Cases, 577. But where the slander imputed to the wife a want of chastity, it was held that, whether or not the action would lie for the loss of her husband's *consortium*, that of her friends' hospitality was a reasonable and natural consequence, for which the action would lie. Davies *v.* Solomon, Law Rep. 7 Q. B. 112.

[1] So in an action for false imprisonment, where the plaintiff offered to prove as special damage, that having been imprisoned till after two o'clock, P. M., and become unwell from his imprisonment, he did not go to a certain place where he would have obtained a situation if he had appeared at two o'clock, the alleged damage was held too remote. Hoey *v.* Felton, 31 L. J. R. (N. S.) C. P. 105; 5 Law Times (N. S.), 354; 11 C. B. (N. S.) 142.

[2] So the loss of an office for which an application had been made by the plaintiff before the assault and battery, but withdrawn after it because of the disability occasioned by the battery, as the plaintiff alleged, was held too inconsequential to be considered, although alleged in the declaration. Brown *v.* Cummings, 7 Allen, 507.

The following late case deserves citation. Where the plaintiff was engaged by the defendant at a salary, and with the further compensation of a house to live in, or a stipulated sum in lieu of it, and was also to receive a gift of £20 if he remained till Lady-day following, and before the end of the term was wrongfully dismissed and ordered to leave the house he had been put into under the agreement, but refused to do so, and the defendant removed the goods and furniture to a barn, from which the plaintiff might have taken them if he had chosen, and while the goods were in the barn it was broken into and some of the goods damaged, and £70 taken, it was held that the jury, in assessing the damages, had a right to consider the £20 which the plaintiff would have earned if he had been permitted, but not the loss of the goods and money, as the relationship of landlord and tenant did not exist between the parties, and the defendant had therefore a right to remove the goods. Lake *v.* Campbell, 5 L. T. R. (N. S.) 582.

For a clear illustration of the principle of the exclusion of secondary damages in an action of tort on the ground of remoteness, see Stone *v.* Codman, 15 Pick. 297, cited on another point, *post*, 454.

STATUTES.—The same principle has also been applied to the construction of statutes. An action was brought in the King's Bench, on the stat. 1 Geo. I, st. 2, c. 5, § 6, against the hundred for reparation in damages on account of rioters having pulled down in part the plaintiff's dwelling-house; and there was a second count for beginning to pull down an out-house. The plaintiff was a baker. It was proved that the mob compelled the plaintiff to sell a quantity of flour at a price much below its value; that they then began to break the windows of the bakehouse, and of his dwelling-house. Besides this, they burst open the lock of a warehouse belonging to the plaintiff on the other side of the street, and threw some flour into the street. It was held that the damage done the warehouse was an act not consequential to the other—and that the flour which the mob compelled the plaintiff to sell was not a damage recover-
[85] able against the hundred.* And the same point was held in another action brought against the hundred, as to flour taken away or stolen by a mob.†

So in an action in Massachusetts, on what is called the mill act, to recover damage for the flowage of land, the plaintiff offered to prove that the flowed land, when the water was drawn off, emitted offensive and noxious smells, and claimed damages therefor. But it was rejected, the court saying that the law did not justify an allowance for remote, possible or speculative damages.‡

But where, in Massachusetts, it was declared by statute that any owner or keeper of a dog should "forfeit to any person injured by such dog *double the damage sustained by him*;" it was held, in expounding that statute, that when the plaintiff brings such action for the injury done to a minor child, he is entitled to recover for the loss of his services and the expense of his cure.‖

But in Connecticut, towns liable to pay "just damages" for defects in bridges or roads, are not liable for consequential damages, such as the loss of service, expense of nursing resulting to a person for injuries to his wife and daughter.¶ To this branch of our subject we shall again advert when we come to the subject of statutes.

CASES ADOPTING A WIDER RULE.—Having thus far illustrated the application of the general rules which prohibit remote or

* Burrows *v.* Wright, 1 East, 615.
† Greasley *v.* Higginbottom, 1 East, 636.
‡ Eames *v.* New England Worsted Co. 11 Met. 570.
‖ McCarthy *v.* Guild, 12 Met. 291.
¶ Chidsey *v.* Canton, 17 Conn. 475.

consequential damages, by an examination of those cases where they have been denied, we now come to consider those instances in which a wider rule of construction has been adopted. They will be found to be few, and may, I think, generally be said to belong to the class of cases which the civil law ranks under *dolus*, or *culpa lata*. This distinction has even been intimated in cases of contract.

Perhaps the strongest case is one in the English Common Pleas, where an action was brought on the warranty of a chain-cable, that it should last two years, as a substitute for a rope cable of sixteen inches; and it was alleged, that within the two years the cable broke, and that thereby an anchor, to which the cable was affixed, was lost. A verdict being [86] found for the value of cable and anchor, a motion was made for a new trial, and it was insisted that the principle contended for by the plaintiffs would render the defendants liable for the loss of the ship, if on the breaking of the cable that event had happened. But the loss was held not too remote; and Dallas, C. J., said, "The defendants warrant the cable sufficient to hold the anchor; and it is proved not to be sufficient. The holding of the anchor by the cable is the very essence of their warranty;" and a new trial was refused.*[1]

And where an agreement had been made to let certain premises as a tavern stand, and the plaintiff had removed his family to take possession, which was refused, it was held that the plaintiff was entitled to recover, not only the value of the lease, but also his expenses in removing his family and furniture, and this without any allegation of special damage in the declaration.†

A case very analogous to this was decided in Massachusetts, where a defendant had engaged the plaintiff to remove to Indiana, to carry on business there, and failed to furnish the stock necessary for so doing; the court allowed the plaintiff as damages, compensation for the loss of his time in removing to Indiana and back again to his original domicil.‡[2]

* Borradaile *v.* Brunton, 8 Taunton, 535; s. c. 2 J. B. Moore, 582. Either the case is ill reported, or the learned Chief Justice gave the warranty a very broad construction; nothing is said in Taunton about the "cable being warranted sufficient to hold the anchor."

† Driggs *v.* Dwight, 17 Wend. 71; Lawrence *v.* Wardwell, 6 Barb. S. C. 423. See also, Giles *v.* O'Toole, 4 Barb. S. C. 261; and see Ward *v.* Smith, 11 Price, 19.

‡ Johnson *v.* Arnold, 2 Cush. 46.

[1] This case is materially discredited by Alderson and Parke, B. B., in Hadley *v.* Baxendale, 9 Exch. 341, *supra*, p. 76.

[2] So in New Hampshire, where the defendant proposed by letter to the plaintiff that the latter should come to that State from Wisconsin, agreeing, if he would do so, to give him and his wife a year's board, and allow him to carry on the defendant's farm; it was held that the

In an early case, in which the plaintiff declared for breach of an agreement to let the plaintiff have the use of certain mills for six months, in consideration of £10, it appeared that the mills were worth but £20 per annum, and yet damages were given to £500, by reason of the stock laid in by the plaintiff; and, *per curiam*, "the jury may well find such damages, for they are not only bound to give the £10, but also all the special damages." *

In a recent case in New York, the Supreme Court of [87] that State, commenting on this case, said, "Very likely it appeared that the breach of contract was committed to favour some particular interest of the defendant, or his friend, though the case mentions a simple refusal to perform;" † but perhaps it may rather be brought within the rule of the French law, both parties knowing the object to which the mills were to be applied, and the loss of the plaintiff's stock being considered as contemplated by them.

In another recent case in New York, the plaintiff sued the defendant in covenant for not maintaining a ferry in good order, according to the agreement contained in a lease made to him by the plaintiff. The plaintiff proved, that, instead of keeping the ferry in good order, the defendant had discontinued it, and transferred it to another wharf of his own, by means of which a tavern stand of the plaintiff at the original ferry, which he had previously let at $300, was injured in its business, so that he could not let it at all. The judge at the trial ruled that the plaintiff was entitled to recover his *actual damages* sustained in the loss of rent; and the jury found a verdict for $225. A new trial was denied, the court holding "that the damages proved were a legitimate claim, and the legal and natural consequences of the breach of the covenant." ‡

In the case above cited, ‖ the Supreme Court of New York, commenting on this last case, said, "It must have been regarded as a fraudulent breach of covenant to keep a ferry in repair, which materially benefited the plaintiff's tavern. The defendant left it unrepaired, in order to favor his own ferry; and therefore damages were allowed, for loss of custom at the plaintiff's inn."

* Nurse *v.* Barnes, T. Raym. R. 77.
† Blanchard *v.* Ely, 21 Wend. 342.
‡ Dewint *v.* Wiltse, 9 Wend. 325.
‖ Blanchard *v.* Ely, 21 Wend. 342.

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expenses incurred by the plaintiff in removing his family, and probably compensation for his necessary loss of time might be recovered, and perhaps also the full value of the board and of the year's produce of the farm, without deduction for the plaintiff's labor in carrying on the farm, unless he was offered and engaged in a similar employment: but without a special agreement, not losses sustained by the plaintiff in selling his property at a sacrifice with a view to the removal. Woodbury *v.* Jones, 44 N. H. 206.

MOTIVE NOT TO BE CONSIDERED.—The ground taken in explanation of these cases, by the learned Supreme Court of New York, cannot, I think, with great deference, be maintained. It supposes that the remote or consequential damages were given on the ground that the contracts were fraudulently violated. This assumes, that in actions on contracts, *ex contractu*, the damages will vary according to the intention of the party in default; and that evidence may be received, and damages will be awarded, in regard to the motives of the defend- [88] ant. When we come to consider the general rules which control the measure of damages in actions on contract,* I believe I shall be able to show that this suggestion is untenable, and that if these cases are to be considered as well decided, some other explanation of them must be given.[1]

ILLEGAL AND MISCHIEVOUS ACTS.—We have already seen,† that in cases of illegal or mischievous conduct, the disposition of the courts is to make the party in the wrong liable for injurious consequences flowing from the illegal act, although they be very remote.‡

So where the defendant had not repaired his fence, by reason of which the plaintiff's horses escaped into the defendant's close and were there killed by the falling of a hay-stack, the court considered that such damage was not too remote.‖[2]

* *Post*, ch. vii.
† *Supra*, 79, 80.
‡ *Supra*, 80, 81; Scott *v.* Shepherd, W. Black. 892; Vandenburgh *v.* Truax, 4 Denio, 464.
‖ Powell *v.* Salisbury, 2 Y. & Jer. 391.

[1] But see *post*, 206, note.

[2] So where in a late case through the defect of a gate which the defendant was bound to repair, his horse, which was not shown to be vicious, strayed into the plaintiff's field and there kicked the plaintiff's horse, the damage was held not too remote. Lee *v.* Riley, 34 L. J. R. (N. S.) C. P. 212. And see Holback *v.* Warner, Cro. Jac. 665; Anon. 1 Ventr. 264.

So in Vermont, where the statute provided that a party neglecting to keep in repair his part of a fence, should "be liable for all damages done to or suffered by the opposite party in consequence of such neglect," and in consequence of the defective condition of the defendant's fence, the plaintiff's horses escaped into the defendant's pasture, where they were gored by a vicious bull of the defendant; the damage was held not too remote, the court considering the defendant's liability very much that of a party at common law—"bound to do an act, from the omission to do which an injury results to others," and not regarding it as indispensable to the maintenance of the action that the vicious habits of the bull should have been known to the defendant. Saxton *v.* Bacon, 31 Vermont, 540.

So in a case in the Irish Court of Queen's Bench, arising under Lord Campbell's act (9 and 10 Vict. c. 93), where it appeared that the deceased was precipitated into the lock of a canal through the defendant's negligence, and while there, was suffocated in consequence of the lock-keeper letting the water into the canal, it was held that the representatives of the deceased could maintain the action. Byrne *v.* Wilson, 15 Ir. Com. Law, 332. See Jones *v.* Boyce, 1 Stark. 493.

But damages for consequential injuries not amounting to trespass, cannot be recovered in an action of trespass (*q. c. f.*) unless they result from an act of trespass. Therefore, in such an action for removing a fence, the plaintiff cannot recover for damages done his crop in consequence of the removal of the fence, by cattle not belonging to the defendant, without proof that the fence was his, or that the defendant committed a trespass in removing it. Richardson *v.* Millburn, 11 Md. 340.

So where the defendant drove against the plaintiff's carriage, and by the shock the plaintiff's friend was thrown off the seat on to the dashing-board, and the dashing-board falling on the horse, he kicked and broke it; it was held that all the damage so sustained was recoverable in trespass.*

DEPRIVATION OF SERVICE.—So where the injury complained of was, that the defendants had invited the plaintiff's servants to dinner, and induced them to leave him; the injurious consequence complained of was, that the plaintiff had lost the profits of the sales of pianos for two years; and this was held not to be too remote, although the servants were not hired by the plaintiff for any definite period, but worked by the piece. Mr. J. Richardson remarks, "The measure of damages he is entitled to receive from the defendants is not necessarily to be confined to those servants he might have in his employ at the time they were so enticed, or for the part of the day on which they absented themselves from his service; but he is entitled to recover damages for the loss he sustained by their leaving him at that critical period.†

But where the plaintiff sued the defendant in case for the loss of service of a servant, resulting from the accidental collision with the defendant, it was held in England ‡ that the damage was too remote; though *case*, and not *trespass*, would have been the proper remedy, if the servant had been plaintiff. ‖[1]

* Gilbertson *v.* Richardson, 5 Man. Gr. & S. 502.

† Gunter *v.* Astor *et al.* 4 Moore's Rep. 12 (16 Eng. Com. Law. Rep. 357).

‡ Martinez *v.* Gerber, 3 Scott, New Rep. 386.

‖ I owe to the courtesy of the Hon. James Gregg of South Carolina, the report of the following case, Berkley *v.* Harrison, decided in May, 1847, by the Court of Appeals in that State. See South Carolina Temperance Advocate, June 10, 1847. The paper also contains an able argument by Mr. Gregg, as counsel for the plaintiff, where the cases are well collected. It was an action of trespass on the case, in which the plaintiff sought to recover damages for that the defendant, being a shopkeeper, in violation of the statute on the subject, and to the wrong of the plaintiff, sold and delivered ardent spirits to his slave, by means whereof the said slave became intoxicated, lay out all night, and died. The plaintiff claimed only compensation for his actual loss; and the jury were instructed to regard the defendant as one who, with no particular evil purpose or ill-will towards master or slave, had violated the law only for his own gain. They found for plaintiff, $650, the value of the slave.

On appeal, it was said, It would be vain to attempt to lay down any general rules, by which consequences that shall be answered for, and those which are too remote for consideration, may be always distinguished; but, according to the general course of decision on this point, it would seem that where, as in this case, the mischievous purpose is manifest, or could be foreseen by ordinary prudence, there the wrong consists in ministering to that purpose, and the natural consequences of that purpose are the legal consequences of the injurious act. The drinking and intoxication of the slave were the natural and probable consequences of selling liquor to him. The lying out all night was the immediate effect of the intoxication; and the two produced death. Thus, without any unconnected influence to be perceived, the death has come from the intoxication, which the defendant's act occasioned. The proximity in order of

[1] In a successful suit for freedom, a negro is entitled to recover damages in the nature of hire, for the period of the restraint. Moore's Adm'r *v.* Minerva, 17 Tex. 20.

WRONG-DOER CANNOT APPORTION WRONG.—So again, where the defendant undertook to carry a quantity of the plaintiff's lime in his barge from Medway to London, and in going to London, deviated from the usual course, and during the [89] deviation, a tempest wet the lime, whereby it set fire to the barge, and the whole was destroyed; it was held that the cause of the plaintiff's loss, to wit, the deviation from the usual course, was sufficiently proximate to entitle the plaintiff to recover, although the immediate cause of the loss was the wetting of the lime by the tempest. In that case, the wrongful act was the deviation from the usual course, and the injurious consequence was the loss of the lime, by first getting wet in the tempest, and secondly, from its natural quality, setting fire to the barge; and it was held not to be too remote, although it was contended that there was no natural connection between the wrongful act, to wit, the deviation, and the loss of the lime, as the same accident might have happened in the usual course; and Tindal, C. J., said, "No wrong-doer can be allowed to apportion or qualify his own wrong; as a loss has actually happened whilst his wrongful act was in operation and force, and which is

events, and intimacy of relation as cause and effect between the injurious act and the damage, are sufficiently great to free the verdict from the objection that the damages were too remote.

In Wright *v.* Gray, 2 Bay Rep. 464, Gray, being concerned in a horse-race, had, without Wright's permission, persuaded his negro boy to ride his horse, which, in the race, threw the boy against a tree and killed him. The jury having found a verdict for the plaintiff for the value of the boy, a motion was made for a new trial, which the judges unanimously refused, upon the ground, as set forth in the report, "that a man who officiously presumes to interfere with, or make use of the property of another, without his permission, is liable for all the consequences of such interference, whether he intended any injury to the owner or not."

In McDaniel *v.* Emanuel, 2 Rich. Rep. 455; the plaintiff's negro, Jack, had been employed by the defendant's agent on his boat, without the consent of his owner, according to the weight of the evidence, and fell overboard and was drowned; though there was some evidence to show that Jack was employed with the consent of the owner; and there was also some evidence to show that Jack was drowned by the negligence of the defendant's agent, the captain of the boat. His Honor, Judge Butler, who tried the case, states, in his report, as his instruction to the jury,—"Taking this view of the fact (that is, that Jack was employed without the consent of his owner), I was of opinion that the company was liable for the loss of Jack, even if it should appear that his death resulted from one of the ordinary perils incident to the navigation of the boat, and without any actual fault on the part of the captain at the time the catastrophe occurred, upon the ground that Jack had been used, by the agent of the company, in a way different from the understanding of Waterman, and in opposition to the instructions of his master" (that is, without the consent of his master).

In Duncan *v.* The S. C. R. R. Co. 2 Rich. Rep. 613, the plaintiff's negro, Wesley, was carried on the railroad car without the consent of his owner, and in jumping off was killed. His Honor, Judge O'Neall, in delivering the opinion of the court, says, "In such a case (that is, carrying the slave on the railroad car without the consent of his owner), it is in vain to say that the slave was a moral agent, capable of wrong as well as of right action, and that he killed himself by jumping off when he ought not." And he referred, with approbation, to Strawbridge *v.* Turner, 9 La. Rep. 213, where the captain of a steamboat took into service the slave of the plaintiff, and without his consent, and the slave having been drowned by jumping or falling overboard, the defendant was held liable, upon the ground of the illegal employment. So, if a slave should, without his owner's permission, get on the railroad car at Columbia, to go down to his plantation, a dozen miles below, and should be killed in jumping off opposite the plantation, the company would be held liable, upon the same ground, that they had illegally interfered with the slave without the consent of the owner.

attributable to his wrongful act, he cannot set up as an answer to the action, the bare possibility of a loss if his wrongful act had never been done." *

So in Massachusetts, it was held, in an action for trespass for digging into a river bank near a dam, that the plaintiff might recover for the injury consequential on the digging, which consisted of the damage done by a flood that occurred three weeks after, and swept away several acres of land, and a cider-mill; the court saying that the plaintiff was entitled to recover in this action all the damage of which the injurious act was the efficient cause, and that it was not necessary to put him to an action on the case for the consequential injury: no malice was suggested.† [1]

FRAUD.—In New York, in case for fraud, where an agent, authorized to sell a flock of sheep, sold a portion of them with knowledge that they were diseased, and the diseased sheep were mixed with another flock, it was held that the claim of the purchaser against the principal was not limited to the loss of the sheep purchased, but extended to that of the others to which the distemper was communicated; and the court
[90] said, "This damage was the natural consequence of the fraudulent act of the defendant's agent." ‡ This case we have seen similarly decided by Pothier.[2]

[91] Where the defendant had sold to the plaintiff's father a gun, for the use of himself and his son, falsely and fraudulently representing the gun to be made by a particular maker, and to be well made, when, in truth, it was not made by the gunsmith in question, nor well made; and the gun exploded in the hands of the plaintiff, and maimed him, it was held that the damage was not too remote. "We think," said Parke, B., "that as there is fraud and damage, and the result of that fraud not from an act remote and consequential, but one

* Davis *v.* Garrett, 6 Bing. Rep. 716 (19 Eng. C. L. Rep. 212).

† Dickinson *v.* Boyle, 17 Pick. 78. The only objection taken by the defendant seems to have been, that the action should have been case, and not trespass.

‡ Jeffrey *v.* Bigelow, 13 Wend. 518.

[1] See *ante*, 67 n. 2. So in Maryland, damages from the non-thriving of cattle in consequence of the construction of a railroad through their pasture, were held not too remote. Balt. and Ohio R. R. Co. *v.* Thompson, 10 Md. 76.

So where a sea-wall, built by the defendant, had not been constructed according to his agreement, and he had promised the plaintiff to rebuild it, but failed to do so, and in reliance on such promise, the plaintiff himself delayed rebuilding it, the loss of the use of the wharf during the period of delay thus caused, was held the direct and immediate consequence of the defendant's failure, for which he was liable. Wiley *v.* Fredericks, 10 Gray, 357.

[2] So Mullett *v.* Mason, 1 L. R. (C. P.) 559; Knowles *v.* Nunns, 14 L. T. (N. S.) Q. B. 592, cited *post*, 296, note; Faris *v.* Lewis, 2 B. Munroe, 375; Bradley *v.* Rea, 14 Allen, 20.

contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured." *

So where the defendant, being about to sell a public-house, falsely represented to a third party, who had agreed to purchase it, that the receipts were a certain sum per month, these representations being, to the knowledge of the defendant, communicated to the plaintiff, who therefore became the purchaser; held that an action lay against the defendant at his suit.†

If the defendant state positively to the commander of a press-gang, that the plaintiff is liable to the impress service, where in truth he is not so, and the plaintiff in consequence of his information is impressed, the defendant is liable to an action of trespass at the plaintiff's suit, the impressment being the consequence of the false statement.‡ [92]

EVIDENCE FOR JURY.—We must take notice that there are cases where evidence of loss somewhat remote has been received, not on the ground of its being a measure of damages, but as an ingredient in the cause, proper to go with the other facts to the jury.‖ So in a case of libel against the editor of the "Times," for the insertion in that paper of a statement that the vessel, an East Indiaman, of which the plaintiff was owner and master, was not seaworthy, and that Jews had bought her to take out convicts. On the trial, the plaintiff was allowed to prove the average profits to the captain on an East India voyage; and the jury were instructed that, with a view to estimate the damage, they might look to the nature of his business, and his general rate of profit; and on a motion for a new trial, this was held right. But the evidence of profits was not regarded properly as a *measure of damage.* Maule, J., said, "The evidence was admitted only

* Langridge *v.* Levy, 2 Mees. & Wels. 519; affirmed in the Exchequer Chamber, 4 Mees. & Wels. 337.

† Pilmore *v.* Hood, 5 Bing. N. C. 97. See also Taylor *v.* Ashton, 11 M. & Wels. 401.

‡ Flewster *v.* Royle, 1 Camp. 187. In New York, in an action on the case for negligently running over and killing the plaintiff's son, the plaintiff was allowed to recover for the deprivation of the society of the wife, and the expense resulting from her illness consequent on the death of the child, these damages being specially laid in the declaration, and clearly proved to have been the consequence of the act complained of. Ford *v.* Monroe, 20 Wend. 210.[1] But as to the damages for the death of the child, see the law of this case denied in Carey and wife *v.* Berkshire R. R. Co. 1 Cushing, 475, and Skinner *v.* Housatonic R. R. Co. *Ibid.*

‖ Ingraham *v.* Lawson, 6 Bing. N. C. 212.

[1] This case was disapproved also in Green *v.* Hudson R. R. Co. 28 Barb. 9, and in Allsop *v.* Allsop, 2 L. T. (N. S.) Exch. 290; and being in conflict with the subsequent course of decision in New York, can no longer be regarded as law.

that the jury might know what sort of business the plaintiff carried on;" and Coltman, J., said, "With respect to the damages, the jury must have some mode of estimating them; and they would not be in a condition to do so unless they knew something of the plaintiff's business, and the general return from his voyages." The evidence was admitted, not as a measure of damages, but to serve as a guide for the exercise of that discretion which, to a certain extent, is always vested in the jury.[1]

[93] So in Alabama, in an action for malicious prosecution, the plaintiffs claimed for loss of profits, and the court admitted evidence on that point, saying, however, "We would by no means say that the jury should make the supposed profits, which the plaintiffs had lost, the *measure of damages*. All we design to affirm is, that proof tending to establish such loss as a consequence of the suit, may properly go before the jury to serve as some guide for them in the exercise of their discretion in estimating the loss." * It will be noticed that these cases are in tort. And here the evidence appears to be often necessary.

Where an action was brought for breach of an agreement to form a partnership, and it was proved that the plaintiff had given up an East India voyage, as was well known to the defendant, he was allowed to show the value of the voyage, not as special damage but as an ingredient for estimating the value which each of the parties set on the contract in dispute.†

There is great difficulty, however, in principle, in admitting evidence of this kind in cases of contract. It is a practical abandonment of those safe rules which go to exclude remote damage. If evidence is admitted, and a fact undisputed, the jury should be controlled by it.[2]

* Donnell *v.* Jones, 17 Ala. 689. † M'Neill *v.* Reid, 9 Bing. 68.

[1] So in an action by an architect for damages for a personal injury, evidence of the nature and extent of his business was held proper for the jury, not as a measure of damages, but to guide their discretion. New Jersey Express Co. *v.* Nichols, 33 N. J. (4 Vroom) 434.

[2] In an action for the breach of a partnership contract, part of the consideration for which was the giving up a claim by one of the parties against the other for breaking a previous contract, the prior agreement cannot be considered. Addams *v.* Tutton, 39 Penn. 447. And in the case of Skinner *v.* Tinker, 34 Barb. 333, where the agreement for the partnership provided no limit to its duration, and it was therefore dissoluble by either partner at any time, the New York Supreme Court held, in a similar action, that the plaintiff was not entitled to prospective damages. He could recover such only as had been sustained up to the time of the defendant's notice of his determination not to form a partnership.

But against one who either breaks his agreement to form the partnership, or wrongfully dissolves an existing one, the weight of authority sanctions the allowance by the jury of compensation for the loss of the prospective profits of a partnership, in the estimation of which the past profits of the concern are to be considered. In the case of Gale *v.* Leckie, at

AVOIDABLE CONSEQUENCES NOT ALLOWED.—The same principle which refuses to take into consideration any but the direct consequences of the illegal act, is applied to limit the damages where the plaintiff, by using reasonable precautions, could have reduced them.

"If," said Lord Chief Justice Abbott, at Nisi Prius, "you charge anybody with a loss arising from mistake, you should show that no due diligence could have been used by you which might have prevented that loss." * "In an action for an injury occasioned by the negligence of another," says Mr. Starkie, "it is a good defence to show that the injury so far arose from the

* Hordern *v.* Dalton, 1 Car. & Payne, 181.

Nisi Prius (2 Stark. 107), Lord Ellenborough remarked that he had known several actions brought against a defendant for not contributing his labor towards the attainment of profit to be subsequently divided between the parties; and in that case, which was an action by a bookselling firm to recover damages sustained by the defendant's refusal to proceed in the publication of a literary work which he had undertaken, and which was partly printed by the plaintiffs, the jury, under his lordship's sanction, made an allowance for the profits of the undertaking in addition to the actual expense of paper and printing. His lordship, after observing that the contract had been entered into on the supposition that it would be profitable, said, "The sum of £90 has been stated by the witnesses as the amount of profit which would probably have been derived from the first edition, and it is doubted whether it would have reached the second. The publication was to have been at the entire risk of the plaintiffs; they might have incurred a loss, but the defendant could not." The jury found a verdict for £50 more than the expenses.

In the case of Bagley *v.* Smith, 10 N. Y. 489, it was insisted by the defendant's counsel that the making of either the prospective or the past profits of a partnership the basis of a rule of damages was contrary to principle, that the inquiry into past profits involved the taking of an account which was impracticable in a trial at law, and that there was no basis for the jury to measure the fluctuations of trade, the danger of losses, and the effects of competition, which were all involved in a calculation of future profits. Moreover, as the profitable prosecution of the business of the firm depended on the mutual confidence and harmonious co-operation of its members, its dissolution under circumstances which precluded these conditions, could not subject the withdrawing partner to damages on the basis of prospective profits.

But the court held that no rule of law required that the breach of a covenant contained in partnership articles should be compensated by nominal damages only; that as the object of commercial partnerships was profit, the most direct and legitimate injury which could be occasioned by an unauthorized dissolution of a firm was the loss of profits; that although there was great inherent difficulty in accurately estimating future gains, this difficulty would not be lessened by shutting out the light from the past, and that as no one out of a court of justice could undertake to judge of the future profits of a business without informing himself, if practicable, as to those in the past, there appeared to be no reason why a legal tribunal should do so. The court also refused to limit the plaintiff's claim for profits to the period between the dissolution and his subsequent entry into business.

The practice, established in New York by the above case of Bagley *v.* Smith, of admitting evidence of past profits, not as in themselves a safe measure of future profits, but as very pertinent to the question what the future profits would probably have been had not the business been interrupted, and as a material aid to the jury in the solution of this question has been elsewhere sanctioned, and may be taken, we think, to the extent here stated, as the general rule. Allison *v.* Chandler, 11 Mich. 542; Chandler *v.* Allison, 10 Mich. 460. And the rule as thus qualified has been extended so as to embrace evidence of what others have made in the same business at the same place, and within the same period. Donnery *v.* Bisa, 6 La. Ann. 365. But the profits, to be recoverable, must not be merely such as would probably have been gained. They are such only as would certainly have been gained but for the defendant's default. Van Ness *v.* Fisher, 5 Lansing (N. Y.), 236.

negligence of the plaintiff himself, that he might by ordinary care and caution have avoided the injury." * [1]

So in case, though the party charged be in fault; yet, if the proximate and immediate cause of the accident be the un-
[94] skilfulness of the plaintiff, there is no relief. Thus, where the defendant illegally placed a heap of lime rubbish in the highway, the dust of which frightened the plaintiff's horse; the animal ran, and in running approached a wagon. The plaintiff, who was driving, endeavored to divert him from the direction of the wagon, but did it so unskilfully that he ran over another heap of rubbish, which upset the plaintiff's vehicle, and did other damage. This was held by the English Common Pleas too remote; it being considered that the proximate and immediate cause of the accident was the unskilfulness of the driver.†

So in Maine, in an action of assumpsit for a quantity of limestone, the court said,—

"In general the delinquent party is holden to make good the loss occasioned by his delinquency. But his liability is limited to the direct damages which, according to the nature of the subject, may be contemplated or presumed to result from his failure. Remote or speculative damages, although susceptible of proof and deducible from the non-performance, are not allowed; and if the party injured has it in his power to take measures by which his loss may be less aggravated, this will be expected of him. If a party entitled to the benefit of a contract can protect himself from a loss arising from a breach, at a trifling expense or with reasonable exertions,—he fails in social duty if he omits to do so. For example, a party contracts for a quantity of bricks to build a house, to be delivered at a given time, and engages masons and carpenters to go on with the work. The bricks are not delivered. If other bricks, of an equal quality and for the stipulated price, could be at once purchased on the spot, it would be un-

* Starkie on Evidence, Vol. II, p. 741, tit. Nuisance.

† Flower *v.* Adam, 2 Taunt. 314; s. p. Butterfield *v.* Forester, 11 East, 60.

[1] It is not only the moral but the legal duty of a party who seeks redress for another's wrong to use due diligence in preventing loss thereby. This principle applies to a breach of contract, and a party is not entitled to compensation for injurious consequences from such breach, so far as he had the information, time and opportunity necessary to prevent them. See The Cincinnati and Chicago Air Line R. R. Co. *v.* Rodgers, 24 Ind. 103. And if he omit to use his opportunities of lessening the damage caused by the other's default, he should be compensated for the injury he might have prevented to the extent only of the labour and expense which such prevention would have required. Mather v. Butler County, 28 Iowa, 253. So where in the case of a contract to saw a certain number of logs in a certain time, the defendant failed to deliver the logs to the plaintiff to be sawed, it was held that the measure of the plaintiff's damages was not necessarily all the profit he could have made from the contract. If other employment offered he was bound to take it, and what he would thus have earned should go in mitigation of his damages. Heavilon *v.* Kramer, 31 Ind. 24; and see State *v.* Powell, 44 Mo. 436; Miller *v.* Roy, 10 La. Ann. 231; Dufort *v.* Abadie, 23 La. Ann. 280.

reasonable, by neglecting to make the purchase, to claim and receive of the delinquent party damages for the workmen, and the amount of rent which might be obtained for the house if it had been built." *

So in trespass in Massachusetts, it appearing that the defendant had broken down the plaintiff's fence in November, but that the plaintiff did not repair the breach till May, in consequence of which cattle got in and destroyed the crop of the next year, and the claim being for the loss of the subsequent year's crop, as well as the expense of repairing the fence, the Supreme Court said,— †

"In assessing damages, the direct and immediate consequences of the [95] injurious act are to be regarded, and not remote, speculative and contingent consequences, which the party injured might easily have avoided by his own act. Suppose a man should enter his neighbor's field unlawfully, and leave the gate open; if, before the owner knows it, cattle enter and destroy the crop, the trespasser is responsible. But if the owner sees the gate open, and passes it frequently, and wilfully and obstinately, or through gross negligence, leaves it open all summer, and cattle get in, it is his own folly. So, if one throw a stone and break a window, the cost of repairing the window is the ordinary measure of damage. But if the owner suffers the window to remain without repairing a great length of time after notice of the fact, and his furniture, or pictures, or other valuable articles, sustain damage, or the rain beats in and rots the window, this damage would be too remote. We think the jury were rightly instructed, that as the trespass consisted in removing a few rods of fence, the proper measure of damage was the cost of repairing it, and not the loss of a subsequent year's crop, arising from the want of such fence." ‡

We shall hereafter see that this principle has been frequently applied to nuisances, to cases of collision, and in many other instances.[1] But we shall find that the language here used is intended to be subject to the qualification that the negligence, or other misconduct of the plaintiff, has actually increased the difficulty. The mere fact of the conduct of the plaintiff being irregular, is of no consequence, unless his misconduct has tended to aggravate the injury. ‖

So where the defendant's servant had left his horse and cart

* Miller *v.* Mariner's Church, 7 Greenleaf, 51. The same language is held in Iowa, Davis *v.* Fish, 1 Iowa (Greene), 407.

† Loker *v.* Damon, 17 Pick. 284, per Shaw, C. J.

‡ And see Thompson *v.* Shattuck, 2 Metcalf, 615.

‖ *Vide post*, ch. xviii, of torts generally.

[1] This principle as to the effect of the plaintiff's own contributory negligence on his right of recovery applies to cases of contract as well as of tort. Milton *v.* Hudson R. Steamboat Co. 37 N. Y. 210.

in the public street, where children might be playing. The plaintiff, who was a child between six and seven years of age, and several other children, played about the cart, and the plaintiff got into it, and another boy led the horse on, and as the plaintiff was getting out he fell, and the cart-wheel ran over his leg, and broke it. It was contended that the mischief was not produced by the unlawful act of the servant alone, but by that combined with two other active causes, namely, the advance of the horse caused by the other boy, and the plaintiff's improper conduct and trespass in mounting the cart. Lord Denman, C. J., said, "Certainly, the child was a coöperating cause of his own misfortune, by doing an unlawful act; and the question arises, whether that fact alone must deprive him of his remedy." . . . . "The question remains: Can the plaintiff then, consistently with the authorities, maintain his action, having been at least equally in fault? The answer is, that supposing that fact ascertained by the jury, but to this extent, that he merely indulged the natural instinct of a child, in amusing himself with the empty cart and deserted horse, then we think that the defendant cannot be permitted to avail himself of that fact. The most blamable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to the temptation. He has been the real and only cause of the mishap." And the verdict for the plaintiff was sustained. *

Counsel Fees.—To the same general principle which we are now considering, the subject of counsel fees appears properly referable. The law awards to the successful party his taxable costs, but the fees which he pays to counsel are not taken into consideration.[1]

So in an action of assumpsit † the Supreme Court of Massachusetts said, that "the expenditure for counsel fees is an item ordinarily to be borne by the suitor, except so far as it may be remunerated by the taxable costs for the travel and attendance of the party, and the allowance of an attorney's fee." "In actions of debt, covenant, and assumpsit, the plaintiff can recover but legal costs as compensation for his expenditure in the suit, and as punishment to the defendant for his unjust detention of the debt." ‡

* Lynch *v.* Nurdin, 1 Queen's B. Rep. 29 (41 Eng. C. L. Rep. 422.)

† Guild *v.* Guild, 2 Met. 229.

‡ Stimpson *v.* The Railroads, 1 Wallace, Jr. 164, per Grier, J.

[1] Haverstick *v.* The Erie Gas Co. 29 Penn. 254. See, as to the allowance of counsel fees as damages, *post*, 179.

We have already had occasion to notice that legal relief is at best but partial.* Under the Roman law the successful party was not restricted to a suit for malicious prosecution, and the party justly chargeable with making a totally ungrounded claim or defence, was punished by a pecuniary mulct. And this, at one time, seems to have been adopted into the jurisprudence of modern Europe. Francis the First, by his ordinance of 1539, Art. 88, authorized the judge to inflict damages proportioned to the "temerity" of the losing party.† And so, too, in England, originally it seems that the plaintiff, in all cases of unsuccessful litigation, might be amerced *pro falso clamore*, and the amerciament [*a merci*, Fr.] was affeered [*affier*, Fr.], or assessed, by the court or its officers. This power, however, no longer exists, and in cases of contract no redress is given beyond the taxable costs. Even in cases the most frivolous and vexatious, in no case is any independent redress given, *i. e.*, by a recriminatory action, unless the first suit or proceeding be malicious. Malice and want of probable cause must concur.‡[1] This principle is rigorously applied to counsel fees in all cases of contract, and, without discrimination, to both parties to the litigation.[2] We are now speaking of counsel fees in the principal suit, for, as we shall see when we come to investigate the subject of the covenant of seizin, that of principal and surety, and some others, counsel fees in former suits are frequently allowed.‖ So in Connecticut, in an action of assault and battery, where, in consequence of the death of a juror, a second trial became necessary, it was held that the jury, in estimating the damages, might take into consideration the expenses of the first trial.¶ But in suits brought on contracts, counsel fees in those particular suits have never been allowed. [96]

In actions of tort, different opinions have been pronounced.

* *Ante*, 33–37.

† Merlin; Repertoire, in voc. Dommages-Intérêts.

‡ Savil *v.* Roberts, 1 Salk. 14; Purton *v.* Honnor, 1 Bos. & Pull. 205; Vanduzor *v.* Linderman, 10 J. R. 106; Donnell *v.* Jones, 13 Ala. (N. S.) 490, 501.

‖ Staats *v.* Ex'rs of Ten Eyck, 3 Caines, 111; Kingsbury *v.* Smith, 43 N. H. 122; Swett *v.* Patrick, 3 Fairf. 9; Beale *v.* Thompson, 3 B. & P. 407; Pitkin *v.* Leavitt, 13 Vt. 379; Allen *v.* Blunt, 2 Wood & M. 121.

¶ Noyes *v.* Ward, 19 Conn. 250.

[1] The South Royalton Bank *v.* The Suffolk Bank, 27 Vt. 505; Gould *v.* Gardner, 11 La. Ann. 289; Lisk *v.* Mathis, *Ib.* 418; Kearney *v.* Holmes, 6 *Ib.* 373. And see Forbes *v.* Geddes, *Ib.* 402.

[2] Newell *v.* Sanford, 13 Iowa, 463. Where the plaintiff had delivered to the defendant a quantity of stone, on the false and fraudulent representation of the latter that it was ordered by A, and had failed in an action against A for the price; it was held that the plaintiff was entitled to recover from the defendant, not only the value of the stone, but also the costs incurred in the former action. Randell *v.* Trimen, 37 Eng. L. & E. 275. See *ante*, 78, note 2.

There may be, and often are, cases nominally in tort, where no actual wrong in the moral sense of the term is complained [97] of, and it is in these cases that the question properly arises; for where the act complained of is tainted by fraud, malice, or insult, the jury which has power to punish has necessarily the right to include the consideration of the probable counsel fees in their estimate of vindictive or exemplary damages. Perhaps this distinction has not been sufficiently kept in mind.

In Massachusetts, the Supreme Court has refused to allow counsel fees in an action on the case for setting a fire on the defendant's own land, whereby the plaintiff's wood was consumed, holding that it was immaterial with reference to the damages, whether the accident resulted from *gross negligence*, or merely the want of *ordinary care*.* "It is now well settled," said the court, "that even in an action of trespass or other action sounding in damages, the counsel fees and other expenses of prosecuting the suit, not included in the taxed costs, cannot be taken into consideration in assessing damages." And the Supreme Court of New York have laid down the same rule in an action on the case for negligence, against a railroad, for injuries to the person, which we have already noticed." †[1]

But in an action on the case brought in Connecticut, these decisions were reviewed; and after stating the rule allowing vindictive or exemplary damages, the court proceeded to use this sound and logical language:—

"The argument in opposition to the doctrine of the charge is substantially founded upon the assumed principle, that the defendant cannot be subjected to a greater sum in damages than the plaintiff has actually sustained. But every case in which the recovery of vindictive damages has been justified, stands opposed to this argument. And we cannot comprehend the force of the reasoning

* Barnard *v.* Poor, 21 Pick. 378. The decisions on this subject in Massachusetts, curiously illustrate the oscillations of the judicial pendulum. In Cole *v.* Fisher, 11 Mass. 137, where trespass was brought, it was said that whether the action should have been trespass or case was immaterial, because the expenses of the first suit would be a ground of further damage. In Rice *v.* Austin, 17 Mass. 197, a case of trespass, but without aggravation, the court were divided as to the allowance of counsel fees. In Leffingwell *v.* Elliot, 10 Pick. 204, on the covenants against incumbrances and warranty, they were disallowed, and finally, in Barnard *v.* Poor, 21 Pick. 378, they were rejected in an action of trespass for gross negligence. It is very plain, that whatever may be the merit of these cases, they do not support each other; they are not in *pari materia*.

† Lincoln *v.* Saratoga and Schenectady R. R. Co. 23 Wend. 425; *supra*, 85.

[1] So in South Carolina, Welch *v* The Northeastern R. R. Co. 12 S. C. (Rich.) 290. And in New York it has been held error for the judge, in an action of slander, to charge the jury that in awarding the damages they might take into consideration the expenses to which the plaintiff had been put, by being compelled to come into court to vindicate her character. Hicks *v.* Foster, 13 Barb. (N. Y.) 663.

which will admit the right of a plaintiff to recover as vindictive damages, beyond the amount of injury confessedly incurred, and in case of an act [98] and injury equally wanton and wilfully committed or permitted, will deny to him a right to recover an actual indemnity for the expense to which the defendant's misconduct has subjected him. In the cases to which we have been referred in other States, as deciding a different principle, the courts seem to have assumed that the taxable costs of the plaintiff are his only legitimate compensation for the expense incurred. If taxable costs are presumed to be equivalent to actual necessary charges as a matter of law, every client knows as a matter of fact they are not. And legal fiction should never be permitted to work injustice." *[1]

And in Alabama, in an action for malicious prosecution, the Supreme Court has said, while recognizing the conflict of authority, "We can readily perceive the justice and good sense of the rule which requires a party who wantonly and maliciously

* Linsley *v.* Bushnell, 15 Conn. 225.

[1] In the same State it is now well settled, that in cases where there is malice or wantonness in the injury, the expenses of the litigation may be included in the damages. Welch *v.* Durand, 36 Conn. 82; Platt *v.* Brown, 30 Conn. 336; St. Peter's Church *v.* Beach, 26 Conn. 355; Dibble *v.* Morris, 26 Conn. 416; Ives *v.* Carter, 24 Conn. 392; Beecher *v.* Derby Bridge Co. 24 Conn. 491; also, Linsley *v.* Bushnell, 15 Conn. 225; Huntley *v.* Bacon, 15 Conn. 71, cited *post*, 460. So in Ohio, the Supreme Court of that State use the following language: "The authorities are not uniform; but the better opinion now seems to be that in actions *ex contractu* and in cases nominally in tort, but where no wrong in the moral sense is complained of, the fees of counsel ought not to be included; but in cases where the act complained of is tainted by fraud or involves an ingredient of malice or insult, the jury which has power to punish has necessarily the right to include the consideration of a proper and reasonable counsel fee in their estimate of the damage." Roberts *v.* Mason, 10 Ohio St. 277. But although in this and some other States counsel fees are permitted to be considered by the jury in fixing the damages,—and indeed can practically hardly be excluded from their consideration where, in actions of tort, the law does not furnish an exact measure,—it is difficult to see why such expenses should be allowed under the head of exemplary damages. The plaintiff's counsel fees are an expense incurred by him, and their reimbursement to him brings the measure of damages back towards the standard of compensation. It is an item of compensation, indeed, not usually allowed on what still seems to be the theory of the law, that every man can be his own advocate; but, nevertheless, it is really compensation. There is nothing especially punitory as regards the defendant in the fact that the sum in which he is mulcted happens in whole or in part to represent the counsel fees paid or incurred by his injured adversary. His payment to the plaintiff of a considerable sum is equally a punishment, whether the plaintiff have paid a like or less sum as counsel fees or not. Indeed, when the jury are permitted to break beyond the bounds which the law prescribes, having compensation only in view, it will be found, on analysis, we think, that every attempt to introduce other standards for their guidance will be futile. The allowance of counsel fees, or their supposed equivalent, in this class of cases, must be regarded as the result of an instinct or inclination on the part of the bench to return to the standard of compensation. (See *post*, 467, note.) Since writing the foregoing note, we have met with the case of Fairbanks *v.* Witter, 18 Wis. 287, in which similar views are expressed, the court saying: "Counsel fees can no more be allowed in actions where punitory damages can be given than in others;" and that if they can "be assessed by the jury, it must be on the principle that they are consequential damages, and relate to the amount of compensation, rather than refer to damages which may be inflicted by way of penalty or punishment for aggravated misconduct." And in Day *v.* Woodworth, 13 How. 363, the court say, alluding to the question discussed in the text, "The punishment of the defendant's delinquency cannot be measured by the expenses of the plaintiff in prosecuting his suit. It is true that damages, assessed by way of example, may thus indirectly compensate the plaintiff for money expended in counsel fees; but the amount of these fees cannot be taken as the measure of punishment, or as a necessary element in its infliction."

abuses the process of the court, or sues out an attachment for the purpose of worrying and harassing the defendant, without probable cause, to make good his losses, and to furnish complete reparation and indemnity for the injury his malice has occasioned;" and the defendant's counsel fees for defending the original suit, were allowed to be "proven and taken into consideration by the jury." *[1]

And it may, on principle, I think, be considered clear that in cases proper for the infliction of exemplary or vindictive damages, the jury in estimating those damages, have a right to take into their consideration the probable expense of the litigation. The question, however, still remains, whether counsel fees can be allowed in cases technically of tort, but where no actual fraud or malice is alleged.

In an action on the case for flowing back the water of a river in Maine, on the plaintiff's lands, although no malice was proved, Judge Story told the jury, "that for the purpose of giving a full indemnity, they might take into consideration such expenses of fees to counsel, and such other necessary expenses, as they might think were properly and fairly incurred;" and on a motion made for a new trial on the ground that the damages were excessive, the court refused to interfere.†

[99] But in an early case ‡ in the Supreme Court of the United States, of a libel filed by the Spanish consul, for restitution of a Spanish vessel captured by a French vessel, it appeared that a charge of sixteen hundred dollars for counsel fees in the courts below had been admitted; and the court said, "We do not think that this charge ought to be allowed. The general practice of the United States is in opposition to it."

In Patent Cases.—In an action for the violation of a patent right, ‖ Story, J., at the trial, considered it the established rule, in estimating damages in cases of mere tort, whether the action was for redress of a personal injury or the vindication of a personal right, to allow counsel fees and the expenses of witnesses, beyond the taxable costs, as items of actual damage; on a review of the question, however, he overruled his own decision, on the authority of the preceding case.

* Marshall *v.* Betner, 17 Ala. 833.
† Whipple *v.* Cumberland Manufacturing Co. 2 Story. 661.
‡ Arcambel *v.* Wiseman, 3 Dall. 306.
‖ Whittemore *v.* Cutler, 1 Gall. 429.

[1] Compare Burnap *v.* Wight, 14 Ill. 301.

But subsequently * the same learned judge examined the case of Arcambel *v.* Wiseman at length, and declared it shaken so far as it could be considered as containing any general doctrine; and in the principal case, which was a patent suit, "he returned to what he originally considered the true doctrine, namely, that the jury are at liberty, if they see fit, to allow the plaintiff, as part of his actual damage, any expenditure for counsel fees, or other charges which were necessarily incurred to vindicate the rights denied under his patent, and are not taxable in the bill of costs." It is to be borne in mind that these cases turned on the construction of the phrase "actual damage," in the Patent Law.† And he subsequently adhered to the doctrine.
In one of the latest cases tried before him on the Rhode [100]
Island circuit, he used this language: "If the plaintiff has established the validity of his patent, and that the defendants have violated it, he is entitled to such reasonable damages as shall vindicate his right, and reimburse him for all such necessary expenditures as have been necessarily incurred by him beyond what the taxable costs will repay, in order to re-establish that right. . . . . My understanding of the law is, that the jury are at liberty, in the exercise of a sound discretion, if they see fit (I do not say that they are positively and absolutely bound under all circumstances), to give the plaintiff such damages, not in their nature vindictive, as shall compensate the plaintiff fully for all his actual losses and injuries, occasioned by the violation of the patent by the defendants." ‡

But on the Pennsylvania Circuit, the correctness of these decisions has been denied. It was said that this doctrine had been introduced from courts of admiralty, which could not afford proper precedents for tribunals following the course of the common law; that the term "actual damages" in the Patent Act did not countenance the doctrine; and that if permitted, it would introduce a great inequality between the plaintiff and

* In the Boston Manufacturing Co. *v.* Fiske, 2 Mason, 120.

† In admiralty it has been since said, by the Supreme Court of the United States, to be the common course to allow counsel fees, either in the shape of damages, or as part of the costs, and that, as well on the instance as the prize side of the court; and such an allowance was once made to the extent of five hundred dollars. The Appollon, 9 Wheat. 163; and Canter *v.* American and Ocean Ins. Company, 3 Peters, 307. In the Mary, 9 Cranch, 126, a capture case, though the libel was dismissed, the captors were allowed their reasonable *costs and expenses*, on the ground that there was probable cause of capture.

In the Amiable Nancy, 3 Wheaton, 546 and 562, costs and expenses were allowed.

In the Venus, 5 Wheaton, 127, captor's costs and expenses were allowed. And the same decision was made in the case of the London Packet, 5 Wheaton, 122. These cases are cited by the learned reporter at the end of the above case, but unless "expenses" include "counsel fees," they do not bear upon the question.

‡ Pierson *v.* Eagle Screw Co. 3 Story, 402; and so, too, held by Judge Woodbury, in the same circuit, Allen *v.* Blunt, 2 Woodb. & M. 121.

the defendant, who could in no case recover his counsel fees;[1] and on these grounds counsel fees were declared not capable of being included in the estimate of the plaintiff's damages.*[2]

NOT ALLOWED WHERE NO AGGRAVATION.—The question had been previously considered on the same circuit, in an action of trespass against the marshal of the United States, for making an illegal levy on certain teas; and no circumstances of aggravation being shown, Mr. Justice Baldwin held that, this being so, the jury could not allow the plaintiff his counsel fees by way of damages. He said:—

"It may be thought a hardship that the plaintiffs shall not be allowed their actual disbursements in recovering their property; but the hardship is equally great in a suit for money lent, or to recover possession of land; they are deemed in law losses without injury, for which no legal remedy is afforded. I am, therefore, of opinion that you cannot, in assessing damages in this case, allow any of the items claimed by the plaintiffs for disbursements, they being consequential losses only, and not the actual or direct injury to the property which they have sustained by its seizure and detention, for which alone they are entitled to [101] recover damages in this case, it not being attended with any circumstances of aggravation on the part of the defendant. Had there been any such, a very different rule would have been applied, by reimbursing the plaintiffs to the full extent of all their expenses and consequential losses." †

And so far is the principle carried the other way in Massachusetts, that a trustee (or garnishee), in whose hands the funds of the debtor are found, can retain nothing to meet the expenses of litigation.‡

It is not easy to say what should be the general rule on the subject, though it is evident that great incongruity has crept in. Nothing is more difficult than to fix the precise limit to which society should go in awarding reparation by means of its civil tribunals. Legal relief is at the best extremely imperfect; and

* Stimpson *v.* The Railroads, 1 Wallace, Jr. 164.

† Pacific Ins. Co. *v.* Conard, 1 Baldwin, 138.

‡ Adams *v.* Cordis, 8 Pick. 260.

[1] And in the case of the Margaret *v.* The Conestoga, 2 Wallace, Jr. 116, the same learned judge (Mr. Justice Grier), while apparently admitting the discretionary power of the Admiralty Court to allow counsel fees, expressed his strong repugnance to its exercise, saying that the principle partook rather of the Hall of the Cadi than the judgment-seat of the court. See Day *v.* Woodworth, 13 How. 363; also, Blanchard's Gun Stock Turning Factory *v.* Warner, 1 Blatchf. C. C. R. 258, in a note to which case it is mentioned that by the practice adopted in patent suits, in the Circuit Court of the United States for the Second Circuit, the plaintiff's expenses and counsel fees will not be allowed to him as part of his damages. As to allowance of costs where a disclaimer has been entered, see Seymour *v.* McCormick, 19 How. 96; Guyon *v.* Serrell, 1 Blatchf. C. C. R. 244.

[2] Counsel fees in patent cases are no longer allowed. (*Post*, 573, n.)

the charges of counsel are a very formidable item in those expenses which tend so largely to reduce to the plaintiff the real benefit of his recovery; while on the other hand, it may be said with great force, that the questions submitted to legal discussion are often so vexed, that it is very doubtful whether the prevailing party is really entitled to a complete reimbursement; and that if absolute indemnity were given, a great stimulus would be furnished to litigation.

But at all events, the same rule should be applied to all cases that contain no element of actual fraud, malice or vexation; the plaintiff and defendant should be treated alike; and whether the form of the action be *ex contractu* or *ex delicto*, the remuneration, as far as counsel fees are concerned, should be similar. "If this principle be introduced from the civil law," says Mr. Justice Grier on the Pennsylvania Circuit, "both parties should have the benefit of it; a defendant should not be left to contend with such odds against him. In actions of contract, the plaintiff can recover but legal costs. His equity is no greater, nor his injury of a higher order when his action is for a trespass or a tort." * [1]

PROSPECTIVE DAMAGES.—Principles analogous to those which we are now considering, also govern the allowance of damages which arise after the commencement of the suit, or as they are sometimes termed, prospective damages. The [102] rule is perfectly clear and imperative, that where the act complained of, which is the origin of the damage, took place after suit brought, it cannot be given in evidence. So where † debt was brought against the marshal of the Marshalsea, for an escape, and the plaintiff offered to give evidence of an escape after the commencement of the suit, and before the time of pleading, Tindal, C. J., of the Common Pleas, said, "It is quite clear that the plaintiff can derive no aid from anything occurring after the commencement of the action."

In a recent action for a libel, which had led to the plaintiff's arrest, both before and after the commencement of the suit, it was held that the defendant might insist that all that took place

* Stimpson *v.* The Railroads, 1 Wallace, Jr. 164.

† Davis *v.* Chapman, 3 Scott, New Rep. 238.

[1] See to the same effect, Day *v.* Woodworth, 13 How. 563. Where the mayor and council of Macon, Ga., under discretionary power given in their charter, removed the marshal from office, which removal was subsequently found to be improper; *Held*, that they were bound to pay his salary for the whole year; but not the money expended by him in defending the charges preferred. His damages were defined to be such as necessarily resulted from his amotion from office. Shaw *v.* The Mayor, &c. of Macon, 19 Ga. 468.

subsequent to the bringing of the action should be excluded from the consideration of the jury; but that after consenting to the admission of evidence in regard to what took place after the commencement of the suit, the jury were at liberty to take it into consideration.* So in slander, no evidence can be given of words spoken after the commencement of the action.†[1]

But where the act complained of was committed before suit brought, and a good cause of action exists, it often becomes a question whether any allowance can be made for prospective damages, or damages which accrue after action brought. "The general rule in personal actions," says Chief Baron Comyns, "is that damages are allowed only to the time of the action commenced."‡ "Judgments," says the Constitutional Court of South Carolina, "generally refer to the situation of the parties at the commencement of the suit. If at that time the plaintiff had no cause of action, he must suffer a nonsuit. It is then the defendant is informed of the wrong with which he is charged, and the redress which is demanded. The declaration, which is but an amplification of the writ, must set forth the form and manner of injury, to enable the defendant to file the pleas necessary to his defence, and the judgment must correspond with the pleadings. If new matter be introduced subse-
[103] quent to the pleadings, the defendant may be surprised, and the judgment of the court may not conform to the pleadings."‖

So in an early action on the case, where the plaintiff declared for procuring his apprentice to depart from his service, and for the loss of his service for the whole residue of the term of his apprenticeship, and the jury assessed damages generally, judgment was arrested, because it appeared that the term was not expired at the commencement of the suit.¶[2] So, too, in Massachusetts, it has been said, "The cases are decisive that by the common law the plaintiff can recover damages only to the time

* Goslin *v.* Corry, 7 Mann. & Gr. 343.

† Root *v.* Lowndes, 6 Hill, 518; Keenholts *v.* Becker, 3 Denio, 346.

‡ Comyn's Digest, Damages, D; and Robert Pilfold's Case, 10 Coke, 117.

‖ Duncan *v.* Markley, 1 Harper's Rep. 276.

¶ Hambleton *v.* Veere, 2 Saund. 196.

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[1] And so, too, in libel. Philadelphia, Wilmington, and Baltimore R. R. Co. *v.* Quigley, 21 How. (U. S.) 202.

[2] So, too, lately held the English Exchequer, on the ground, however, that the contract of apprenticeship was by deed and still binding on the parties. (1862.) Lewis *v.* Peachy, 1 H. & C. 518. Compare Moore *v.* Love, 3 Jones (N. C.), L. 215. In New York, in an action to recover damages for enticing the plaintiff's son away, and inducing him to enlist in the army for three years, as a substitute for the defendant, it was lately held by the Supreme Court that the plaintiff could only recover to the time of the commencement of the action, or at most to the time of the trial. Covert *v.* Gray, 34 Howard's Pr. R. 450. Balcom, J., dissented.

of bringing the action, and that in this respect there is no distinction between actions of covenant and of tort." * [1]

But the application of this general principle is often attended by serious embarrassment, both in actions of covenant and of tort; the former where the agreement covers a long space of time, and the latter where the wrongful act is followed by injurious consequences. The question is, in the former case, whether the agreement is to be treated as a continuing one, and a fresh action brought for every breach, or whether on the first breach final damages must be assessed.[2] And so in regard to torts, whether but one action can be brought, or whether a new suit must be had for the consequences after they have appeared.†

DIRECT CONSEQUENCES MAY BE CONSIDERED.—As a general proposition, it may be said that the plaintiff is at liberty to prove, and the jury are bound to take into consideration, those direct and immediate consequences of the act complained of, which are so closely connected with it that they would not of themselves furnish a distinct cause of action.[3] But it is very difficult in many cases to define the point where the law will stop in the investigation of these probable consequences. The question was early considered by Lord Holt in a case of tort.‡ The plaintiff declared of a battery, alleging that he had previously brought an action for it against the defendant, and recovered £11, and no more; and that afterwards part of his skull, by reason of the said battery, came out of his head, and for this subsequent damage the suit was brought. The [104] defendant pleaded the recovery in bar, and demurrer. And Shower, *pro querente*, argued, "that if a consequence will take away an action, for the same reason it will give an action." But judgment was given for the defendant, the whole court being of opinion "that the jury, in the former action, considered the nature of the wound, and gave damages for all the damage that it had done the plaintiff." The case was moved

* Powers *et al. v.* Ware, 4 Pick. 106; Pierce *v.* Woodward, 6 Pick. 206. See, also, Catherwood *v.* Caslon, 1 Car. & Marsh. 431.

† We shall have occasion to discuss this subject again under the head of Contracts, ch. vii, in speaking of continuing Agreements.

‡ Fetter *v.* Beal, 1 Lord Raymond, 339; s. c. 1 Salk. 11.

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[1] Additional damage from the continued withholding of the conveyance of real estate sustained after the commencement of a suit for breach of a contract to convey it, cannot be recovered in that action, but may in a subsequent one. Warner *v.* Bacon, 8 Gray, 397. See Gordon *v.* Brewster, 7 Wis. 355.

[2] See Closs'man *v.* Lacoste, 28 Eng. L. & E. 140.

[3] Chamberlain *v.* Porter, 9 Minn. 260; Cooke *v.* England, 27 Md. 14.

again,* when Holt, C. J., said, "If this matter had been given in evidence as that which *in probability might have been* the consequence of the battery, the plaintiff would have *recovered damages for it.* The injury, which is the foundation of the action, is the battery, and the greatness or consequence of that is only in *aggravation of damages.*" [1]

So where the defendant was employed as an attorney, to investigate securities on which a loan was to be made, and it was alleged that he had neglected to use proper care, and that the securities had proved defective, that a large amount of interest was lost, and that probably a portion of the principal would be also lost; the statute of limitations was pleaded, and it appeared that the examination of the title took place in 1814; but that the insufficiency was not discovered till 1820, up to which time the interest was paid. It was insisted that the statute ran, not from the time when the insufficient security was taken, but from the period when the special damage alleged in the declaration, namely, the loss of interest, accrued. But the statute was held a good bar, and Holroyd, J., said, "If the action had been brought immediately after the insufficient security was taken, the jury would have been bound to give damages for *the probable loss* which the plaintiff was likely to sustain from the invalidity of the security." † And the authority of this case was very recently recognized in the Court of Chancery, by Mr. Vice-Chancellor Wigram. ‡

In a very analogous case, an action of assumpsit against an attorney for negligence, the Supreme Court of the United States said, "When the attorney was chargeable with [105] negligence, his contract was violated, and the action might have been sustained immediately. Perhaps, in that event, no more than nominal damages may be proved, and no more recovered; but, on the other hand, it is perfectly clear that the proof of actual damages may extend to facts that occur and grow out of the injury, even up to the day of the verdict." ‖ But where the act itself is lawful, and the action is sustained only in consequence of special damage, as in the case of an overflow

* Fetter *v.* Beal, 1 Lord Raymond, 692.

† Howell *v.* Young, 5 B. & Cres. 259. See Gillon *v.* Boddington, 1 R. & M. 161.

‡ Smith *v.* Fox, 12 Jur. 130 (21 and 26 January, 1848). See 2 Saund. by Williams, n. 63, E.

‖ Wilcox *et al. v.* Ex'rs of Plummer, 4 Peters, 172 and 182.

[1] In an action for assault and battery, the plaintiff may recover for damages accruing after the commencement of the suit, provided they are the direct and natural consequences of the battery. Birchard *v.* Booth, 4 Wis. 67. So in an action by a husband against a railway company for an injury to his wife, his expenses for her cure incurred after the bringing of the suit were allowed. Hopkins *v.* Atlantic & St. Lawrence Railroad, 36 N. H. 9.

of lands by reason of a culvert being negligently erected by a railroad company, here the statute only begins to run from the time that the consequential injury occurred.*

In Kentucky, also, the rule is recognized that loss, accruing subsequent to the suit, may be recovered, where the subsequent damages are the mere incident or accessory of the principal thing demanded, and no action can be maintained for them.† But in the same State, in an action on the case for diverting the water of a stream, it was held by the Court of Appeals, that the plaintiff could legally recover only for damages he had sustained up to the commencement of the suit. ‡[1] And so in South Carolina, in an action on the case for damages occasioned by a nuisance, damages sustained after action brought have been held not to be recoverable. ‖[2]

In New York, also, the same rule has been laid down in a similar case, brought by tenant for one year, against his landlord for obstructing his lights; but in delivering its judgment, the court said, "Suppose the lease to have contained a covenant not to obstruct the light, and the action to have been brought on such covenant, the rule of damages would be otherwise; for the covenant being a single cause of action, one recovery on it would be an absolute bar to any further action." ¶[3]

PROSPECTIVE DAMAGES IN CONTRACT.—And this brings us to the consideration of the subject of prospective damages, as connected with cases of contract.[4]

The rule arbitrarily limiting the damages to the commence-

* Delaware and Raritan Canal Co. *v.* Wright, 1 Zabriskie's New Jersey Rep. 469.

† Trigg *v.* Northcut, Lit. Sel. Cas. 414.

‡ Langford *v.* Owsley, 2 Bibb, 215. In Illinois, see Greenup *v.* Stoker, 2 Gilman, 688.

‖ Duncan *v.* Markley, 1 Harper's Rep. 276.

¶ Blunt *v.* McCormick, 3 Denio, 283.

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[1] And see Shaw *v.* Etheridge, 3 Jones (N. C.) L. 300.

[2] So in Alabama in an action for damages for overflowing lands. Polly *v.* McCall, 1 Ala. Select Cases, 246.

[3] For obstructing the plaintiff's right of way, or for unlawfully excluding the light from his doors and windows, the damages are to be assessed, not to the time of trial, but to the date of the writ. Cole *v.* Sprowl, 35 Me. 161; see Fettretch *v.* Leamy, 9 Bosw. 510.

In case for a nuisance, if the act done is necessarily injurious, and is of a permanent nature, the party injured may at once recover his damages for the whole injury. But if the act done is not necessarily injurious, or if it is contingent whether further injury may arise, the plaintiff can recover damages to the date of his writ only. The Town of Troy *v.* The Cheshire Railroad Co. 3 Fost. (N. H.) 83.

[4] Rents and profits, in an action therefor, are recoverable only up to the date of the writ. Larrabee *v.* Lambert, 36 Me. 440. In a suit upon a bond, commenced after a breach, the damage occurring during its pendency may be included in the judgment; also compensation for necessary services rendered and expenses paid in relation thereto. Gennings *v.* Norton, 35 Me. 308. In a suit upon a bond binding the obligor not to exercise a trade within certain limits of time and place, damages may be recovered for the breach that are sustained, even after the date of the writ, and up to the time of trial. Whitney *v.* Slayton, 40 Me. 224.

ment of the suit, was so long adhered to, that up to the
[106] time of Lord Mansfield, even in actions of assumpsit, it seems to have been the practice to compute the interest only to the time of the bringing of the action; that great judge, however,* declared the true doctrine, and said, "It is agreeable to the principles of the common law, that whenever a duty has been incurred pending the writ, for which no satisfaction can be had by a new suit, such duty shall be included in the judgment to be given in the action already depending." But "in trespass and in tort new actions may be brought as often as new injuries and wrongs are repeated, and therefore damages shall be assessed only up to the time of the wrong complained of."

So, if by reason of any default, a party is made liable to pay money, the right of action is vested, and suit can be maintained against the one in default. And on the trial evidence may be given, and recovery had of sums paid subsequent to the commencement of the suit, by reason of the previous liability. But in these cases it is necessary that care should be taken to make the declaration broad enough to cover the expenses to which the plaintiff is apprehensive he may be put. Thus where suit was brought on an agreement to assign certain premises to the plaintiff, and the breach assigned was that the defendant did not make out a good title, by reason whereof the plaintiff had been necessarily "put to great expense," in and about investigating the title, the plaintiff sought to recover the amount of his attorney's bill and broker's bill, both of which had been paid after the commencement of the suit. It was insisted that the allegation of damages was erroneous, and that merely being liable to pay, he had not been *put to expense.* But it was held sufficient by the Queen's Bench, Lord Denman, C. J., saying, "If the plaintiff alleges he has paid money, he must prove it; but if he says that he has been put to expense, I think we may fairly hold that such an allegation amounts to no more than that the plaintiff has incurred the liability to pay certain expenses."† [1]

So in Massachusetts, in suits on the covenant of warranty and against incumbrances, the plaintiff may recover the

* Robinson *v.* Bland, 2 Burr. 1077 and 1086.

† Richardson *v.* Chason, 10 Q. B. R. 756; and see the cases there cited.

[1] An allegation of *payment* of a physician's or attorney's bill, is not sustained by proof of its having been incurred. Pritchett *v.* Boevey, 1 C. & M. 775; Jones *v.* Lewis, 9 Dowl. P. C. 143; Ward *v.* Haws, 5 Minn. 440.

amount fairly and justly advanced to remove the incum- [107]
brance, though paid after the suit begins.*[1]

So where the plaintiff sued the defendant on a contract made in 1810, to deliver spring wheat, alleging that the plaintiff had re-sold the wheat to one Shephard as spring wheat, but that it was in fact winter wheat, and that in consequence thereof it failed; hereupon Shephard sued the plaintiff, and recovered a judgment, which the plaintiff paid in 1818, and then brought this suit. The statute of limitations was pleaded, and the Court of King's Bench held it a good bar, saying that the breach of contract was the gist of the action, and that the special damage was stated merely as a measure of the damages resulting from that cause of action; and Bailey, J., said, "If the plaintiff had failed in proving the special damage in the case, it would not have been a ground of nonsuit." †

CONTINUING AGREEMENTS.—The subject which we are now considering is closely connected, as I have said, with that of continuing agreements, or agreements covering a long space of time.[2] In an action of covenant by trustees of a wife against the husband, on his covenant to pay off certain incumbrances within twelve months, although no special damage was laid or proved it was held that the plaintiffs were entitled to a verdict for the whole amount of the incumbrances. ‡

We have already seen that the day of the breach of a covenant to pay for articles furnished for a building is in New York held the time at which the damages are to be estimated, provided the plaintiff elects to consider it in that light, although the covenant is broken before the time fixed for full performance. ‖

And thus, perhaps, we are furnished with the elements of a sound and reasonable rule; which varies, however, as the case is one of contract or of tort. If the former, and if the original breach of contract is such that the plaintiff, at all events, would be entitled to nominal damages, then he can go on to give in evidence those consequences of the act which are im- [108]

* Leffingwell *v.* Elliott, 10 Pick. 204; Brooks *v.* Moody, 20 Pick. 474.

† Battley *v.* Faulkner, 3 B. & Ald. 288. It may, perhaps, be doubted whether the damage here complained of was not too remote to be taken into consideration, but the question does not appear to have been discussed.

‡ Lethbridge *v* Mytton, 2 B. & Ad. 772.

‖ *Supra*, 76; Masterton *v.* Mayor, &c. 7 Hill, 72.

[1] In an action for breach of an agreement to withdraw another suit, the costs of the plaintiff in the former action, who is the defendant in this, may be recovered if paid by the plaintiff in this at any time before verdict. Hagan *v.* Riley, 13 Gray (Mass.), 515.

In Indiana, in the action of disseizin as regulated by the Code of Procedure, damages may be recovered up to the trial. Pendergast *v.* M'Caslin, 2 Ind. 87.

[2] See Shaffer *v.* Lee, 8 Barb. (N. Y.) 413, where many cases on this subject are reviewed. (*Post*, 226.)

mediately traceable to it, although they have taken place after the commencement of the suit.*[1] The English decisions are founded on the idea that damages are to be given for the *probability* of loss, as said by Holroyd, J., in Howell *v.* Young;† but it appears to us that in cases of contract the American rule, as we have seen suggested above by the Supreme Court of the United States, in Wilcox *v.* Plummer's Ex'rs,‡ is the more correct. ‖

In Contract Future Damages must be Certain.—*Actual compensation* should never be given for merely *probable damage.* If there is a breach of contract, the right to nominal damages exists at once to vindicate the right, and suit may be brought; if those consequences of the act for which the law renders the party in default responsible, have developed themselves so as to create absolute injury before the verdict, the jury are bound to give compensation for such injury; but if at the time of trial the loss is still only probable, the verdict should be but for nominal damages. The question in regard to continuing agreements, or agreements covering a long space of time, although frequently confounded with the one under consideration, is in truth wholly distinct from it. Where an agreement covers a long period and is broken, there is no doubt that suit may be brought at once. Nor is there any doubt that prospective damages for the whole time covered by the contract may be obtained. A question has indeed been raised whether the day of the breach is to fix those damages; that is, whether they are to be computed according to the state of things existing on that day, and on the assumption that such state of facts would not change during the time the agreement has to run, or whether proof should be gone into as to any fluctuations that may have taken place prior to the trial of the cause, and the rights of the parties determined by the precise facts. But this is rather a question of evidence, which we shall consider more at large hereafter. It does not touch the question of prospective damages, which in cases of contract is governed by the rule stated above.[2]

* The authority of the English cases, as to the effect of the statute of limitations, has been recently recognized in New York. Rodman *v.* Hedden, 10 Wend. 498.

† *Supra*, 107.

‡ *Supra*, 107.

‖ See this question ably discussed, but left undecided, in Alabama, in Snedicor *v.* Davis, per Chilton, J. 17 Ala. 472.

[1] Where a tenancy at will is wrongfully terminated by the landlord, the tenant's damages are not restricted to the beginning of the suit, but he may recover such damages as are the direct result of his expulsion, up to the time when the tenancy might be lawfully determined. Palmer *v.* Crosby, 1 Blackf. 139; Ashley *v.* Warner, 11 Gray, 43.

[2] The true criterion whether a party can recover damages for non-performance of the whole

RULE IN TORT.—But, on the other hand, if the case be tort, and the wrong done before suit brought, then the [109] plaintiff is not limited solely to the consequential damage which has actually occurred up to the trial of the cause, but he may go on to claim relief for the prospective damage which can then be estimated as reasonably certain to occur.[1] So in an action of tort for wounding the plaintiff's servant, the jury may give damages for the loss of service, not only before action brought, but afterwards, down to the time when, as appears in evidence, the disability may be expected to cease.* And therefore fresh damage merely will not give a fresh action, and a judgment in a suit founded on a single act of tort, will be a conclusive bar to a second suit for the same injury, although harmful consequences made have made themselves apparent subsequent to the first suit; as it will be held that in the first verdict the plaintiff recovered all he was entitled to claim.[2] But where there is a repetition or continuation of the trespass, then of course a fresh action will lie; in other words, as it is sometimes said, injury and damage must concur.[3]

The decisions which we have thus reviewed, show that the rule is by no means universal that the rights of either party, whether plaintiff or defendant, are absolutely concluded by the state of facts at the time of the commencement of the suit. As many events which occur, or which appear certain to occur, after suit brought, may increase the plaintiff's demand; so there may

* Hodsoll *v.* Stallebrass, 11 Ad. & E. 301. And this decision has been fully adopted in a well-reasoned case in Vermont. Adm'r of Whitney *v.* Clarendon, 18 Verm. 252; but see the dissenting opinion of C. J. Williams.

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contract, and so for damages not sustained when the action is brought and the suit tried, is whether there has been such a breach of the contract as authorizes the plaintiff to treat it as entirely ended. Remelee *v.* Hall, 31 Vt. 582.

[1] Russ *v.* The Steamboat War Eagle, 14 Iowa, 363; Curtiss *v.* Rochester & Syracuse R. R. Co. 18 N. Y. 534; *ante*, 85. So in an action in the nature of waste. Hicks *v.* Herring, 17 Cal. 566. So where one had let a slave for a specified time to another, from whose possession it was immediately taken by a third party, it was held in Missouri that the owner might recover the value of the slave's services from the wrong-doer for the whole term, although the suit was brought before it had ended. Moore *v.* Winter, 27 Mo. (6 Jones) 380. But where the reasonable certainty required by the language of the text does not exist, prospective damages cannot be allowed. And where the court awarded as damages for digging a ditch on the plaintiff's land, a sum sufficient to pay the expense of filling the ditch and restoring the land to its previous condition, the measure was held erroneous, because this expense might never be incurred, and might exceed the injury sustained, which should furnish the measure of damages. De Costa *v.* Massachusetts Flatwater Mining Co. 17 Cal. 613.

[2] Where, in an action for breaches of a covenant, the plaintiff was entitled to damages accruing subsequently to the bringing of the suit, but under the erroneous instruction of the court, damages to the time of the trial only were given,—*Held*, that this afforded no ground for bringing another action for the same breaches. Winslow *v.* Stokes, 3 Jones (N. C.), L. 285.

[3] Plate *v.* N. Y. Central R. R. Co. 37 N. Y. 472. See, as to consequential damages in cases of marine insurance, *post*, 251, note.

many defences arise after the bringing of the action, which will be fatal to it.

PLEADING.—The question has often been discussed whether such defences can be shown under the general issue, or must be specially pleaded. In an early case, where the captain of a man-of-war was sued by the master of a trading vessel which he had seized as a smuggler, he was allowed by Lord Mansfield to prove, under the general issue, a certificate of probable cause, which was a flat bar to the action, although given several months after suit brought, but before plea pleaded.* But this doctrine has been since overruled. And it is now settled that where a [110] matter of defence arises after action brought, it should be pleaded; and not merely in bar of the action, but specially pleaded in bar of the further maintenance of the suit; as where the plaintiff has become an alien enemy after bringing his action.† And if it arises after the plea put in, it must be pleaded *puis darrein.* The principle of these cases has been recognized in this country.‡ So payment after action brought cannot be given in evidence under the general issue. ‖[1] In the King's Bench, however, where the declaration is considered the commencement of the suit, a payment after the writ, but before the declaration, can be given in evidence under the general issue. ¶

In a recent case in the Queen's Bench, in an action of trespass for taking goods, the defendant having pleaded only the general issue, it was held that he could not, even in mitigation of damages, give in evidence a repayment by him, after action brought, of money produced by the sale of the goods. And Lord Denman, C. J., said, "The rights of parties at the trial are the same as they were at the commencement of the suit; or if they are changed, a plea *puis darrein continuance* ought to place the new facts on the record. It is important to uphold the principle that a plaintiff is entitled to recover, by way of damages, all that at the commencement of the suit he has lost through the wrongful act for which the defendant is sued."** We shall have occasion to refer to this subject again when treating of Recoupment.††

* Sullivan *v.* Montague, Doug. 106.
† Le Bret *v.* Papillon, 4 East, 503; Lee *v.* Levy, 4 Barn. & Cres. 390.
‡ Covell *v.* Weston, 20 J. R. 414.
‖ Boyd *v.* Weeks, 2 Denio, 321.
¶ Worswick, Adm'r, *v.* Beowick, 10 Barn. & Cres. 676.
** Rundle *v.* Little, 6 Q. B. R. 174.
†† *Post*, ch. xvii.

[1] But see Dana *v.* Sessions, 46 N. H. 509.

Liability of Grantees of Franchises.—An important question connected with this branch of our subject has frequently presented itself, as to the liability of grantees of a public franchise, or the public agents of government, for consequential damages resulting from the exercise of the powers granted to them, as, for instance, in the case of canal and railroad corporations, or commissioners of public works. The question sometimes arises in actions of trespass, sometimes in actions on the case; but the rule is substantially the same, whatever the form of action. Where property is actually *taken* for the purposes of the public work, our constitutions generally declare that compensation must be made; but we are now considering the cases where immediate or consequential injury is inflicted. And the general rule is, that where, in the absence of any constitutional or statutory provision, the grantees or agents have not exceeded the power conferred on them, and [111] when they are not chargeable with want of due care, no claim can be maintained for any damage resulting from their acts; *actus legis nemini est damnosus.*[1]

Otherwise, it is said, the absurdity would follow that operations undertaken and conducted by virtue of the supreme authority, are unauthorized in the view of the law, and lay a foundation for damages. The proper light in which to regard the matter is, to consider the grantee of the franchise, or the public agent, so long as he does not transcend the authority conferred on him, as representing the government, and the government as acting under its right of eminent domain, subject of course to the duty to provide compensation, where that duty is imposed by the Constitution, and to that only.*[2] And the protection

* So in Pennsylvania, neither the State nor a person, artificial or natural, acting by its authority under a law which the legislature is competent to make, is answerable for consequential damages occasioned by the construction of a highway any further than is specially provided by the law itself. Henry *v.* Pittsburgh Bridge Co. 8 Watts & Serg. 85. See also, Callender *v.* Marsh, 1 Pick. 418, 430; Boston and Roxbury Mill Dam Corporation *v.* Newman, 12 Pick. 467; The Boston Water Power Co. *v.* The Boston and Worcester R. R. Co., 16 Pick, 512; and s. c. 23 Pick. 360; King *v.* The Severn and Wye Railroad Co. 2 B. & Ald. 646; Gov. & Co. of the British C. P. Manufactory *v.* Meredith, 4 T. R. 794; Sutton v. Clark, 6 Taunt. 29; Wardens and Commonalty of the Mystery of Grocers *v.* Donne, 3 Scott, 356: Bolton *v.* Crowther, 4 D. & R. 195; The King *v.* Commissioners

[1] So a party obstructing a stream by a railway built pursuant to legislative authority and thereby causing the lands of the adjacent proprietors to be overflowed, is liable only for so much of the injury as results from not providing necessary safeguards. Bellinger *v.* The N. Y. Central R. R. 23 N. Y. 42. See Kavanagh *v.* City of Brooklyn, 38 Barb. 232, where the same principle is applied to damage done by municipal corporations in making improvements authorized by law.

[2] See the City of Vincennes *v.* Richards, 23 Ind. 381. A municipal corporation is not liable for damage to private property, unless the act complained of was without authority of or against law, or was improperly or wantonly executed. Bennett *v.* City of New Orleans, 14 La. Ann. 120. And so of consequential damage caused by a turnpike company. Douglass *v.* Boonsborough Turnpike R. Co. 22 Md. 219.

is extended not merely to the immediate grantees of the
[112] franchise, or the immediate agents of the government, but to the sub-agents or inferior employees who are acting under the same general authority. The loss sustained in all such cases is *damnum absque injuriâ*.* [1]

So in New York, where in grading a street, the ground was cut down so as to injure an adjacent proprietor, but none of his land was actually taken, it was declared that the loss was *damnum absque injuriâ;* that the constitution had made no mention of indirect or consequential damages; and that although the proprietor had actually suffered injury, still it could not be said that property had been "taken for public use," within the meaning of the constitution.†

It appears to me the decision is an unfortunate one, although sound perhaps on a strict construction of the constitutional clause. But it is to be regretted that the court felt itself bound to apply a strict instead of a liberal interpretation. The tend-

of Sewers, 8 B. & C. 355; The Queen *v.* Eastern Counties Railway Co. 1 Gale & Davison, 589; Lehigh Bridge Co. *v.* Lehigh Coal and Navigation Co. 4 Rawle, 9; Lansing *v.* Smith, 8 Cowen, 146; Steele *v.* President, &c. of Western Inland Lock Navigation, 2 Johns. 283; Livingston *v.* Adams, 8 Cowen, 175; Jermaine *v.* Waggoner, 1 Hill, 279; and Waggoner *v.* Jermaine, s. c. in error, 7 Hill, 357; Graves *v.* Otis, 2 Hill, 466. Any inconvenience or damage suffered in consequence of the proper and reasonable repairs of a public highway by a plank-road corporation, in the legitimate exercise of the powers conferred by the statute, is *damnum absque injuria*, and no action lies. Benedict *v.* Goit, 3 Barb. S. C. R. 459; Bord. & So. Amboy T. Co. *v.* The Camden & Amboy R. R. Co. 2 Harr. (N. J.) 314; Hollister *v.* Union Co. 9 Conn. 436; Hooker *v.* New Haven and Northampton Co. 14 Conn. 146; Burroughs *v.* Housatonic R. R. Co. 15 Conn. 124. The cases are not in perfect accord with each other, but they sustain substantially the doctrine in the text. See, also, a very clear and satisfactory exposition of the subject in the American Law Magazine, April, 1843, p. 5, from which many of these authorities are taken. The whole subject was recently examined in Radcliff's Ex'rs *v.* Mayor of Brooklyn, 4 Comstock, 195. The doctrine of the text was affirmed, and it was held that persons acting under an authority conferred by the legislature, to grade, level and improve streets and highways, if they exercise proper care and skill, are not answerable for the consequential damages which may be sustained by those who own land bounded by the street or highway. See in Hatch *v.* Vermont Central R. R. Co. 25 Vt. 49, a very full and able opinion by C. J. Redfield on this subject. But in New Jersey, see Delaware and Raritan Co. *v.* Lee, 2 Zabriskie, 243, where a canal company was held liable for damage done to land flooded by the work.

* *Vide supra*, 29.

† Radcliff's Ex'rs *v.* Mayor of Brooklyn, 4 Comstock, 195.

[1] So in Monongahela Bridge Co. *v.* Kirk, 46 Penn. 112; Clarke *v.* The Birmingham and Pittsburgh Bridge Co. 41 Penn. 147. And see Quin *v.* City of Paterson, 3 Dutch. N. J. 35. But in the case of Tinsman *v.* Belvidere Delaware R. R. Co. 2 Dutch. 148, the Supreme Court of New Jersey, while admitting the weight of authority in favor of the doctrine of the text, declares it not to be the law of that State. So far as the rule applies to public agents of the government, the learned court does not question it, but insists that to maintain that corporations holding grants of public franchises, possess sovereign immunity against liability for damages, leads to the unjust rule that no redress can be had for damages resulting from their acts. In answer to the argument that it would be absurd that an act authorized by law should lay a foundation for damages, the court say, "Where is the absurdity in supposing that the legislature intended, by virtue of their sovereign power, to confer upon the corporation authority to take the land necessary to construct the road, to do precisely what they might have done if they had owned the land necessary for that purpose, leaving their common law liability precisely where it would have stood if the work had been constructed upon the lands of the corporation without the aid of the statute?"

ency of our legislation in matters of public improvement is undoubtedly to sacrifice the individual to the community; and we cannot attach too much importance to those provisions of our fundamental law which are framed to protect private property against encroachments, which, though sanctioned by legislative enactment, are in truth often dictated by private interests. We shall have occasion to consider this subject again when treating of damages under Statutes.

General Conclusions.—From the examination which we have thus made of this branch of our subject, it is apparent that it is difficult to lay down any general rules in regard to the extent to which the law goes in search of resulting damages. To facilitate any effort to reduce the subject to principle, a division of actions into three classes is necessary.

The *first* comprises those where a contract is made for the payment of money alone; and here it is well settled that the consequences of the non-performance cannot be inquired into in any way, and that payment of the principal sum with interest is the only compensation that can be looked for.

Second, those where the contract is to do, or to refrain from doing, some particular thing. Here the rule of the civil law is perhaps the best that can be adopted; that the party in default shall be held liable for all losses that may fairly be considered as having been in the contemplation of the parties at the time the agreement was entered into. Or, in other words, where it appears, or may fairly be inferred, that the party complaining of the non-performance of a contract has, at the time it was entered into, turned the mind of the party whose conduct is complained of to the consequences likely to ensue from default on his part, and such consequences do ensue, he shall be held responsible for them as having stipulated against them.

Third, those where a tort is committed, or the action is brought for a violation of right, unattended by any of those circumstances of aggravation which give the control of the matter to the jury. These cases are by far the most difficult to reduce to principle. We have no money standard to resort to, nor any agreement to guide us.[1] The general rule in this class of cases

[1] But in some cases a money standard exists, as where one has lost a sum certain by another's negligence. In this case the sum lost furnishes the measure. So in California, where because of a defect in a notary's certificate of acknowledgment to a mortgage, it was held not to import notice to subsequent incumbrancers, and the lien of the plaintiff's mortgage was in consequence postponed to that of a later one, and his debt thereby lost, in an action by the mortgagee against the notary on his official bond, the plaintiff was held entitled to recover the mortgage debt and interest. It should be mentioned that by statute the notary was liable on his official bond to parties injured by his official misconduct for "all damages sustained." Fogarty *v.* Finlay, 10 Cal. 239.

is, to adhere as closely as possible to the maxim, that the natural and proximate consequences of the act are alone to be
" taken into consideration. This rule is, however, subject to the qualification that the motive and conduct of the defendant is to a certain extent to be taken into account, and that even
[113] in cases where vindictive damages cannot be demanded, the law will go further in quest of consequence to punish a wrong-doer, than to redress an act of pardonable negligence. I state this qualification, as it is undoubtedly to be deduced from the adjudged cases. But its results are so serious that I may be permitted to draw the attention of the reader more fully to the matter. And I do not know that it can be done more satisfactorily than by following out the train of reasoning which the civilians adopt on the subject of *culpa*, or legal liability.

Doctrines of Civil Law.—One of the most recent and best of the German writers thus speaks:

"Responsibility or legal liability (*Imputatio*) exists whenever a person is the moral cause of an illegal act, and must bear the consequences thereof. *Culpa*, or legal fault, goes hand in hand with *imputatio*, or legal liability. It is that which fastens on the person charged the responsibility of the transaction; and consequently the phrases are often convertible, and *in culpa est*, he is in fault, has the same meaning as *ei imputatur*, he is responsible."

"*Culpa* relates both to acts of trespass, or those embraced under the Aquilian Law (*damnum injuria datum*) and to violations of contract. In the latter cases only is the learning of *culpa* intricate and difficult; in the former easy and simple. In the cases which come under the Aquilian Law, *dolus* and *culpa* have the same effect, and the latter embraces almost everything; but in matters of contract the liability depends on the nature of the duty imposed upon the party charged; he is sometimes answerable for *dolus* or *culpa lata;* sometimes for *culpa* merely. It hence becomes necessary to distinguish more carefully between *dolus* and *culpa*, and especially to make the definition of
[114] *culpa lata* as clear as possible."* And a large space is then devoted to an examination and definition of the three

* Zurechnung (*imputatio*) findet nämlich statt, wenn jemand als moralische Ursache einer rechtswidrigen Handlung angesehen wird, so dass er die rechtlichen Folgen derselben tragen muss. Schuld (*culpa*) und Zurechnung gehen Hand in Hand; jene bezeichnet dasjenige in dem Handelnden was ihn zur moralischen Ursache der Handlung machte, und daher bewirkte, das sie ihm zugerechnet werden kann; daher diese Ausdrücke im ganzen denselben Sinn hervorbringen, und es so oft für *in culpa est* heisst *ei imputatur*.—Hasse, *Die Culpa des Römischen Rechts*, § 13, p. 63.

Nach der *Aquilia* haben *dolus* und *culpa* gleiche Wirkungen, und die *culpa* umfasst jederzeit alles: im Obligationenrecht richtet

shades of illegality, *dolus*, *culpa lata*, *culpa levis*; a subject which, as it is discussed in all our treatises on Bailment, it is unnecessary to review here. In the case of the Steamboat New World *v.* King,* Mr. Justice Curtis describes the three degrees of negligence — slight, ordinary, and gross — and says, "It may be doubted if these terms can be usefully applied in practice."[1]

OBJECTIONS TO CONSIDERING MOTIVES IN MEASURING DAMAGES FOR TORTS.—My object is to call attention to the practical result of the doctrine stated in the text; which is that in cases of tort, even where vindictive damages cannot be demanded, the degree of fault will govern not only the question of liability, but the amount of remuneration; and accordingly, as the act is more or less morally wrong, so the courts will make the guilty party responsible for the consequences, more or less remote, of his conduct. It is very plain that this will introduce into the subject of wrongs all the nice distinctions which exist in the law of Bailments, and others still more perplexing; the tribunal will in each case have to decide not only a legal but a moral question, and to determine, moreover, the amount of consequences for which a given amount of immorality or negligence is to be made answerable. There seems at first sight reason in saying that a wrong-doer should be visited more severely with the consequences of conduct immoral as well as illegal, than when the act is simply the breach of positive law. But in a large class of cases this difficulty is already obviated by the allowance of vindictive damages; and where this is not the case, there is inherent difficulty in drawing the nice distinctions which this rule requires. The danger to be apprehended is, either that the courts will lose themselves in a maze of abstract casuistry, as to the different degrees of fault; or that in despair of reducing the subject to principle, they will throw the responsibility of the matter on the jury, leaving everything to their vague, fluctuating, and all but uncontrolled discretion.†

Better, I humbly think, it would be, in all matters of tort

sich der Grad der *præstatio culpæ* nach dem Grad der besondern Verpflichtung, welche das bindende Verhältniss mit sich bringt, und es wird zuweilen nur *dolus* und die ihm gleich stehende *culpa lata*, gewöhnlich aber auch mehr prästirt. Diese noch unbestimmte Bemerkung reicht hier noch hin um zuvörderst die Nothwendigkeit zu zeigen den *dolus* von der *culpa* s. str. genauer zu unterscheiden als es bei der Aquilischen *culpa* nöthig war und dabei vornemlich den Begriff der *culpa lata* so scharf als möglich zu fassen.—Ibid. § 16, p. 73.

* 16 Howard (U. S.), 474.

† Hasse, in his 12th chapter, p. 400, admits and defends the almost absolute control over the subject, both of liability and remuneration, which the vagueness of the Roman law, in its definition of *culpa*, necessarily gave to the *judex*, whose functions answered to those of our jury. The more loose the law, the more absolute, of course, the tribunal.

[1] See *post*, 466, editor's note on exemplary damages.

where the wrong is not so flagrant as to warrant vindictive damages, to adhere as closely as possible to a fixed rule,—to declare that in no case shall the measure of relief depend
[115] on the motive of the party, and that the remuneration is in all cases to be limited to the natural and proximate consequences of the act. Even this is vague enough; for language confesses itself incompetent to depict the nicer shades of right and obligation; and all rules will be found valueless unless applied and expounded by tribunals as sagacious as they are learned.[1]

Having thus examined the general principles which govern the measure of damages in regard to the consequences of the act complained of, we now proceed to consider the rule of compensation in particular actions; and first, of those in which are litigated claims to the possession of real property.

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[1] Although authorities may be found which depart from the principle of compensation in cases other than those proper for exemplary damages, they are not, as we think, consistent with the actual doctrine of the law. By that doctrine, as we understand it, there is in civil jurisprudence, no "debatable ground" or border land between these two domains of the judicial forum. There are but two principles on which damages are decreed, namely, compensation to the injured party, and punishment of the wrong-doer for example's sake. In some instances, it is true, where the injury or default has been peculiarly negligent or otherwise especially unjustifiable, the courts, in awarding damages, have sometimes allowed compensation for secondary or consequential injuries which in less flagrant cases would be thought too remote. But these decisions can be fully justified only on the same grounds which sanction exemplary damages, and must be regarded as simply limiting, by the principle of compensation, the otherwise unrestricted range of those damages. The blending of the two principles tends to confusion, and we venture to submit that they should be definitely remanded to their separate jurisdictions. See *ante*, 38, 39, notes.

CHAPTER IV.

MEASURE OF DAMAGES IN ACTIONS FOR POSSESSION OF REAL PROPERTY.

Rule of Damages in Actions brought to Recover the Possession of Real Estate.—In Real Actions generally.—Ejectment.—Trespass for Mesne Profits.—Equitable Defences Allowed.—Dower.

ACTIONS FOR POSSESSION OF REAL ESTATE.—Having thus disposed of nominal and of remote or consequential damages, we proceed to consider the rules which govern the measure of compensation in the various forms of common-law procedure. And first, of those actions which relate to the possession of real estate.

Five of the first chapters of Mr. Sayer's work on this subject, to which I have already referred,* are devoted to a consideration of the law of damages in the actions of *Assize of novel disseisin*, *Entry sur novel disseisin*, *Assize of mort d'ancestor*, *Cosinage*, *Aiel and Besaiel*. Many of the forms of real actions were introduced into America from the mother country,† and some still survive; but the particular actions above mentioned have been rarely, if ever employed in the Union; and they were in England absolutely abolished by the statutes 3 and 4 Will. IV, ch. 27, § 36; for the "limitations of actions," which swept away, indiscriminately, between fifty and sixty pieces of proceedings, leaving as the only real or mixed actions, *a writ of dower, dower unde nihil habit, quare impedit, and ejectment.* ‡ Repeated statutory changes have also been made in the various States on this same subject, the general result of which has been that the actions of ejectment or trespass to try titles and dower, are the only real or mixed actions now in extensive use in the Union.
The action of *quare impedit*, relating to a species of prop- [117]
erty—advowson—which never existed among us, is wholly a stranger to American jurisprudence.

WASTE.—There is still another form of action—waste—by

* Introduction, p. 1.

† As to the extent to which the real actions were adopted by us, see Kent's Commentaries, Vol. IV, 5th ed. p. 70, *in notis*. And see an article by Judge Jackson, American Jurist, Vol. II, p. 65, for July, 1829, to the same point.

‡ Warren's Law Studies, 1st ed. 15 and 16, *in notis*.

which the possession of real estate is sometimes changed, and which may, perhaps, strictly belong to this division of the subject; but I have thought that it might be more conveniently and appropriately discussed under the head of trespasses, nuisances, and other interferences with the occupation or enjoyment of real property.

The actions above named are the usual modes of procedure with us, by which the possession of real estate is now altered. It is necessary briefly to allude to the general principles regulating damages in real actions as they once existed: but the sweeping changes which have been effected in the original structure of English jurisprudence, will make this discussion a very cursory one; and we shall then examine the law in regard to the substitutes which have now taken their places—ejectment and dower.

REAL ACTIONS.—In real actions, properly speaking, damages were not originally given at common law,* "for it is of the essence of a real action, that only a real thing can be recovered therein; whenever damages, which are a pecuniary recompense, and consequently a personal thing, are recoverable in the same action, the action becomes mixed." † By the statutes of Merton, Marlbridge, and Gloucester, however,‡ damages were [118] given in the principal real actions. In those actions where no damages were directly given, and in which, pending the suit, the defendant might impair the value of the property, the ancient writ of *estrepement* ‖ gave indirect relief. It lay properly in real actions, where the plaintiff could not recover damages by his suit, and, as it were, supplied damages.¶

* Sayer on Damages, 5.

† Blackstone says, that in the *assize of novel disseisin*, if the recognitors find the seisin and disseisin, the demandant shall recover his seisin and damages for the injury sustained, "being the only case in which damages were recoverable in any possessory action at the common law, the tenant being in all other cases allowed to retain the intermediate profits of the land to enable him to perform the feodal services."—*Com.* book, iii. ch. 10, 187 and 188.

So in Pilfold's case, Rep. x. 115, it is said, "In personal actions they shall declare to damage, because they shall recover damages only for the wrong done before the writ brought, and shall recover no damages for any done pending the writ; but in real actions the demandant shall never count to damages, because he is to recover damages pending the writ. . . . At the common law, before the statute of Gloucester (anno 6 E. I. c. i.), a man should not recover damages in any real action, as in dower, before the statute of Merton, c. i., nor in Aiel, Mordancestor, before the said statute of Gloucester; but in actions mixed, as in assize, entry in the nature of assize, or in personal actions, as trespass *quare clausum fregit*, of goods taken away," etc. See also, Roscoe on Real Actions, i. 307.

‡ 20 Hen. III. c. 3; 52 Hen. III. c. 16; and 6 Edw. I. anno 1278.

‖ Estrepamentum—from the Fr. *estropier*—*mutilare*.

¶ Termes de la Ley, *in voc.*; Tomlin's Law Dictionary, *in voc.* In New York (by Rev. Stat. vol. II. p. 260, 2d ed. § 18), the benefit of this writ is given by a provision which, where an action is brought for the recovery of land, or the possession thereof, authorizes the court in which the suit is pending, to make an order restraining the defendant from the commission of waste.

ADVOWSONS.—In regard to property in advowsons, it may be briefly noticed that no damages were recoverable at the common law in an assize of *darrein presentment*, nor an action of *quare impedit*.* And the action of *darrein presentment* was abolished in England by the statute of limitation of actions, to which we have already referred. By the statute of 2 West., c. 5, it was provided, in writs of *quare impedit* and *darrein presentment*, if a disturbance of six months took place, that damage should be awarded to two years' value of the church; if six months did not pass, but the presentment were *deraigned* (*i. e.* proved) within that time, damages should be awarded to half a year's value of the church. If a more particular view of this branch of our subject is desired by the student, he will find it in those English treatises which are devoted to this particular matter. The scope of this work does not allow a further examination of it.

EJECTMENT.—We come, then, to consider the law of damages in the actions relating to real property, as in general application in the Union; and first, of *Ejectment*.†

"Whilst the action of ejectment remained in its original state ‡ and the ancient practice prevailed, the measure of damages given by the jury when the plaintiff recovered his term were the profits of the land acruing during the tortious holding of the defendant. But as upon the introduction of the modern system the proceedings became altogether [119] fictitious, and the plaintiff merely nominal, the damages assessed became nominal also; and they have not, since that time, included the injury sustained by the claimant from the loss of his possession."[1]

And thus it has been decided in New York,‖ that a recovery of nominal damages in the action of ejectment is no bar to an

* Sayer, 35.

† The 12th chapter of Mr. Mayne's valuable work on damages which I have already noticed, discusses the heads of Ejectment, Dower, and Quare Impedit.

‡ Adams on Ejectment, by Tillinghast, 379. "Before the time of Henry VII.," said Wilmot, C. J. in Goodtitle *v.* Tombs, 3 Wils. 118, "plaintiffs in ejectment did not recover the term, but until about that time the mesne profits were the measure of damages. . . By the old law and practice, in an action of ejectment, as I before said, you recovered nothing but damages, the measure whereof was the mesne profits."

‖ Van Alen *v.* Rogers, 1 J. Cas. 281.

[1] It is held in North Carolina, that in ejectment the usual and proper course is to give the plaintiff nominal damages, leaving the real damages to be recovered in the subsequent correlative action of trespass for the mesne profits; yet that it would not be error to direct, that the actual damages should be assessed in the ejectment, the division of actions being merely for convenience. Miller *v.* Melcher, 13 Ired. (N. C.) Law, 439. See Ryers *v.* Wheeler, Hill & D. supp. 389.

action for the mesne profits, and that it is necessary to enter a *remittitur damna.**

In Pennsylvania, it has been decided that the damages in ejectment being merely nominal, a verdict finding for the plaintiff without assessing damages is not thereby vitiated;† and the same would probably be the rule in New York. In some of the States, the course of proceedings is, however, to recover the mesne profits in the action of ejectment, or in an action of trespass to try the title;[1] and in those States the rules that we shall proceed to give, in regard to the action of trespass for mesne profits, will, it is to be supposed, govern in the ejectment suit, or in the action of trespass.‡[2]

*In the same State, by a statutory provision (Rev. Stat. ii. 231, 2d ed. § 6), the real plaintiff is now obliged to bring the suit against a real defendant; but the damages are still merely nominal, subject to the exception hereafter noticed. The seventh section of the same statute requires the plaintiff to aver, in his declaration, that the defendant "unlawfully withholds from the plaintiff the possession of the premises, to his *damage any nominal sum* the plaintiff shall think proper to state." In Pennsylvania, a plaintiff in ejectment, under the acts of 1806 and 1807, may recover damages and costs, although he has conveyed the title to a third person, pending the suit. Murray *v.* Garretson, 4 S. & R. 130.

The New York statute (Revised Statutes, ii. 2d ed. 236, § 44 *et seq.*) has also prescribed the mode of recovering mesne profits, by a suggestion on the record; the action of trespass for mesne profits, as we shall see hereafter, being retained where the defendant in the ejectment suit is a tenant or mere occupant claiming title under some other person, who defends the suit in his name. See Leland *v.* Tousey, 6 Hill, 328. The Code has made little change in regard to Ejectment. Rogers *v.* Wing, 5 How. Pr. 50.

† Harvey *v.* Snow, 1 Yeates, 156; Gough's Lessee *v.* Rinehart, cited, 1 Yeates, 157.

‡ Starr *v.* Pease, 8 Conn. 541. So in

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[1] In New York, a claim for mesne profits may now be sued in an action under the Code of Procedure. Holmes *v.* Davis, 19 N. Y. 488. In Massachusetts mesne profits are recovered under the writ of entry as regulated by Revised Statutes, c. 101. As to the mode of procedure in that State, see Raymond *v.* Andrews, 6 Cush. 265; Richards *v.* Randall, 4 Gray, 53. So in Massachusetts damages in the nature of mesne profits may be recovered by the landlord during the period of a tenant's holding over after the termination of the lease. Sargent *v.* Smith, 12 Gray (Mass.), 426. As to recovery of mesne profits in a possessory action in Louisiana, see Chinn *v.* Blanchard, 6 La. Ann. 66. As to the proper mode of proceeding in other States, see the following cases: Pennsylvania, Blight's Ex'rs *v.* Ewing, 26 Penn. St. 135; Maine, Larrabee *v.* Lumbert, 36 Me. 440; Georgia, Shadwick *v.* McDonald, 15 Ga. 392; Arkansas, Main *v.* Gordon, 7 Eng. 651; Floyd *v.* Ricks, 14 Ark. 286; Brock *v.* Smith, *Ibid.* 432; Maryland, Mitchell *v.* Mitchell, 1 Md. 58; s. c. *Ibid.* 234.

[2] Where a plaintiff in ejectment was in possession of a part of the land sued for, it was held erroneous to assess damages against the defendant for the use of the whole tract. Ellis *v.* Jeans, 26 Cal. 272. The same rule is applied in California in relation to damages in regard to proceedings for forcible entry and detainer. Thompson *v.* Smith, 28 Cal. 527. So in the same State where a plaintiff in ejectment was tenant in common of the premises withheld, with one not a party to the suit, he was entitled to recover as damages for the detention, a part of the mesne profits only, in proportion to his interest, and not the whole. Clark *v.* Huber, 20 Cal. 196. But in a late case in Missouri where the plaintiff and defendant were tenants in common, the court said that the actual annual value of the property with interest was the measure of damages in ejectment, and denied that the case of tenants in common formed an exception to the general rule. Cutter *v.* Waddingham, 33 Missouri, 269.

Where in an action for the recovery of real property in the nature of a writ of right, begun against an ancestor who died during the pendency of his suit, the heirs were substituted as parties after his death, the recovery of damages for rents and profits against them was limited to the period of their possession of the property. Cavender *v.* Smith, 8 Iowa, 360. So in ejectment brought by devisees, their recovery of the rents and profits is limited to the time when their title to them accrued. All claims for damage to the real estate and for its rents and profits prior to the testator's death go to his personal representatives. Hotchkiss *v.* Auburn and Rochester R. R. Co. 36 Barb. 600.

The only case in which actual damages can be recovered in the ejectment suit itself is that where the plaintiff's title expires pending the action.[1] [120]

So in New York,* where the plaintiff's life estate had

Pennsylvania, if the plaintiff choose to proceed for mesne profits in ejectment at common law, he may do so on giving notice to the defendant of his intentions. Battin *v.* Bigelow, 1 Peters' C. C. Rep. 452. The mesne profits may be recovered in ejectment at common law in some of the State courts, by way of damages; see Boyd's Lessee *v.* Cowan, 4 Dall. 138; and Dixon's Lessee *v.* Hosack, Tharpe *v.* Bell, Yeates *v.* Stewart, cited, s. c. In this case the practice of blending the two actions is ably vindicated by McKean, C. J. He says, "I shall now briefly consider the *argumentum ab inconvenienti*, which refers but to a single instance, to wit, the difficulty the jury may labor under in deciding on the titles of the parties to the possession, and at the same time in fixing the value of the mesne profits if the verdict shall be for the plaintiff. There can be no great hardship in this. In actions of waste, dowry, assize, and all others where the thing itself, as well as the damages, is recovered, the jury are liable to the same inconvenience; nor can I perceive any great perplexity that can arise in determining the rent or annual value of a house or parcel of land, where complete evidence is given of it. It appears to me that the inconvenience or hardship is the other way. After a person has been unlawfully kept out of his house or land for a series of years, and undergone great trouble and expense in recovering a judgment for them, to give him the possession merely, without any satisfaction for the use and occupation pending the action, does not seem to be complete justice. To tell him 'You must sue for the mesne profits in a new action, fee counsel, attend the courts, produce witnesses, and have a new trial for the sole purpose of fixing their value,' is certainly imposing an improper burden upon him if justice can be had in a more speedy, cheap, and easy way. Taking a verdict for the amount of the mesne profits as well as on the title in the ejectment, will prevent this circuity, delay, and expense; and I believe it to be equally beneficial for the defendant; for if on the trial he shows a reasonable ground for controverting the plaintiff's claim, or a specious title in himself, a jury would be inclined to give but very moderate damages against him (of which the jury in the action for the mesne profits can have no consideration, as the title cannot in that action be again gone into), and he would certainly be saved the costs and expenses of the second suit." See, also, Joan *et al. v.* Shield's Lessee, 3 Har. & M'H. 7; Gore's Lessee *v.* Worthington, 3 Har. & M'H. 96; Little *v.* Meachum, 1 Tyler, 438; Longstreet *v.* Ketcham, 1 Coxe, 170. In Denn *ex dem.* Delatouche *v.* Chubb, 1 Coxe, 466 (New Jersey), it was ruled in ejectment that the mesne profits might be recovered, and that in assessing them the jury might include all the plaintiff's reasonable and necessary expenses, such as a fee to counsel. An action of trespass is a proper mode of recovering mesne profits after a recovery in ejectment in Pennsylvania, under the acts of 21st March, 1806, and 13th April, 1807. Osbourn *v.* Osbourn, 11 Serg. & R. 55. In Vermont, also, the two actions have been blended. Walker *v.* Hitchcock, 19 Vt. 634; Beach *v.* Beach, 20 Vt. 83; Edgerton *v.* Clark, 20 Vt. 264. The object of the action of ejectment, in that State, is not merely to recover possession, but also to settle the title and establish the right of property. Marvin *v.* Dennison, 20 Vt. 662. But in such action of ejectment the plaintiff cannot, with a view to increase his claim for mesne profits, give evidence of wanton acts of trespass, injuring the intrinsic value of the premises. Walker *v.* Hitchcock, 19 Vt. 634. In Alabama the action of trespass to try titles has been substituted for the actions of ejectment and trespass for mesne profits, and performs the office of both; and, as in the action for mesne profits, the plaintiff is entitled to recover the damages he has sustained by being kept out of possession; and these are never increased or diminished by the profits acquired by the defendant from his occupancy. Bullock *v.* Wilson, 3 Porter, 382. So in South Carolina, the mesne profits are recoverable in an action of trespass to try titles, and after that action is had, no separate action lies for the recovery of mesne profits. Sumter *v.* Lehie, 1 Treadway's Com. Rep. 102. In Massachusetts, by statute it is provided, that if the demandant recovers judgment in a writ of entry, he shall also, in the same action, recover damages for the rents and profits of the premises. Gen. Stat. c. 134, § 13; Washington Bank *v.* Brown, 2 Met. 293.

* Jackson *ex dem.* Henderson *v.* Davenport, 18 J. R. 295 and 302. This was before the revision of the statutes; the case is now covered by the statutory provision which enacts (Rev. Stat. vol. ii. 234, 2d ed. § 81), "If the right or title of a plaintiff in ejectment expire after the commencement of a suit, but before trial, the verdict shall be returned according to the fact, and judgment shall be

[1] The attempt to assess in any action of ejectment the damages due from one party to the other for the breach of a contract which is not the foundation of the title to the property, is "novel, dangerous, impracticable, and erroneous." Per Strong, J., Gile *v.* Gile, 37 Penn. 312.

[121] terminated before trial, the Supreme Court said, "The plaintiff has no title to turn the defendant out of possession, but he has a title to the mesne profits and costs of this suit, and must, therefore, have judgment to enable him to recover them." * So in South Carolina, in the action of trespass to try titles: "If a term expire pending an action, the party shall not have possession, but he may have damages." †

IMPROVEMENTS.—In regard to improvements made on the land while out of the possession of the rightful owner, the general principle of the English law, as well as our own, is, that the owner recovers his land in ejectment without being subjected to the condition of paying for improvements which may have been made upon it by any intruder, or occupant without title. The improvements are considered as annexed to the freehold, and pass with the recovery. Every possessor makes such improvements at his peril, and whether acting on an honest belief in his title or without color of right, the party who is ousted loses all benefit of his expenditures. ‡[1]

The civil law, however, as we shall see, draws a clear line of distinction between the possessor *bonæ fidei* and *malæ fidei*; and the latter only loses the benefit of his improvements.[2] This too is the case[3] in Louisiana. ‖[4]

entered that he recover his damages by reason of the withholding of the premises by the defendant, to be assessed, and that as to the premises claimed, the defendant go thereof without day."

* Wilkes *v.* Lion, 2 Cowen, 333, and Robinson *v.* Campbell, 3 Wheat. 212; and this seems the rule in Pennsylvania; when the term of the plaintiff expires before the trial, although he cannot recover the possessson, yet he may proceed for damages for the trespass and for mesne profits; Brown's Lessee *v.* Galloway, 1 Peters' C. C. Rep. 291, 299. And the English rule is the same. Runnington on Ejectment, 404; England *v.* Slade, 4 T. R. 682, 683; Co. Litt. 285 *a*; Doe *v.* Bluck, 3 Camp, 447; Thrustout *v.* Grey *et al.* 2 Strange, 1056; Adams on Ejectment, 228.

† Stockdale *v.* Young, 3 Strobhart, 501.

‡ Kent's Comm. Lec. 34, vol. II. 335.

‖ The Civil Code of Louisiana, Art. 500, provides, "If the work has been done by a third person, evicted but not sentenced to make restitution of the fruits (mesne profits), because such person possessed *bonâ fide*, the owner shall not have a right to demand the demolition of the works, but shall have his choice either to reimburse the value of the materials and the price of workmanship, or to reimburse a sum equal to the enhanced value of the soil." See Stanbrough *v.* Barnes, 2 La. Ann. 376.

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[1] The same rule holds in an action of trespass by a tenant against his landlord to recover damages for being ejected before the end of his lease. Schlemmer *v.* North, 32 Mo. 206.

One who forcibly disseises another and improves his land, can have no claim for the value of his improvements, because he has no right to improve another's property against the owner's will. But a *bonâ fide* occupant is entitled to have them taken into account in ascertaining whether the owner of the land has sustained damage or not, both in the case where such improvements were made by the occupant and by one whose title he has purchased. Morrison *v.* Robinson, 31 Penn. 456.

[2] See Justinian's Institutes, § 30, *De Ædificatione ex Suâ Materia in Solo Alieno*, and § 35, *De fructibus bona fide perceptis.*

[3] So too in California, Carpentier *v.* Small, 35 Cal. 346.

[4] This provision of the Louisiana Code (Art. 500, Rev. Code, 1870, 508) is copied from the digest of the civil law of the Territory of Orleans (Dig. Law of Territory of Orleans, 1808, Book 2, Tit. 2, ch. 3, sec. 1, Art. 12,) which was itself taken with very slight verbal alteration from

And this distinction has been introduced, to a certain extent, into the rules which govern the subject of mesne [122] profits. To this head we now turn.

As nominal damages only were given in ejectment, it was necessary to provide another remedy for the claimant for the injury sustained by him from the loss of his possession; and this was affected by a new application of the common action of trespass *vi et armis*, generally termed an action for mesne profits, in which action the plaintiff complains of his ouster and loss of possession, states the time during which the defendant (the beneficial occupant) held the lands, and took the rents and profits, and prays judgment for the damages which he, as rightful owner, has thereby sustained.*

MESNE PROFITS.—According to the division adopted in this treatise, the subject of mesne profits, as it does not concern the recovery of real property, would fall under the head of trespass; but as this action is directly auxiliary or subsidiary to

* Adams on Ejectment, by Tillinghast, ch. xiv, 379, 380.

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the Code Napoleon (Code Civile, § 555), and substantially declares the rule of the civil law. (Domat, Part 1, Book 3, Tit. 5, sec. 3; Toullier, Liv. 3, Tit. 1, §§ 307, 308; and see Pothier, Droit de Propriété, Part 1, ch. 2, sec. 3, Art. 3.) It has just been considered and construed by the Supreme Court of the United States in the very important case of Gaines *v.* The City of New Orleans. By the courtesy of the Hon. James Emott, of counsel for Mrs. Gaines, to whom the editor is indebted for his brief and MSS. notes, he is enabled to give a summary of the points decided in advance of the appearance of the case in a future volume of the reports of the court. A bill was filed by Mrs. Gaines to compel an account of the rents and profits of land recovered under a former decision of the court in the same litigation, by which the city was held a possessor in bad faith (6 Wallace, 642), and liable for rents and profits during its occupation, and to obtain a decree for the amount so ascertained. No rent as such had been derived from the land, but the city had established a draining machine on it, and used it for the purposes of the machine. By this use a large district belonging to the city had (as well as the land in question) been drained, and had in consequence become valuable and productive of revenue by taxation. At the beginning of the wrongful occupation, which was in September, 1834, the land was worth $2,000. The city had erected on it buildings, which (independent of the drainage machinery) cost $18,000, and the fair rental value of the land and buildings was $2,400 a year. The expense of repairs was $500 a year. The master to whom it was referred, to take an account of the rents and profits, made several estimates on different bases. By one of these, he charged the defendant with the market value of the premises during the period of wrongful occupation and interest, and allowed the expense of repairs and interest. The report was excepted to, chiefly on the following grounds: That the defendant's liability should have been limited to the loss of the improvements, and that it should have been protected in the possession of these improvements until the complainant had paid their value or required their removal, and that she should have been compelled to elect which. That the defendant should have been allowed the benefit of the prescription of three years against the claim for rents. (La. Code, Art. 3503; Rev. Code, 1870, 3538.) That the defendant had received no rent, income or remuneration, but had expended a large sum for the buildings and draining-machine. That it was not liable for any rents because it had dedicated the property to the use of the public. That other lands of the complainant had been greatly benefited by the drainage effected by the machine, and that the defendant was erroneously treated as a mere trespasser. But the Circuit Court disallowed the exceptions; confirmed the master's report on the above basis; made a decree for the difference between the two sums, amounting to $125,266 79; and this decree was affirmed by the Supreme Court of the United States, March 31, 1873. See, also, Gibson *v.* Hutchins, 12 La. Ann. 545; Cannon *v.* White, 16 La. Ann. 85.

that of ejectment, and in many States of the Union actually blended with it, it seems properly to be introduced here.

The mesne or intermediate profits of lands are those received while the property is withheld from its rightful occupant; and when he recovers possession, the right to the mesne profits follows his recovery. By the Roman law, the *bonâ fide* possessor of land held without title, was not liable to the legitimate owner for the *fructus*, or mesne profits. *Si quis a non domino quem dominum esse crediderit, bonâ fide fundum emerit, vel ex donatione, aliâve quâlibet justâ causâ, aeque bonâ fide acceperit, naturali rationi placuit fructus quos percepit ejus esse pro culturâ et curâ. Et ideo, si postea dominus supervenerit et fundum vindicet, de fructibus ab eo consumtis agere non potest.** This is also the rule of the Scotch † and of the French system; ‡ and the same principle prevails in Louisiana, [123] the jurisprudence of which State has been largely affected by the liberal reasoning and enlightened equity of the civil law.‖ But the common law makes no such distinction, except as we shall now see with regard to improvements put on the premises; it looks only to the strict legal title, and the right to recover the mesne profits follows in all cases upon a recovery in ejectment.¶ The rule of damages in this ancillary action we have now to consider. And the remarks which we shall make, and the authorities cited, will apply to the action for trespass to try titles in those States where by statute this remedy has been made to assume the functions of the former actions of ejectment and trespass for mesne profits, and also to the action of ejectment in those States where the plaintiff is allowed to recover the rents and profits in that proceeding.

* Instit. de Rer. Divisione, lib. ii, tit. 1, sec. 35.

† Kaims' Equity, book III. ch. i.

‡ Domat, I. 272, book iii, tit. v. § 3. There were, however, before the Revolution, several exceptions to the general principle in France, which will be found noticed by Touillier, in his admirable work, vol. IV, 327, liv. iii, tit. i, ch. iv, § 307, *et seq.* The matter has been put at rest by the Code Napoleon, which declares, Art. 549, "The occupant makes the mesne profits his own only in case he is a *bonâ fide* possessor; if otherwise, he must return the profits with the thing itself to the true owner. The occupant is regarded as a *bonâ fide* possessor when he holds as proprietor under a derivative title, of the defect of which he is ignorant. The occupant ceases to be so regarded as soon as the defect of title is known to him."

Le simple possesseur ne fait les fruits siens que dans le cas où il possède de bonne foi; dans le cas contrarie, il est tenu de rendre les produits avec la chose au propriétaire qui la revendique. Le possesseur est de bonne foi quand il possède comme propriétaire en vertu d'un titre translatif de propriété dont il ignore les vices. Il cesse d'être de bonne foi du moment où ces vices lui sont connus.

‖ The Civil Code of Louisiana asserts, Art. 494, "The produce of the thing does not belong to the simple possessor, and must be returned with the thing to the owner who claims the same, unless the possessor hold it *bonâ fide*" Art. 495: "He is a *bonâ fide* possessor who possesses as owner by virtue of an act sufficient in terms to transfer property, the defects of which he was ignorant of; he ceases to be a *bonâ fide* possessor from the moment these defects are made known to him, or are declared to him by a suit instituted for the recovery of the same by the proprietor."

¶ Green *v.* Biddle, 8 Wheat. 1 and 80. In North Carolina, see Camp *v.* Homesley, 11 Iredell, 212.

In an action for mesne profits, the plaintiff, as a general rule, recovers the annual value of the land[1] from the time of the accruing of his title, or from the time of such title accrued as laid in the declaration in the ejectment suit, if he relies on the record in that suit to establish his recovery. But, "The jury are not confined in their verdict to the mere rent of the premises, but may give such extra damages as they think the particular circumstances of the case demand."* So in an early case in England, it was said,† "The plaintiff is not confined in this case to the very mesne profits only, but he may recover for his trouble. I have known four times the value of the mesne [124] profits given by a jury in this sort of action of trespass; if it were not so, sometimes complete justice could not be done to the party injured."[2]

So where‡ an action of trespass for mesne profits was brought, and bankruptcy was pleaded: on demurrer it was admitted that bankruptcy was no bar to demands for torts in general, but it was insisted that the claim here was in substance for the annual value of the land. But judgment was given for the plaintiff Judge Mansfield saying, "The plaintiff goes for the whole damages occasioned by the tort;" and Mr. J. Buller said, "The damages here are as uncertain as in an action of assault."

"There are certainly some cases," says Mr. Runnington,‖ "in which the jury are not bound by the amount of the rent, but may give extra damages, and after judgment by default the costs in ejectment are recoverable, and are therefore usually declared for as damages in the action for mesne profits." And so the

* Adams on Ejectment, 391.
† Goodtitle *v.* Tombs, 3 Wils. 118.
‡ Goodtitle *v.* North, 2 Doug. 504.
‖ Ejectment, 439.

[1] The plaintiff's recovery in this action should be measured by his actual interest, and the wrong-doer should not ordinarily pay more than the injured party has suffered, except where the plaintiff, as owner, necessarily gets the benefit of any accretions or profits resulting from the trespasser's acts. And where the plaintiff is a lessee, or the representative of a lessee of an unexpired term, such recoverable interest is the value of the lease for the residue of the term. He is not entitled to the full value, as would be the case if he were the owner. And if the defendant, as owner and lessee, have an interest in the profits of the use of the premises, that circumstance should also be taken into account. The authorities which hold that a trespasser, carrying on another's manufacture, should be denied an allowance for so doing, or who expends money on another's chattels, does not thereby acquire a property in them, have no application to such a case. Holmes *v.* Davis, 19 N. Y. 488. See Davis *v.* Tallcott, 14 Barb. (N. Y.) 611, reversed on another point, 12 N. Y. 184; Sheldon *v.* Van Slyke, 16 Barb. 26. And in Georgia, in an action for mesne profits of a ferry landing, the receipts of the ferry, deducting expenses, were held to be the damages recoverable; and it was further held, that if the profits had been increased by improvements, the jury might deduct for the improvements. Averett *v.* Brady, 20 Ga. 523.

[2] But where, in an action of trespass by a tenant against his landlord the premises had been in the possession of sub-tenants, who before the end of the term left them for a consideration paid by the defendant, who thereupon removed the houses with a view to rebuilding, the measure of the tenants' damages was held to be the rent or value of the use of the premises for the rest of the term only. Schlemmer *v.* North, 32 Missouri, 206.

Supreme Court of New York:* "The damages in the action for mesne profits are not limited to the rent. Extra damages may be given." "As to the amount of damages," said Washington, J., on the Pennsylvania Circuit,† "the jury are the only proper judges; there is no general rule, and the quantum depends on the circumstances of the case."

And so in Pennsylvania, the jury were told at Nisi Prius, that they might give interest from the time of the commencement of the suit; and on motion for a new trial, the court said, "As to the measure of the damages, the court gave in this respect as favorable a construction as the case could possibly admit of. It would not have been error in the court to have left it to the discretion of the jury to have allowed the plaintiff more than interest upon the amount of the mesne profits. The jury are not confined in their verdict to the mere rent of the premises, although the action is said to be brought to recover the rents and profits of the estate; but may give such extra damages as they may think the particular circumstances of the case demand.‡

[125] These *dicta* are evidently very loose, and in Pennsylvania an effort has been made to lay down something like a clear rule. So, where the judge charged that the plaintiff might recover the value of the property with interest, together with the costs and expenses of prosecuting the claim, and such other damages as the jury might think the plaintiff entitled to recover, the verdict was set aside. ‖

General Rule.—As a general rule, however, it may be said that the actual annual value of the property, together with the costs of the ejectment suit, will furnish the measure of damages. "The action for mesne profits, though in form it is an action of trespass, in effect is to recover the rent," ¶ said Ashurst, J. And in New York,** interest has been allowed upon the rents. The court said, "As rents in the city of New York, where the premises are situated, are payable at the usual quarter day (1 R. S. p. 736), we think the referees, in ascertaining the value of the mesne profits, were warranted in adding to the amount of rent the interest quarterly. So much the plaintiff has lost and the defendant enjoyed, by means of the wrongful possession.[1]

* Dewey *v.* Osborne, 4 Cowen, 329.

† Brown's Lessee *v.* Galloway, Peters' C. C. R. 291.

‡ Drexell *v.* Man, 2 Barr, 271.

‖ Alexander *v.* Herr, 11 Penn. 537; Good *v.* Mylin, 8 Barr, 51.

¶ Utterson *v.* Vernon, 3 T. R. 539–547.

** Jackson *v.* Wood, 24 Wendell, 443.

[1] As a general rule, the landlord in an action for mesne profits, may recover the value of

And the costs of the ejectment suit are also recoverable in this action.*[1] But where the ejectment suit has been defended, and the plaintiff's costs taxed, he cannot recover beyond those taxed costs.† So in the King's Bench,‡ the plaintiff was allowed to recover, by way of damages, the costs incurred by him in a court of error in reversing a judgment in ejectment obtained in the first place by the defendant; and Lord Tenterden said, "There can be no doubt that the court of error could not award costs to the plaintiff. But the expenses incurred in the court of error were part of the damages sustained by the plaintiff; and I think that the jury might reasonably consider the costs between attorney and client, as the measure of the damages which he had sustained." ‖

The same rule as to allowing the costs of the ejectment which was laid down by Lord Mansfield, has been [126] declared in New York.¶ But in a case where the costs were not included in the verdict, the Court of King's Bench refused to assist the plaintiff.**

Where a recovery in ejectment is effected on the demise of two only, out of several tenants, and suit is afterwards brought for mesne profits, none but the shares of the mesne profits to which those two tenants are entitled, can be recovered.††

EQUITABLE DEFENCES ALLOWED.—When, on the other hand, we come to consider the limitations of relief in this proceeding, we find it everywhere held to be a liberal and equitable action, and one which will allow of every equitable kind of defence.‡‡ Among the most important considerations that a defendant can urge, in answer to the claim for the rents and profits received by him, is that which the common law has, to a certain extent, adopted from the civil law, and which grows out of permanent improvements made by him upon the premises during his occupancy. We have already seen the lenity with which the civil

* Aslin *v.* Parkin, 2 Burr. 665; Sayer, 88.

† Doe *v.* Davis, 1 Esp. 358, and Brooke *v.* Bridges, 7 J. B. Moore, 471; Doe *v.* Filliter, 13 Mees & Wels. 47.

‡ Nowell *v.* Roake, 7 B. & Cres. 404.

‖ See, also, Symonds *v.* Page, 1 Cr. & J. 29, and Doe *v.* Hare, 2 Dowl. P. C. 245.

¶ Baron *v.* Abeel, 3 J. R. 481.

** Gulliver *v.* Drinkwater, 2 T. R. 261.

†† Holdfast *v.* Shephard, 9 Iredell (N. C.), 222.

‡‡ Murray *v.* Gouverneur, 2 J. Cas. 438.

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all the crops during the period of wrongful possession, Hodgson *v.* Gascoigne, 5 B. and A. 88. But if the plaintiff have recovered rent for the year, in which the recovery is had, he is not entitled to the growing crops of that year. If he have recovered rent up to the time of the trial, and there is a growing crop on the premises at the time, the crop is to be divided *pro rata* between him and the tenant. Gardner *v.* Kersey, 39 Geo. 664.

[1] But not counsel fees paid by the plaintiff in the ejectment suit. White *v.* Clack, 2 Swan (Tenn.), 230.

law treated the occupant in good faith; and the reasoning of the civilians has so far obtained in the tribunals of our law, that a *bonâ fide* occupant of lands is allowed to mitigate the damages in the action brought by the rightful owner, by offsetting the value of his permanent improvements made in good faith, to the extent of the rent and profits claimed. This principle has been fully declared by the Supreme Court of the United States,*[1] in a case in which the distinction between a possessor *bonæ fidei* and *malæ fidei* was distinctly recognized, the former being one who not only supposes himself to be the true proprietor of the land, but who is ignorant that his title is contested by any person claiming a better right to it.†[2] The Supreme Court of the State of New York went still further, and allowed improve-
[127] ments made after suit brought by the legal owner, and during its pendency, to be given in evidence for the purpose of mitigating damages. The distinction between improvements made before and after notice of suit brought, does not, however, appear to have been clearly taken; and the court rely on the case above cited in the Supreme Court of the United States, where the point was not even raised.

In a case in Pennsylvania,‡ the general principle has been recognized; but Washington, J., charged the jury that, as the plaintiff, having proved no title prior to the time of the devise in the ejectment suit, could recover damages only subsequent to that period, the value of the defendant's improvements ought first to be set off against the mesne profits received by him prior to that time, and after the plaintiff's title accrued, the balance to be deducted from the rents and profits to which the plaintiff was entitled subsequent to the devise. The case does not seem clear; because it is expressly stated that the plaintiff had proved no title except under the ejectment recovery, and yet some other period is spoken of as that when the plaintiff's title accrued.‖[3]

* Green *v.* Biddle, 8 Wheaton, 1.

† See, also, to this same point, Bright *v.* Boyd, 1 Story's Rep. 479; Jackson *v.* Loomis, 4 Cow. 168.

‡ Hylton *v.* Brown, Wash. C. C. R. 165.

‖ In the ancient real actions, the improvements of the tenant appear to have always been the subject of set-off or recoupment. "Damage of 40s. and no more was found by the assize, because the land sown and the house well amended, and so recouped the damage." Viner's Abr. tit. Discount, where see many other cases in the same connection. See also, Coulter's Case (5 Co. 30), and Bro. tit. Damages. Lord Kaims says, book iii, ch. i, 276, "It is a maxim suggested by nature, that reparations and meliorations bestowed upon a house or upon land, ought to be defrayed out of the rents;" and so says the Roman law. Sumptus in prædium quod alie-

[1] It was also recognised in Gill *v.* Patten, 1 Cr. C. C. R. 465; and see Averett *v.* Brady, 20 Ga. 523.

[2] So in Dothage *v.* Stuart, 35 Mo. 251.

[3] The value of permanent improvements is also allowed in this action, where they were erected, not by the defendant, but by one whose title he had purchased. Morrison *v.* Robin-

STATUTE OF LIMITATIONS.—As to the time for which the defendant is liable, each occupant is answerable for [128] the time he has been in possession.* This right, however, extends back for six years only, if the statute of limitations be pleaded.†[1]

CONFUSION FROM FORMS OF ACTION.—It is plain that the measure of compensation which we are now considering, has been involved in confusion by the technical character of our forms of action. "The *dicta* on the subject," says Gibson, C. J., in Pennsylvania, "seem to have been predicated by judges who had no precise idea of it; for they have not defined it by any landmarks." ‡ The action of trespass, being one of *tort*, admits of any evidence in aggravation; and therefore in one sense it is correct to say, that the damages in this proceeding are entirely at large and under the control of the jury. But, on the

num esse apparuit, a bonâ fide possessore facti, neque ab eo qui prædium donavit, neque a domino peti possunt, verum exceptione doli positâ, per officium judicis æquitatis ratione servantur, scilicet si fructuum ante litem contestatam perceptorum summam excedunt. Etenim, admissâ compensatione, superfluum sumptum meliore prædio facto dominus restituere cogitur. L. 48, de Rei Vindicatione.

All this, however, applies to the case of a *bona fide* possessor, or one without notice, and does not touch that of a person who, being apprised of a claim of better title and with full notice, and even after suit brought, goes on to apply the mesne profits to permanent improvements. It seems very dangerous to make a compulsory allowance for such an application of funds to property which the defendant is fully apprised will be claimed by another. Such expenditures should be made, it would seem, at the occupant's peril. In Kentucky the occupant is allowed for lasting and valuable improvements. Oldham *v.* Woods, 3 Monroe, 47. In Ohio, in trespass for mesne profits, as a general rule, valuable and lasting improvements may be set-off against rents. Worthington *v.* Young, 8 Ohio, 401.

* Holcomb *v.* Rawlyns, Cro. Eliz. 540; Morgan *v.* Varick, 8 Wendell, 587.

† Bull, N. P. 568; Saund. Pleading and Ev. 668. But the Revised Statutes of New York have done away the necessity of pleading this statute.

By the Revised Statutes of New York, vol. II. p. 236, it is declared, that instead of the action for mesne profits heretofore used, the plaintiff seeking to recover such damages shall within one year after docketing his judgment, make and file a suggestion of the claim; and the recovery is limited to six years, whether the statute of limitations be pleaded or not. Jackson *ex dem.* Genet *v.* Wood, 24 Wend. 443. This provision, however, has been declared not to abolish the action of trespass for mesne profits except as against the defendant in the ejectment suit; and wherever the defendant is a merely nominal party, or if it is necessary to join others, or if possession is obtained without suit or judgment, the old action of trespass must still be resorted to. Leland *v.* Tousey, 6 Hill, 328.

As to the rule of damages in this action in New Jersey, See Denn *v.* Chubb, 1 Coxe, 466; in Pennsylvania, Huston *v.* Wickersham, 2 Watts & Serg. 308; and in Maryland, Gill *v.* Cole, 1 Har. & J. 403.

‡ Alexander *v.* Herr, 11 Penn. 537.

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son, 31 Penn. St. 456. And to entitle the defendants to a deduction of the value of their improvements, it must appear that they held under color of title adversely to the claims of the plaintiff in good faith. White *v.* Moses, 21 Cal. 34.

[1] In New York, on a suggestion for mesne profits, after a recovery in ejectment, the plaintiff can recover for the six years next before the filing of the suggestion only. He cannot elect to recover for the six years next succeeding the commencement of the ejectment suit. Budd *v.* Walker, 9 Barb. 493. And a defendant cannot he charged in damages for a period when he was not in possession in fact or in judgment of law. New York Supreme Court, 1844. Hill & D. supp. 389. In Indiana it is held that the recovery may be down to the time of the trial, if the defendant remains in possession. Pendergast *v.* McCaslin, 2 Ind. 87.

other hand, there is nothing necessarily in the action of the nature of a trespass. The property may have been withheld, and the rents received, in entire good faith. In this case the allegations of force, etc., are purely fictitious; and it certainly never would be tolerated, on such facts, that the jury should give any damages beyond the actual value of the income.

It may, then, be said as long as the technical form of action is maintained, that where circumstances of malicious aggravation are proved, such, for instance, as a wilful holding for the purpose of oppression, the jury may give vindictive or exemplary damages; but that where no such facts are shown, they are limited to the actual annual value of the property, with interest thereon, and the costs of the ejectment suit.

[129] DOWER.—We come now to the subject of *Dower*. Where the husband of a woman is seized of an estate of inheritance and dies, the wife shall have the third part of all the lands and tenements whereof he was seized at any time during the coverture, to hold for the term of her natural life.* "A dowress," says Mr. Park,† "having no right of entry till her dower is assigned, cannot, if an assignment is refused, maintain a possessory action." In England the legal remedy to enforce an assignment of dower is by a writ of dower, *unde nihil habet*, or by a writ of right of dower, upon which, if she obtains judgment, dower is assigned, and ejectment may then be brought. In consequence, however, of the jurisdiction assumed by courts of equity in regard to setting out dower, the prosecution of a writ of dower has become very unusual, except where it is ordered by Chancery to try a disputed title.‡

"Dower being a real action," says Mr. Park, ‖ "no damages were at the common law recoverable for its detention." "No damages," says Mr. Sayer, ¶ "are recoverable either at the common law or under any statute, in an action of right of dower."

STATUTE OF MERTON.—But in the action of dower *unde nihil habet*, damages were given by the statute of Merton. This act gave damages to widows who *could not have their dower without plea*. A previous demand was, therefore, necessary, and in an action ** under this statute, where the jury upon a writ of in-

* Black. Com. book ii, ch. 8, § iv, p. 129.

† A Treatise on the Law of Dower, by John James Park, London, 283.

‡ The writ of right of dower is of rare occurrence if not entirely unknown in this country; and the learned author of the Treatise on Pleading and Practice in Real Actions, says that he never knew any such action brought in Massachusetts. Stearn's Real Actions. 307; Kent's Com. vol. IV, p. 63.

‖ Park on Dower, 301.

¶ Ch. 6, p. 23.

** Penrice *v.* Penrice, Barnes' Notes, 3d ed. 191, 234.

quiry assessed damages to the amount of the third part of the value of the land, from the death of the husband to the day of the inquisition, without making deductions for land-tax, repairs, or chief-rents, the inquisition was set aside on the two grounds, that these deductions should have been made, and that the damages should have been assessed to the day of awarding the writ of inquiry only; but on this latter point there are conflicting decisions, and the contrary rule seems now [130] to be established.*

It appears that by damages under this statute are to be understood the net profits of the third part of the land subsequent to the death of the husband, or the teste of the original after deducting outgoings. So, if the lands are leased for years before marriage, the wife will recover dower not according to the value of the land, but according to the rents; and it follows that if the rent reserved was nominal, no damages, or none but nominal damages, can be recovered.†

On a plea of *tout temps prist* to a declaration in dower under the statute of Merton, replication of a demand and refusal to render dower before the writ, rejoinder traversing the demand, and issue thereon found for the demandant, the demandant is entitled to damages from the death of her husband, and not from the date of the demand only.‡

Many other cases have been decided on the statute of Merton, which will be found in Mr. Park's valuable treatise above cited; but equity having, as already said, obtained a very extensive control over the subject of dower, it does not appear necessary to do more than to refer to a repository of the authorities which appertain to this branch of the law.‖

New York Statute.—In New York, the action of ejectment was early substituted for the former legal remedies for the recovery of dower, writs of dower being formally abolished;¶ and, in this action, it is provided, by statute, that "wherever the wife recovers dower in lands of which her husband shall have died seized, she shall be entitled also to recover damages for the withholding of such dower. Such damages shall be one third part of the annual value of the mesne profits of the

* Pilford's case, 10 Rep. 117; Walker and Nevill's Case, 1 Leon. 56; Park on Dower, 308, and cases there cited.

† Hilchens *v.* Hilchens, 2 Vern. 403.

‡ Watson *v.* Watson, 20 Law J. Rep. (N. S.) C. P. 25; 1 Eng. L. & E. 371; 10 C. B. 3.

‖ In South Carolina and Ohio, no damages are allowed in a judgment of dower, and the rule prescribed in the statute of Merton is not adopted nor followed. Heyward *v.* Cuthbert, 1 McCord's R. 386; Bank U. S. *v.* Dunseth, 10 Ohio, 18.

¶ 2 R. S. 343, § 24; 2 R. S. 304, § 2.

lands in which she shall so recover her dower, to be estimated in a suit against the heirs of her husband from the time [131] of his death, and in suits against other persons from the time of her demanding her dower of such persons; and in all cases to be estimated to the time of recovering judgment for such damages, but not to exceed six years in the whole in any case."*[1] Such damages are not to be estimated, however, for the use of any permanent improvements made after the death of the husband, by his heirs or by other persons claiming title.†

And it is further enacted, that where dower is recovered in lands that have been aliened by the heir, the wife shall be entitled, in an action on the case against the heir, to recover her damages for withholding the dower from the time of the husband's death to the time of the alienation, not exceeding six years in all; and any damages so recovered against the heir, or in the dower suit against the heir's grantee, are to be respectively deducted from each other.‡ The provision which gives damages from the time of the husband's death, is an affirmance of the doctrine laid down by the Supreme Court of New York in an early case.‖

In a somewhat recent case,¶ the construction of this statute was settled; and it was held that where lands were aliened by the husband, the value was to be computed as at the time of the alienation, and no more; and it was further held, that when the widow brings ejectment for dower, although before admeasurement, she is entitled to costs.**

Right of Dower in Improvements.—On this point, independently of any statutory provision, some perplexity exists, and the greatest authorities of American Law, Chancellor Kent and Mr Justice Story are divided. The authorities, both English and American, have been fully examined by Mr. Justice [132] Story, on the Massachusetts circuit;†† and the result

* 1 R. S. 742 and 743, §§ 19 and 20.

† *Ibid.* § 21.

‡ 2 R. S. 743, § 22. In Virginia, the widow recovers damages against an alienee so far forth as profits are concerned, only from the date of the subpœna. Tod *v.* Baylor, 4 Leigh's R. 498. In Maryland, from the time of the demand and refusal to assign; Steiger's Adm. *v.* Hillen, 5 Gill & Johnson, 121. In New Jersey, see Woodruff *v.* Brown, 2 Harrison's N. J. Rep. 246.

‖ Hitchcock *v.* Harrington, 6 J. R. 290, See, also, Jackson *ex dem.* Clark *v.* O'Donaghy, 7 J. R. 247; Humphrey *v.* Phinney, 2 J. R. 484; Dorchester *v.* Coventry, 11 J. R. 510; Dolf *v.* Bassett, 15 J. R. 21; Shaw *v.* White, 13 J. R. 179; Coates *v.* Cheever, 1 Cow. 460.

¶ Walker *v.* Schuyler, 10 Wend. 480.

** In Massachusetts, see on this subject Leonard *v.* Leonard, 4 Mass. 533; Miller *v.* Miller, 12 Mass. 454; Conner *v.* Shepherd, 15 Mass. 164, 167; Ayer *v.* Spring, 10 Mass. 80; Perry *v.* Goodwin, 6 Mass. 498, 499; Leavitt *v.* Lamprey, 13 Pick. 382; Stearns *v.* Swift, 8 Pick. 532.

†† Powell *v.* Monson & Brimfield's Manufacturing Co. 3 Mason, 347.

[1] So in Iowa. O'Ferrall *v.* Simplot, 4 Iowa, 381.

arrived at by him is, that when the heir builds on or otherwise improves the estate, the widow shall have her dower of the improvements, otherwise as against a purchaser; but that as against the latter the dowress is to have the benefit of any enhanced value of the land between the alienation and the assignment of dower, arising from the general progress and population of the country. So, if the land has depreciated, she sustains the loss.* On the other hand, Mr. Chancellor Kent has critically examined the subject in his Commentaries, and declares it to be the ancient and settled rule of the common law, that the widow takes her dower according to the value of the land at the time of the alienation, and not according to its subsequent or improved value;[1] though he assents as to the right of the dowress to be allowed for increased value, arising from extrinsic or general causes.† In this conflict of authorities, it becomes me only to state the doubt as it exists.‡

* Leggett *v.* Steele, 4 Wash. C. C. R. 305; Coke's Littleton, 32 *a*; Perkins, Dower, §§ 328, 329; Bacon's Abr. Dower, B. 5; Gilbert's Tenures; Gore *v.* Braizer, 3 Mass. 523, 534; Catlin *v.* Ware, 9 Mass. 218; Ayer *v.* Spring, 9 Mass. 8; s. c. 10 Mass. 80. But in New York the point seems doubtful. Humphrey *v.* Phinney, 2 J. R. 484; Dorchester *v.* Coventry, 11 J. R. 510; Shaw *v.* White, 13 J. R. 179; Hale *v.* James, 6 J. C. R. 258; Roper, Husband and Wife, ch. 9, § 8, 346, 347. In Pennsylvania and Ohio, Mr. Justice Story's doctrine is upheld. Dunseth *v.* Bank of the U. S. 6 Ohio, 76; Thompson v. Morrow, 5 Serg. & Rawle, 289.

† Com. vol. iv. p. 65.

‡ See Tod v. Baylor, 4 Leigh's R. 498, in Virginia, which excludes improvements. Wilson *v.* Oatman, 2 Blackf. Ind. R. 223; Mahoney *v.* Young, 3 Dana's Ken. R. 588; Wall *v.* Hill, 7 *Ibid.* 172: Wooldridge *v.* Wilkins, 3 Howard's Miss. R. 360.

In Virginia, the act, 1 Rev. Code, ch. 118, § 1, 468, which authorizes the recovery of damages in writs of right, intends such damages as may be recovered in actions of trespass for mesne profits. Purcell *v.* Wilson, 4 Grattan, 16. See a recent English case, Garrard *v.* Tuck, 8 Man. Gr. & S. 231, of dower *unde nihil habet*, where it was held that the exact number of acres of land in respect of which dower is demanded is not material in a writ and count in dower. And see the same case as to the effect of outstanding terms, and setting aside and quashing writs of error.

[1] Such is the rule in Missouri, where in an action for deforcement of dower, the jury, after deducting the taxes, if the land has been reasonably used by the owner, should find from the evidence what was its reasonable yearly net value without reference to any improvements, and allow the plaintiff one-third of the net sum. Thomas *v.* Mallinckrodt, 43 Mo. 67; O'Flaherty *v.* Sutton, 49 Mo. 583.

CHAPTER V.

MEASURE OF DAMAGES FOR WRONGFUL INTERFERENCE WITH REAL PROPERTY.

The Rule of Damages in Actions for Wrongful Interference with the Occupation or Enjoyment of Real Estate.—Trespass to Real Property.—Mills.—Flooding Lands.—Actions by Reversioners.—Case.—Nuisance.—Waste.

NOMINAL DAMAGES FOR TRESPASS TO REAL PROPERTY.—We have already seen,* when treating of the subject of nominal damages, that every unauthorized entry on the real estate of another, whether actual injury be or be not thereby inflicted, lays the foundation for a claim to at least nominal damages.† So says the Supreme Court of Connecticut, "An injury, legally speaking, consists of a wrong done to a person, or in other words, a violation of his right. For the vindication of every right there is a remedy. When, therefere, there has been a violation of a right, the person injured is entitled to an action. If he is entitled to an action he is entitled to at least nominal damages, or else he would not be entitled to a recovery. Such damages are given in order to vindicate the right which has been invaded; and such further damages are awarded as are proper to remunerate him for any specific damage which he has sustained.[1] It is on this principle that a person may sustain an action of trespass for an unauthorized entry on his land, although he show no actual specific damage to have thereby accrued to him, and even although the defendant may prove that such act was beneficial to the plaintiff."‡[2] And we have also considered the rules of compensation where the posesssion of real property has been wrongfully withheld. The present division of our subject is consequently reduced to narrow limits.

* *Ante*, ch. ii, p. 43, *et seq.* So in Texas, Carter *et al. v.* Wallace, 2 Texas, 206.

† So even an entry on the plaintiff's land for the purpose of taking away the defendant's own property, is a technical trespass. Heermance *v.* Vernoy, 6 J. R. 5; Blake *v.* Jerome, 14 J. R. 406. But it has been held otherwise in Pennsylvania, if the chattel was wrongfully taken away. Chambers *v.* Bedell, 2 Watts & S. 224.

‡ Parker *v.* Griswold, 17 Conn. 288.

[1] See Sanderlin *v.* Shaw, 6 Jones (N. C.), 225. In an action for obstructing a right of way, the plaintiff is not to be limited to the recovery of nominal damages. Smiles *v.* Hastings, 24 Barb. 44.

[2] Murphy *v.* The City of Fond du Lac, 23 Wisc. 365.

As a general rule, the remedy for illegal entries upon [134] real estate, or interference with its enjoyment, is either by an action of trespass or trespass on the case, or proceedings as for nuisance; in all these proceedings the rules are analogous, and the measure of damages is the amount of injury directly resulting from the act complained of.[1]

Principles Controlling Damages in Trespass.—It is well settled in England, and generally in the United States, that to entitle the plaintiff to bring an action of trespass *quare clausum fregit*, possession in fact is indispensable.*[2] And as against a

* 3 Wooddeson, 193, 194; Bedingfield *v.* Onslow, 3 Lev. 209. The general doctrine that trespass *quare clausum fregit* will not lie by lessor out of possession against a stranger for an injury to real property, is well settled in New York. Campbell *v.* Arnold, 1 J. R. 511; Stuyvesant *v.* Dunham, 3 J. R. 61; Wickham *v.* Freeman, 12 J. R. 183; unless where the plaintiff shows title to lands not in the actual possession of any one; in which case the possession follows the title. Van Rensselaer *v.* Radcliffe, 10 Wendell, 639; Holmes *v.* Seely, 19 Wend. 507; and so in Massachusetts, Lienow *v.* Ritchie, 8 Pick. 235; French *v.* Fuller, 23 Pick. 104. And it is equally well settled in Ohio: Miller *v.* Fulton, 4 Hammond's Ohio R. 433. And in Kentucky: Foster *v.* Fletcher, 7 Monroe, 536; Owings *v.* Gibson, 2 A. K. Marsh. 515; Carrine *v.* Westerfield, 3 A. K. Marsh. 331. In Texas, also, a lessor cannot maintain an action for a trespass committed on the leased premises while in possession of the tenant; the lessee alone can sue. Reynolds *v.* Williams, 1 Texas, 311. In the ordinary case of carrying on a farm at the halves, the owner is not so far divested of the possession but that he may maintain trespass for injury to the inheritance. Cutting *v.* Cox, 19 Verm. 517. And if the plaintiff have the right of property, and of immediate possession, he may maintain trespass though not in actual possession. Mason *v.* Lewis, 1 Iowa (Greene), 494; Poole *v.* Mitchell, 1 Hill (S. C.), 404. In Connecticut, it has been decided that a plaintiff in trespass, having the sole and exclusive possession, may recover against a wrong-doer the whole damage done by him, though the conveyance from some of those under whom he claims was defective. Curtiss *v.* Hoyt, 19 Conn. 154.

[1] This is the general rule, namely, that the diminished value of the property or of the plaintiff's interest in it, and not the cost of restoring the premises to their original condition, furnish the measure of damages for injuries to real estate. Hosking *v.* Philips, 3 Exch. 168; Lukin *v.* Goodsall, Peake Ad. Ca. 15. Therefore the measure of damages for an injury to a freehold would be the difference between its value when the injury began and such value as affected by it. Honsee *v.* Hammond, 39 Barb. (N. Y.) 89. But damages for injuries to property vary according to the claimant's right. The owner of a freehold may recover for an injury which permanently depreciates his property, while a tenant, or one having only a possessory right, may recover for an injury to his use or enjoyment of it. Seeley *v.* Alden, 61 Penn. St. 102, per Agnew, J.

In an action in the nature of trespass *q. c. f.* to recover damages for the plaintiff's house and furniture which were destroyed by a fire-warden without right, for the purpose of staying a conflagration, the jury should estimate the value of the property with reference to the peril to which it was exposed, and give nominal damages only for that which could not have been saved. Parsons *v.* Pettingell, 11 Gray (Mass.), 507.

The holder of a pew in a church has a remedy where his pew is destroyed by the trustees for convenience only, or through a wanton and malicious abuse of their power in destroying it. His only remedy in such cases is, however, by an action for damages by way of indemnity for the loss of his pew. If the church edifice is so far decayed as to be unfit for use as a house of public worship, and it is for that reason taken down, the pew-holder's right to his pew is gone, and he is not entitled to any indemnity for its loss. Voorhees *v.* The Presbyterian Church of Amsterdam, 17 Barb. (N. Y.) 103; affirming, s. c. 8 *Ibid.* 135. Compare the case of The Minister, &c. of the Ref. D. Church in Saugerties, 16 *Ibid.* 237; see Grier *v.* Ward, 23 Geo. 145.

[2] A tenant may recover for whatever damages he sustains by the interference with his possession, although caused by the same wrongful act which injures the freehold. So held where the defendant, in blasting rock on his own land, threw stones on an adjoining

wrong-doer bare possession is sufficient.* And it results from this same rule, that if the trespass amount to an ouster of the plaintiff, he can recover damages only for the trespass itself, or first entry; for though every subsequent wrongful act is a continuance of the trespass, yet to enable the plaintiff to recover damages for these acts there must be a re-entry.†

It will be borne in mind, in the consideration of the present division of the subject, as we have already had occasion to notice,‡ that as the jury in actions of tort are not re-
[135] strained to the amount of the mere pecuniary loss sustained by the plaintiff, he is always at liberty to give in evidence the circumstances which accompany and give character to the trespass.‖ And if the act be malicious or oppressive, exemplary damages may therefore be recovered.¶ In Pennsylvania, where a party proceeded in the Common Pleas, under the act of that State, to obtain the right to enter on land of a third party to make a railroad, and after the value of the land of the plaintiff was fixed upon, but before judgment was given, proceeded to enter, it was held that though this did not excuse the trespass, it took away all pretext for vindictive damages.** But of these damages we shall have occasion to speak more fully

* Chambers *v.* Donaldson, 11 East, 66; Graham *v.* Peat, 1 East, 244; First Parish in Shrewsbury *v.* Smith, 14 Pick. 297; Branch *v.* Doane, 18 Conn. 233.

† Holcomb *v.* Rawlyns, Cro. Eliz. 540; Monckton *v.* Pashley, 2 Ld. Raym. 974; s. c. 2 Salk. 638; Black. Com. lib. iii, p. 210; Case *v.* Shepherd, 2 J. Cases, 27; Holmes *v.* Seely, 19 Wend. 507. And so in Ohio: Rowland *v.* Rowland, 8 Ohio R. 40. And in Kentucky: Shields *v.* Henderson, 1 Lit. Rep. 239.

‡ *Supra*, 36.

‖ Starkie's Evidence, vol. ii, p. 1114. Trespass. Damages.

¶ So in Alabama: Mitchell *v.* Billingsley, 17 Ala. 391.

** Harvey *v.* Thomas, 10 Watts, 63.

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lot occupied by plaintiff as tenant; and so extended his blast as to forcibly split out the rock in the plaintiff's lot, undermining the foundation of his house. Gourdier *v.* Cormack, 2 E. D. Smith's (N. Y.) C. P. R. 200. See Seeley *v.* Alden, *supra*.

In estimating the damages recoverable by a tenant of a building for injuries to his possession, the expense necessary to restore the building to a state such as would make that possession as beneficial to the tenant as it was before the trespass was committed, should be allowed. In general such allowance should not exceed the value of the plaintiff's term, taking into view the rent reserved. But where, in an action for such trespass, it appears that by the terms of the tenancy the plaintiff is bound to make repairs, and to restore the premises to the landlord at the end of the term in as good a condition as when they were leased, then the defendant is bound to enable the plaintiff to put the building in as good a condition as it was when the trespass was committed. Walter *v.* Post, 4 Abbott's Pr. R. 382; 6 Duer, 363.

And the action being maintainable by one who has possession only, where it was brought by one claiming title as well as having possession, it was held that the defendant could not show a want of title in the plaintiff in mitigation of damages. Reed *v.* Price, 30 Mo. 442.

In Maryland it is held, that in an action by a termor against his reversioner, the measure of damages is the actual loss sustained by the lessee; but in such an action against a stranger and wrong-doer, the termor is treated as the absolute owner of the property, and he is held entitled to recover its full value. Harker *v.* Dement, 9 Gill, 7. As to a recovery by one of two co-tenants, see Hibbard *v.* Foster, 24 Vt. 542.

when we come to consider the rule of damages in regard to torts in general.

REMOTE DAMAGES.—We have also seen,* that the plaintiff is limited to the immediate consequences of the wrongful act, and that remote damages are not allowed.†[1] In Maryland, however, in trespass *quare clausum*, the plaintiff has been allowed to give evidence of damage to his crop, occasioned by reason of the defendant driving away his negroes.‡[2] And if the defendant, while a trespasser on the plaintiff's land, commits any other distinct trespass for which a separate action would lie, yet such acts of trespass and their consequences may be alleged and proved in aggravation of damages. Thus in an action for breaking and entering the plaintiff's house, the debauching of his daughter and servant, and the consequential damages to the plaintiff, may be laid in aggravation.‖

So in trespass for the entry of diseased cattle, damage from infection may be stated in aggravation; and so in Connecticut, in an action of trespass *quare clausum fregit*, where the defend-

* *Supra*, 56, *et seq.*

† Loker *v.* Damon, 17 Pick. 284; and *supra*, 96.

‡ Johnson *v.* Courts, 3 Har. & M'Hen. 510.

‖ Starkie on Evidence, vol. ii, p. 1114: Bennett *v.* Allcott, 2 T. R. 166. The rule is the same in Kentucky. Wright *v.* Chandler, 4 Bibb, 422.

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[1] In actions of trespass brought for the reparation of some injury to the plaintiff's right to real estate, where no indignity to the person or invasion of the personal rights of the plaintiff appears, the extent of the injury to his proprietary rights furnishes the true measure of damages. Jefcoat *v.* Knotts, 13 Rich. L. (S. C.) 50.

In an action for injury to leasehold property from a cause which could be ascertained, and the continuance of which could be prevented at a moderate expense, it is erroneous to estimate the damages by a difference between the value of the lease before the injury and after it. Terry *v.* The Mayor and Commonalty of New York, 8 Bosw. (N. Y.) 504.

In an action against a municipal corporation for negligence in building a wall, in consequence of which the wall fell and injured the plaintiff's mill, the damages recovered should be equal only to the actual injury sustained, with interest on the amount from the time it occurred. If any rent is allowed, it can be for such time only as is necessary to repair the premises. Ludlow *v.* Village of Yonkers, 43 Barb. 493.

In an action to recover for injuries to the plaintiff's land, occasioned by its falling in, in consequence of excavations made by the defendant in his own land adjoining, the measure of damages is not what it will cost to restore the lot to its former condition, or to build a wall to support it, but the amount by which the lot is diminished in value by reason of the acts of the defendant. McGuire *v.* Grant, 1 Dutcher's (N. J.) R. 356.

In an action for damages for obstructions which hindered the plaintiff in his business, as the keeper of a refectory and lodging-house, and diminished his custom, loss of custom and of profits are the measure of damages; and the mode of computing the damages is by proof of the actual receipts of the plaintiff's hotel for a sufficient period previous to the obstructions, the actual receipts during the continuance of the obstructions, and the receipts after they were removed. St. John *v.* The Mayor, &c., of New York, 13 How. Pr. R. 527; 6 Duer, 315.

In an action of forcible entry and detainer, for the purpose of determining the measure of damages, the jury may look not only to the violation of the plaintiff's right, and the manner in which it was done, but to any actual inconvenience or expense directly resulting from the unlawful act of the defendant. White *v.* Suttle, 1 Swan (Tenn.), 169. This is not allowed in California. Kower *v.* Gluck, 33 Cal. 401. The question depends on the construction of statutes.

[2] And so of damage to crops occasioned by defendant removing fence. Gray *v.* Waterman, 40 Ill. 522.

ant's sheep, while trespassing on the plaintiff's land, mingled with his sheep and communicated to them a dangerous disease of which many died, it was held that the plaintiff might recover for the loss of his sheep as well as the breach of his close, and that the defendant's knowledge of the existence of the disease might properly be considered by the jury in estimating damages.*[1] So spoliation or asportation of trees may be [136] laid as aggravation in this form of proceeding.† And the value of fruit-bearing trees is to be estimated with reference to what they are worth on the premises in their growing state, and not as taken up and removed from the place.‡[2]

So the value of growing timber is what it was worth at the place where it stood when the trespass was committed, not what it would have been worth if differently situated in other parts of the country.‖[3]

And in an action of trespass for entering upon the plaintiff's close, and carrying away the soil, the proper measure of damages has been held by the English Court of Exchequer to be the value of the land removed, and not the expense of restoring the premises to their original condition.¶[4]

But where trespass was brought for breaking and entering the plaintiff's dwelling-house, and taking and carrying away certain goods and chattels, and converting and disposing of the same to the defendant's use, it not being averred that the chattels belonged to the plaintiff, the judge who tried the cause directed a verdict for the trespass only; and on a motion to increase the damages, this was held right.**[5]

Nor will the damages be allowed to be given with any reference to the defendant's wealth or poverty; and if evidence to this point is admitted, the verdict will not be allowed to stand.††[6]

* Barnum *v.* Vandusen, 16 Conn. 200.

† Anderson *v.* Buckton, 1 Strange, 192. Should not the term *aggravation* be limited to acts of malicious insult or injury accompanying the principal transaction?

‡ Mitchell *v.* Billingsley, 17 Ala. 391.

‖ Ivey *v.* McQueen, 17 Ala. 408.

¶ Jones *v.* Gooday, 8 Mees. & Wels. 146.

** Pritchard *v.* Long, 9 Mees. & Wels. 666.

†† Myers *v.* Malcom, 6 Hill, 292.

[1] For the analogous rule in cases of fraudulent sales, see *post*, 296, note.

[2] And, *per contra*, the rule of damages in an action for the destruction of such trees is not the extent to which the value of the land is diminished by such destruction. Whitbeck *v.* N. Y. Cent. R. R. Co. 36 Barb. 644. Otherwise, where the action is by a mortgagee or lienor for a trespass. State *v.* Weston, 17 Wis. 107; Cory *v.* Silcox, 6 Ind. 39.

[3] See *post*, 484, note.

[4] In trespass *d. b. a.* by one tenant in common against another for carrying away the whole crop, the damages are limited to the value of the share wrongfully taken. Daniels *v.* Brown, 34 N. H. 454.

[5] But the jury may combine damages for the defendant's conduct in breaking into the close and for his subsequent conduct, as cutting and removing timber. Ridgley *v.* Bond, 18 Md. 433.

[6] In an action of trespass *q. c. f.* brought by a tenant at will against an officer for illegally ejecting the tenant's wife and removing their furniture, an instruction to the jury to find "a reasonable compensation to their feelings," is erroneous. Smith *v.* Grant, 56 Maine, 255.

Where a plaintiff had a right of action against the defendant for a tortious entry by the latter on his land and committing a nuisance thereon, from which damages ensued, and thereafter a release was given; it was held that this discharge extinguished all right of action not only for the original injury and damages up to the time the release was given, but for all future damages; that if, however, the defendant had placed the nuisance on his own land, and the plaintiff's demand was for consequential damage only, a discharge of the plaintiff would not have extinguished the right of action for future damages.*

MILLS AND FLOWAGE.—We have already seen that where the injury consists in improperly flooding the land of another, the law presumes nominal damages, even if no actual [137] damage be proved;[1] and so if water be wrongfully diverted from a mill, or a water-course be obstructed, nominal damages will, at all events, be awarded.†[2]

* Vedder *v.* Vedder, 1 Denio, 257.
† Butman *v.* Hussey, 3 Fairf. 407; Parker *v.* Griswold, 17 Conn. 288; Branch *v.* Doane, 18 Conn. 233.

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[1] Munroe *v.* Stickney, 48 Me. 462. See Miller *v.* Laubach, 47 Penn. 154. In this class of cases, the jury without reference to the person of the owner of the property, or the state of his business, are to value the injury at the time when it was completed. The measure of the damage is the difference between what the property would have sold for as affected and as unaffected by the injury. Schuylkill Navigation Co. *v.* Farr, 4 Watts and Sergeant, 362. See below, note 2.

[2] Chatfield *v.* Wilson, 27 Vt. 670. It is no answer to this action that the defendant first appropriated the water to his own use. Mason *v.* Hill, 3 B. & Ad. 304. The value of the use of the water during the time the plaintiff was wrongfully deprived of it is usually the true measure of damages in these cases. Pollit *v.* Long, 58 Barb. (N. Y.) 20. The owners of a dam are liable for the full amount of the injury where the plaintiff is not guilty of negligence, notwithstanding he might have prevented the damage by an expenditure beyond what was usual and necessary before the dam was erected. Reynolds *v.* Chandler River Co. 43 Md. 513.

And in an action for flowing lands, a verdict for nominal damages will not be set aside where part of the injury was the result of the plaintiff's unlawful act, if such damages bore no appreciable proportion to those actually sustained by the plaintiff and resulting from other causes. Phillips *v.* Phillips, 34 N. J. (5 Vroom) 209. No allowance can be made for remote or speculative damages. But if the flowing water separates one part of the complainant's land from another, so as to render bridges or new causeways necessary, it is a direct injury for which damages are to be awarded, and the cost of a new structure would, in some cases, be a proper measure of the injury. Where the value of the land so separated is not enough to justify the outlay, the damages under this rule must be limited to the cost of productive value. Bates *v.* Ray, 102 Mass. 458. And generally, in cases of this class, the measure of damages may vary according to circumstances; and, as was remarked by [redacted], J., in an action for injury to a mill pond by throwing refuse into the stream above, it is often difficult for the court to determine it till the evidence is all in. It may turn out that the cost of removing the deposit would be less than the difference in the value of the land occasioned by it, and then the cost of removal would be the proper measure, or it may be that the cost of removal would be much greater than the injury by the deposit, in which case the true measure would be the difference in value merely. Per Agnew, J., Seely *v.* Alden, 61 Penn. St. 302. Where the defendant threw flax shives into the stream below the plaintiff's grist mill, and the shives settled in the plaintiff's pond, forming a bar which caused an obstruction and filled the dam belonging to the mill, it was held that the plaintiff, without having removed the deposit, could recover as damages the amount necessary to restore the mill pond

So it is not necessary for the plaintiff, in an action for the diversion of a water-course, to show that he has sustained specific damage thereby; he may recover, notwithstanding he has sustained no actual or perceptible injury.*

In Massachusetts, where an action was brought for an injury to the plaintiff's mill, by causing the water to flow back on it, the judge instructed the jury, that, if the plaintiff proved his mill to have sustained any actual perceptible damage in consequence of the defendant's act, he was entitled to recover, but that for a theoretic injury or damage to be inferred from the obstruction of the water by the defendant's

* Parker *v.* Griswold, 17 Conn. 288; Bowen *v.* Hill, 1 Bing. N. C. 549.

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to the condition it was in before the damage occurred. O'Riley *v.* McChesney, 4 Lansing, N. Y. 278.

In an action on the case for damages to the plaintiff's saw-mill and other property, occasioned by the act of the defendant in constructing a dam and dike below such mill, and thereby causing the water to flow back upon the mill, and rendering it incapable of being used, the plaintiffs are entitled only to recover the value of the use of their mill during the time they were necessarily deprived of the use of it, and the amount it was permanently diminished in value by the erection of the dam. They cannot recover the amount of a loss upon saw-logs on hand at the time of the injury, sustained either in consequence of a deterioration in their value, or by a depression in the market price. Walrath *v.* Redfield, 11 Barb. (N. Y.) 368; affirmed 18 N. Y. 457.

In a complaint for flowing lands, damages can be awarded only for the effects of the dam described in the complaint. Those arising from other dams, although *auxiliary* to the one complained of, cannot be considered by the jury. Underwood *v.* North Wayne Scythe Factory, 38 Me. 75. For other cases on flood lands, see Bryant *v.* Glidden, 36 Me. 36; Lawrence *v.* The Great Northern Railway Co. 16 Q. B. 643.

There is some conflict of authority on the question whether in an action for flooding lands, the defendant can be allowed for benefit, if any, caused by the flowing. In New York, in an action of this kind for injuries occasioned in the construction of a railroad, it was held proper to charge the jury that the rule of damages in that class of cases is the difference between the value of the plaintiff's premises before the injury happened, and the value immediately after the injury, taking into the account only the damages which have resulted from the defendant's acts. Chase *v.* The New York Central Railroad Company, 24 Barb. (N. Y.) 273; Easterbrook *v.* Erie R. R. Co. 51 Barb. 94. But see the qualification of this principle in Terry *v.* The Mayor, &c. of New York, *ante*, 135, note 1. All allowance for benefit was also denied in Gerrish *v.* The New Market Manufacturing Company, 10 Fost. (N. H.) 478. See also Tillotson *v.* Smith, 32 N. H. 90. But in Massachusetts, in an action for damages occasioned by the filling up by the defendants of their land lying adjacent to that of the plaintiff, whereby the free flow of water off the plaintiff's land as formerly existing, had been obstructed, it was held that instructions to the jury, that "they should take into consideration the evidence on both sides bearing on this point, and if they were satisfied that the filling up had actually benefited the plaintiff's estate in any particular, they should in assessing the damages, make an allowance for such benefit, and give the plaintiff such sums in damages as they found upon the evidence would fully indemnify and compensate him for all the damages he had actually sustained."—were correct. Luther *v.* The Winnisimmet Company, 9 Cush. 171. To a like effect is Brower *v.* Merrill, 3 Chandler (Wis.), 46. But the Massachusetts rule seems to be somewhat restricted by late decisions. The allowance must be confined to benefits resulting from the overflow itself, and does not include those incidentally received from the defendant's operations in other respects. So the benefit to the complainant's land by being drained by a ditch made by the respondent on his own land to draw water from a pond to the projected dam, cannot be offset against the damage caused by the overflow of the dam after its erection. Giles *v.* Stevens, 13 Gray, 146. So where a riparian proprietor, by obstructing the river and thereby setting back the water, becomes liable to a mill-owner for the damages thereby occasioned, he cannot, in an action by the injured party, offset the benefit to the plaintiff's lands by the removal of obstructions in the river at another time and place. Talbot *v.* Whipple, 7 Gray, 122.

dam, he was not answerable; and on motion for a new trial this was held right.* [1]

The principle of the common law in cases of this kind, as we shall see hereafter, in regard to nuisances, is that successive actions can be brought as long as the obstruction exists; and in some of the States of the Union an attempt has therefore been made to regulate the subject by statute. So, in North Carolina, an act was passed, of which the leading feature is to prevent any action being brought against the owner of a mill unless it be first ascertained on petition, by the verdict of a jury, that the annual damage during the time for which the action is to be brought, amounts to the sum of twenty dollars at least. †

Where two or more mills are entitled to a common use of water, the owner of the upper mill must afford the lower mill a fair and reasonable participation in its use. If the injury is trivial the law will not afford redress, but it will interpose to prevent the lower mill being rendered useless or unproductive.‡ And in a case of this nature, the Supreme Court of New York said, that the defendants were liable for the use of the water beyond their relative proportion, and that in esti- [138] mating the damages the jury should be governed by this principle; and the damages were arrived at by a comparison of the tolls upon the number of barrels of flour actually ground by the plaintiff's mill, with the number that he might have

* Thompson *v.* Crocker, 9 Pick. 59. See an action for flooding lands in Pennsylvania, Bell *v.* McClintock, 9 Watts, 119.

† Gilliam *v.* Canady, 11 Iredell, 106.

‡ Wheaton's Selwyn's Nisi Prius, ii. 1138; Sackrider *v.* Beers, 10 J. R. 241.

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[1] Actual compensation, taking into account all qualifying circumstances, is the standard in these as in all other cases of trespass, which are free from intentional or reckless wrong. So where in consequence of the wrongful construction of a railway embankment the plaintiff's lands were flooded, but would have been flooded in a lesser degree had the embankment not been constructed, the measure of damages was held to be the difference between the two amounts of damage. Workman *v.* The Great Northern Railroad Company, 32 Law J. (N. S.) Q. B. 279.

In an action to recover damages for the unlawful raising a dam by one mill-owner across the stream below another's mill, thereby interrupting the operation of the latter mill by back-water, evidence of the profits of manufacture thus lost by the plaintiff may go to the jury as a basis on which to estimate the plaintiff's damages, if not as a measure of them. Simmons *v.* Brown, 5 R. I. 299.

And the occupant of premises injured in such a case by the setting back of the water is entitled to damages to an amount sufficient to indemnify him for the interest he had in them. Brown *v.* Brown, 30 N. Y. 519.

To a like effect with the case cited in the text is Elliott *v.* The Fitchburg Railroad Co. 10 Cush. (Mass.) 191. See also Burden *v.* The Mayor of Mobile, 21 Ala. 309; McElroy *v.* Goble, 6 Ohio St. 187. The damage from the stoppage of the plaintiff's mill is an injurious consequence which he may recover in an action of trespass for the destruction of his mill-dam without specially averring it in the declaration. Spigelmoyer *v.* Walter, 3 W. & S. 540.

ground if he had had the use of the water to which he was entitled.*

In a recent case in the Queen's Bench, where in an action of trespass for entering the plaintiff's close and destroying a mill-dam, the defendant justified the trespass on the ground that he was possessed of a mill, and that a stream of water of right flowed thereto, and that the plaintiff's dam obstructed the flow of water to defendant's mill, it was asked whether the plaintiff sought to recover substantial damages; and his counsel not declaring such to be the case, the Lord Chief Justice said that the action was brought more to try a right than to recover damages, and directed the defendant to begin; and on motion for a new trial, this was held right.†

QUALIFICATION OF LANDOWNERS' RIGHTS.—It is settled, that the right of an owner of lands to the enjoyment thereof is qualified by the rights of others. He may pursue any lawful trade, but he cannot create a nuisance to the premises of another. So he may dig a canal, but, in so doing, he has no right to blast rocks so as to cast them upon the premises of a third party. And in such a case, where the plaintiff does not claim exemplary damages, evidence that the work done by the defendant was performed in the best and most careful manner, is irrelevant and inadmissible.‡

ACTIONS BY REVERSIONERS.—There is a class of cases properly belonging to this branch of our subject, where actions are brought by reversioners for injuries to their inheritance, the remedy being by an action on the case;‖[1] and to these [139] we shall again allude when treating of the subject of waste.¶ It was at first doubted, whether the reversioner's remedy was not limited to the case of an absolute and perma-

* Merritt *v.* Brinckerhoft, 17 J. R. 306. See, also, Platt *v.* Root, 15 J. R. 213.

† Chapman *v.* Rawson, April 15, 1846. Jurist, Vol. X, p. 287.

‡ Hay *v.* Cohoes Co. 2 Comstock, 159; Tremain *v.* Cohoes Co. 2 Comstock, 163.

‖ In Massachusetts, it was held, previous to the revision of the statutes of that State, that the owner of real estate in the possession of a lessee, other than at will, could not maintain trespass for an injury to his reversionary interest, and that case was the only remedy. Lienow *v.* Ritchie, 8 Pick. 235; but if the lessee were at will only, it was held that trespass would lie. Now, however, since the Revised Statutes, ch. 60, § 26, requiring three months' notice to be given in order to determine estates at will, this distinction is held to be done away, and case is considered the proper remedy for any injury to the landlord's reversionary interest in estates at will as well as others. French *v.* Fuller, 23 Pick. 104.

¶ *Post*, 153.

[1] Alston *v.* Scales, 9 Bing. 3. One of two reversioners may maintain the action, recovering only a moiety of the damages, if the non-joinder of the co-reversioner is not pleaded in abatement. Putney *v.* Lapham, 10 Cush. (Mass.) 232.

nent diminution of the value of the property, and in an action for erecting a wall, whereby the plaintiff's lights were obstructed, the declaration counting for the plaintiff as reversioner, it was insisted that a temporary nuisance could not be an injury to the inheritance; but the court held otherwise, being of opinion that an action might be brought by the tenant in respect of his possession,[1] and by the landlord or reversioner in respect of his inheritance, for the injury done to the value of it.* [2] And it is now well settled that, if the act complained of works any injury to the inheritance, or affects in any way the reversioner's title, the law will remunerate him in damages.† [3] But as it is evident that injuries of this character are often of a nature very difficult to be estimated, the courts have uniformly exhibited great caution in requiring the fact of damage to the reversionary interest to be clearly established. Thus it is held that, in actions of this nature, it must be distinctly averred in the declaration that the act complained of has been done to the damage of the reversion, or must state an injury of such permanent nature as to be necessarily injurious to the reversion;[4] and where a verdict was obtained on a declaration alleging that the defendant had constructed a wall so as to overhang the yard of which the plaintiff

* Jesser *v.* Gifford, 4 Burr. 2141.

† Shadwell *v.* Hutchinson, 3 Car. & Payne, 615; s. c. 4 Car. & Payne, 333.

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[1] In an action by the tenant for life for damages to the estate, the New York Superior Court at special term lately held that the present value of the rents and profits of the promises, multiplied by the probable number of years of the plaintiff's life, exceeded the proper measure of damages, and that from the amount thus obtained a deduction must be made for taxes, repairs, insurance, and a rebate of the interest. Greer *v.* The Mayor of N. Y. 1 Ab. Pr. R. (N. S.) 206.

[2] So in an action of trespass for cutting down and carrying off trees, one having an estate for life in possession in a term for 99 years, and the reversion after the expiration of the term, was held entitled to the whole value of the timber, although the holder of an intermediate estate could also bring an action on the case in the nature of waste for the same act, and recover damages to the extent of the diminution of the value it occasioned to the expectancy. Bennett *v.* Thompson, 13 Ired. (N. C.) 146.

[3] Schnable *v.* Koehler, 28 Penn. St. 181. The action of trespass to real as well as personal property is a possessory action (*ante*, 134). A party in possession is *prima facie* the owner, and that possession will entitle him to recover to the full extent of the injury, unless the defendant show something in mitigation of the damages. If there is a reversionary interest entitling the *reversioner* to an action for damages to the freehold affecting that interest, the trespasser must show that there is such a reversioner, and that the damages should be mitigated, because the defendant is answerable over for the same injury to another person. Todd *v.* Jackson, 2 Dutcher (N. J.), 525. The true rule of damages in an action on the case brought by a reversioner on account of injury done to the premises, is the amount of injury done to the estate in reversion. Dutro *v.* Wilson, 4 Ohio St. 101.

In an action by a reversioner for damages done to the reversion, by cutting off the eaves of a building belonging to him, and by erecting a wall with a drip over his premises, it was held, that as there might be repeated actions for continuing the nuisance, evidence for the purpose of showing the diminution in the saleable value of the premises should be rejected. Bathishill *v.* Reed, 37 Eng. L. & E. 317. See, also, on the measure of damages in these cases, Smith *v.* Peet, 9 Exch. 161.

[4] Tinsman *v.* The Belvidere Delaware Railroad Co. 1 Dutcher (N. J.), 255.

was reversioner, and to produce a water drip in the yard, but without alleging any injury to the plaintiff's reversionary estate and interest in the premises, the judgment was arrested by the King's Bench.*

But building a roof with eaves which discharge rain-
[140] water by a spout into the adjoining premises is an injury for which the landlord of such premises may recover as reversioner, while they are under demise, if the jury think there is a damage to the reversion.†

So again, where the defendant, being a lessee for years, without leave opened a door in the house owned by the plaintiff as landlord, and the jury found that the house was not in any way weakened or injured by the act, the court refused to allow a verdict for nominal damages to be entered, and directed a new trial to be had on this point; saying, "We cannot say that the opening of the door in this case affects the evidence of the plaintiff's title. That is a question of fact."‡ And so a reversioner cannot maintain an action on the case against a stranger for merely entering upon his land held by a tenant on lease, though the entry be made in exercise of an alleged right of way.‖[1] So, again, it has been held that the obstruction of a public navigable river is not a damage to a reversioner out of possession of premises abutting thereon.¶

Action by Lessee.—Where the plaintiff was the lessee for years of certain premises at an annual rent, with liberty to dig half an acre of brick earth annually, and covenanted that he would not dig more, or that if he did he would pay an increased rent of £375 per half acre, being after the rate that all the brick earth was sold for, and a stranger dug and took away brick earth; the lessee recovered against him the full value of the earth dug, on the ground that the brick earth was by the terms of the lease sold to the lessee, as well as that the tenant would be liable over for the waste to the landlord; and on argument this was held right.**

Nuisance.—We come next to the subject of nuisances. A great deal of learning will be found in the books as to the precise nature of a nuisance, and as to what can be so considered

* Jackson *v.* Pesked, 1 M. & Sel. 234.
† Tucker *v.* Newman, 11 Ad. & Ell. 40.
‡ Young *v.* Spencer, 10 Barn. & Cres. 145.
‖ Baxter *v.* Taylor, 4 Barn. & Adol. 72.
¶ Dobson *v.* Blackmore, 9 Q. B. 991.
** Attersoll *v.* Stevens, 1 Taunt. 182.

[1] But compare Tinsman *v.* The Belvidere Delaware Railroad Co. 1 Dutcher (N. J.), 255.

and treated. That examination would, however, fall beyond the limits of this treatise. "Whatsoever," says Blackstone,* "unlawfully annoys or doth damage to another, is [141] a nuisance;" and the remedies for private nuisances he declares † to be,—"an action on the case for damages, in which damages only are recoverable; and an assize of nuisance, by which not only are damages recovered, but the nuisance, is itself abated."‡

The ancient real action which abated the nuisance is, as will be readily seen, one peculiar in its character; but the action on the case, which simply gives damages for the infringement of the plaintiff's right, falls strictly within the class which we are now considering, of disturbances of the enjoyment of real estate as vindicated in the ordinary actions of trespass or case, and the measure of compensation is to be regulated by the same principles.‖

We have already seen,¶ that if the nuisance is so general as to be a common or public nuisance, the remedy is by indictment, not by private suit. But every individual who suffers actual damage from a common nuisance may maintain an action for his own particular injury, though there may be others equally damnified.[1] It is essential, however, to allege and prove special damage. So it was very early held in England. Thus in an action for stopping up a highway: "All the court agreed that when an action arises from a public nuisance, there must be a special damage; for he that doeth nuisance is punishable at a suit of the public, and to allow all private persons their actions, without special damage, would create an infinite and endless multiplicity of suits."** [2]

So, too, in this country: "If a person," said the learned Chancellor Walworth, in the Court of Errors in New

* Book iii. ch. i. p. 51.

† Book iii. ch. xiii. p. 220.

‡ This latter remedy has been in New York retained and simplified (4 Kent, 70, note) by the provisions of the Revised Statutes (part iii. ch. v. title 4, vol. 2, p. 256), which prescribe the form of the writ, directing the jury that inquires of the nuisance, if they find for the plaintiff to assess the damages; and which also declare that the judgment, in case the plaintiff prevails, shall be as heretofore accustomed, that the nuisance be removed, and that the plaintiff recover the damages occasioned thereby.

‖ To bring an assize of nuisance, it was necessary that the plaintiff should show a freehold estate in the premises; but in the action on the case, it is only necessary to prove that he is in possession. Cornes *v.* Harris, 1 Comstock, 223. The remedy by assize of nuisance has long been obsolete in England, and there is said to have been but one such writ prosecuted in New York. Kintz *v.* McNeal, 1 Denio, 436.

¶ *Ante*, 30 and 32, and cases there cited.

** Iveson *v.* Moore, 1 Salk. 15.

Smith *v.* Lockwood, 13 Barb. 209.

Winterbottom *v.* Ld. Derby, 2 L. R. (Exch.) 316.

[142] York,* "sustains no damages by the erection of a nuisance, whether direct or consequential, but that which the law presumes every citizen to sustain: because it is a common nuisance, no action will lie; but every individual who receives actual damage from a nuisance may maintain a private suit for his own injury, although there may be many others in the same situation."† It has been questioned whether the injury from a nuisance, to authorize a private suit, must be direct, or whether a consequential injury would suffice; but it seems now settled that it is sufficient if *peculiar* or *special* damage result therefrom, though it be consequential and not direct. So, where in consequence of the defendant's mooring a barge across a canal the plaintiffs were obliged to carry their goods overland.‡ But a claim for damages against a turnpike company, arising from the plaintiff's *not attempting* at certain times to travel a public highway because of its general badness, is hypothetical, and does not constitute such peculiar damage as to give a private action for a public nuisance.‖

And in Connecticut, where the grievance complained of consisted in the erection by the defendant of a dam in a public navigable creek, by means of which the plaintiff was prevented from passing along such creek from his residence above to the land below, and the converse, it was held that such obstruction was not the subject of a private action.¶

The general principle which we have heretofore considered,** limiting liability for damages to those consequences of the act complained of which a due exercise of caution could not avoid or obviate, has been applied to nuisances; and it is well [143] settled, that to entitle the plaintiff to an action for damages resulting from this cause, he must be able to show that he acted with common and ordinary caution, or, at all events, that his want of care has not increased the injury.[1] So

* Lansing *v.* Smith, 8 Cow. 146; 4 Wend. 9. See also, to S. P. Lansing *v.* Wiswall, 5 Denio, 213; Dougherty *v.* Bunting, 1 Sand. Sup. Ct. Rep. 1; and see also, First Baptist Church *v.* Sch'y & Troy R. R. Co. 5 Barb. S. C. R. 79; Irwin *v.* Dixon, 9 Howard, 10. See the subject considered in Dobson *v.* Blackmore, 9 Q. B. 991; where it is held that the obstruction of a public navigable river is not a damage to a *reversioner out of possession* of premises abutting thereon. So in regard to mandamus, if a nuisance is not more injurious to the relators than to the inhabitants at large, the remedy is only by indictment. Councils of Reading *v.* Commonwealth, 11 Penn. State R. 196.

† See People *v.* Corporation of Albany, 11 Wend, 539, to same point; Allen *v.* Ormond, 8 East, 4; and Story *v.* Hammond, 4 Ohio, 376; Simpson *v.* Seavy, 8 Greenleaf, 138; City of Georgetown *v.* Alexandria Canal Co. 12 Peters, 91. In South Carolina, See Carey *v.* Brooks, 1 Hill's Rep. (S. C.) 365.

‡ Rose *v.* Miles, 4 M. & S. 101.

‖ Baxter *v.* Winooski Turnpike Co. 22 Verm. 114.

¶ Seeley *v.* Bishop, 19 Conn. 128.

** *Ante*, 95.

[1] But see The Vicksburg and Jackson Railroad Co. *v.* Patton, 31 Miss. 156; Kerwhacker *v.* The Cleveland, Columbus and Cincinnati Railroad Co. 3 Ohio St. 172; The Central Railroad Co. *v.* Moore, 4 Zabr. (N. J.) 824.

in the King's Bench, where the plaintiff, who was riding violently on a public highway, was thrown down and injured by means of an obstruction placed there by the defendant, it was proved, that if the plaintiff had not been riding very hard he might have seen the obstruction and avoided it; and on this ground he failed to recover, Lord Ellenborough saying, "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right; one person's being in the fault will not dispense with another's using ordinary care for himself."* And the same principle has been recognized in various cases in England and in this country.† We shall have occasion to consider this subject again when we come to speak of the measure of damages in cases of trespass generally.‡

In a case in Massachusetts, where an action on the case was brought for a nuisance upon the plaintiff's land, occasioned by the discharge of impure water from the defendant's brewery into the plaintiff's clay pits, through a drain which the defendant dug from his premises to those of the plaintiff, it appeared that the water had become so stagnant and offensive as to be complained of as a nuisance, and that the Boston Board of Health had ordered one of the clay pits to be filled up by the plaintiff; and it was held that the expense of filling up the pit should be included in the assessment of damages.‖[1]

In Pennsylvania, it has been decided that in an action on the case for a nuisance, the defendant could not be made liable for an erroneous opinion that a dam erected by him was in proper order for the passage of vessels.¶

In the same State consequential injuries to property to which a private alley is not appurtenant, are inadmissible in evidence in an action for a nuisance destroying the use of the alley.**[2] [144]

* Butterfield *v.* Forrester, 11 East, 60; Carlisle *v.* Holton, 3 La. Ann. R. 48.

† Flower *v.* Adam, 2 Taunt. 314; Smith *v.* Smith, 2 Pickering, 621; Wheaton's Selyn's Nisi Prius, vol. ii, p. 1139. The doctrine of Butterfield *v.* Forrester was expressly recognized by the English Court of Exchequer, in Bridge *v.* The Grand J. R. Co. 3 Mees. & Wels. 246; and also in Davies *v.* Mann, 10 Mees. & Wels. 546.

‡ *Post* ch. xviii.

‖ Shaw *v.* Cummiskey, 7 Pick. 86.

¶ Roush *v.* Walter, 10 Watts, 86.

** Commissioners of Kensington *v.* Wood, 10 Penn. State R. 93.

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[1] Compare Carhart *v.* The Auburn Gas Light Company, 22 Barb. (N. Y.) 297.

[2] In an action by the owner of land bordering on a public street against a Railway Company for building their railway, without right, along such street, the measure of his damages is the loss and inconvenience he has sustained, in view of the use to which his land has been put during the continuance of the nuisance. Hatfield *v.* The Central R. R. Co. 33 N. J. 251.

Continuing Nuisances.—"Every continuance of a nuisance is held to be a fresh one, and therefore a fresh action will lie." * "And," says Blackstone,† speaking of the same subject, "very exemplary damages will probably be given, if, after one verdict against him, the defendant has the hardiness to continue it." ‡ On this ground, that suit can be brought *toties quoties*, it has been decided that in an action on the case for a nuisance, damages sustained subsequent to the bringing of the action, are not recoverable.‖ [1]

In regard to permanent or continuing nuisances, it has been questioned how far the defendant is liable after he has parted with the possession of or the title to the premises. As a general rule, the erector of the nuisance is answerable for the continuance of it, not only where he has demised the property with a nuisance on it, reserving rent, but where the erection was made on the land of another, and though he has no right to enter for the purpose of removing it.¶ On this point it has been held in

* 3 Black Com. 220; Vedder *v.* Vedder, 1 Denio, 257. So, also, in New Jersey, Delaware and Raritan Canal Co. *v.* Wright, 1 Zabriskie, 469.

† Book III, ch. xiii.

‡ "If a party, against whom a verdict in an action of this kind has been recovered, does not abate the nuisance, another action may be brought for continuing the nuisance, in which the jury will be directed to give large damages." 2 Wheaton's Selw. N. P. 1141.

‖ Duncan *v.* Markley, 1 Harper, 276; Blunt *v.* McCormick, 3 Denio, 283; and *vide ante*, 108, as to damages resulting from nuisances after suit brought. And see, to s. p. Thayer *v.* Brooks, 17 Ohio, 489.

¶ Rosewell *v.* Prior, 12 Mod. 635; 1 Lord Raym. 713; and 2 Salk. 460; s. c. Thompson *v.* Gibson, 7 Mees. & W. 456; Holmes *v.* Wilson, 10 A. & E. 503; Staple *v.* Spring, 10 Mass. 74; Fish *v.* Dodge, 4 Denio, 311. But, though there is a legal obligation to discontinue a trespass or remove a nuisance, no such obligation lies on a trespasser to replace what he had pulled down or destroyed upon the land of another, though he is liable in trespass for the loss sustained. Therefore, where the owner of a coal mine excavated as far as the boundary, and continued the excavation wrongfully into the neighboring mine, leaving an aperture in the coal of that mine, through which water passed

[1] See, as to the general rule of damages from a nuisance to improved real estate, Ill. Cent. R. Co. *v.* Grabill, 50 Ill. 241. And as to the principle of valuation of damages to real estate caused by the carrying on of a noxious trade on adjoining land, see Houghton *v.* Bankhard, 3 L. T. R. (N. S.), 266 (V. C. Wood's Court). An action was brought in the Superior Court of the city of New York: 1st, to recover damages for injury to certain buildings of the plaintiff, caused by the working of certain steam machinery by the defendant, upon premises adjoining those of the plaintiff, and the effect of the motion and noise of such machinery upon the facility of letting the plaintiff's buildings and the amount of their rents; and 2d, for an injunction. On the trial, it appeared that the defendant's premises were used as a marble factory, containing machinery for such manufacture propelled by steam, and also that the plaintiff had suffered damages from this fact,—*Held*, that the action lay. The court say: "This presents the naked question whether the lawful character of the results of an occupation, trade or mechanical art, or the care with which it is carried on, can prevent any right of action by those whose enjoyment of life or property is disturbed by the mode or means of conducting such occupation, trade or mechanical art." "The right of jarring a neighbor's house by the motion of a steam-engine upon one's own premises, cannot depend at all upon the utility or lawfulness of the purpose for which such motion is employed, or of its final results. The intermediate injury, before such results are obtained, wrought upon another's property or enjoyment of life, make such employment unlawful." The measure of damages was held to be the injury to the building, deprivation of rent, and loss of tenants, to the commencement of the action. For damages for injuries caused since that time a new suit might be brought. McKeon *v.* See, 4 Rob. (Sup. Ct. N. Y.), 449.

New York, that where the defendant has conveyed the lands on which the nuisance had been placed by him, and [145] surrendered the possession to his grantee, before the time when the plaintiff acquired title, or possession of the lands which were subsequently injured, and without any covenant of warranty, or agreement to uphold the grantee in the occupancy of the premises, no action will lie against such former owner and erector of the nuisance. But though the defendant is out of possession at the time the injury was committed, and another person has the entire possession, still, if the defendant was the erector of the nuisance, and owner of the premises, and under any agreement to uphold the occupant in possession, or if he have conveyed the premises with warranty,—the action will lie against him on the ground that, by such relation with the occupant, he has affirmed the continuance of the nuisance, and that it may be said to be a continuance by himself; and in such case he is liable, of course, for damages subsequent to the conveyance and down to the commencement of the suit.*

TRESPASS DE BONIS ASPORTATIS.—Injuries to real estate are sometimes redressed by actions of trespass *de bonis asportatis*, or trover, as in the case of coal mines, or destruction of growing trees;† but this class of cases will fall most properly under the head of torts to personal property.

DISTRAINT OF CATTLE.—It would be improper, while speaking of trespasses to real property, to omit mention of the right given by the English law to distrain beasts doing damage, or in the old Norman French, "*damage feasant.*" The right is strictly limited to the time when the beasts are actually committing the trespass: "The beasts must be damage-feasant at the time of the distress; and if they were damage-feasant yesterday and again to-day, they can only be distrained for the damage they are doing when they are distrained. And if many cattle are

and did damage, held that, though the party excavating was liable in trespass for breaking into the neighboring mine, he was not liable in case for omitting to close up the aperture on his neighbor's soil, though continuing damage resulted. Clegg *v.* Dearden, 12 Q. B. 576.

* Blunt *v.* Aikin, 15 Wendell, 522; Waggoner *v.* Jermaine, 3 Denio, 306; Staple *v.* Spring, 10 Mass. Rep. 74; Angell on Watercourses, 152, and cases there cited. A subsequent purchaser of premises injured by a nuisance erected previous to his purchase, has a remedy for the injury occasioned by the continuance of the nuisance. Brady *v.* Weeks, 3 Barb. (N. Y.), 157.

† So where a reversioner brought trover against his tenant for cutting some branches off the trees growing on the demised close, it was held that the plaintiff was entitled to nominal damages, though no proof of the value was given at the trial. Cotterill *v.* Hobby, 4 Barn. & Cres. 465; see Wild *v.* Holt, 9 Mees. & Wels. 672; Morgan *v.* Powell 3 Q. B. Rep. 278; Martin *v.* Porter, 5 Mees. & Wels. 351; and *vide post*, ch. xxii.

doing damage, a man cannot take one of them as a distress for the whole damage; but he may distrain one of them for
[146] its own damage, and bring an action of trespass for the damage done by the rest." *

DOUBLE AND TREBLE DAMAGES.—Another class of injuries to real estate, according to most of the systems which derive their origin from the English jurisprudence, is taken under the special protection of the statute law, and redressed by the infliction of double or treble damages; but of these we shall speak when we come to the subject of damages as regulated by statutes.

We close this subject with the consideration of Waste.

WASTE.—"Waste, *vastum*," says Mr. Justice Blackstone,† "is a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that hath the remainder, or reversion in fee simple, or fee tail." This subject might, perhaps, be classed among actions for the recovery of real estate; but as the proceeding does not always result in a change of the property, I have thought it more properly classified among suits brought for interferences with its enjoyment.[1] The punishment for waste was by common law, and by the statute of Marlbridge ‡ single damages only; but by the statute of Gloucester ‖ it was provided that the tenants therein mentioned should forfeit the place wasted, and treble damages to him that had the inheritance.

At common law the action of waste lay against tenants in dower and guardians; and the better opinion seems to be that it also lay against a tenant by the courtesy; ¶ but by the statute of Marlbridge and the statute of Gloucester, above referred to, it was given against every person holding a lease for life or lives, or for years; and by the latter act, the damages which before were single, were in the cases specified in that statute

* Hoskins *v.* Robins, 2 Saund. 327; Vaspor *v.* Edwards, 12 Mod. 660; Clement *v.* Milner, 3 Esp. 95; Wormer *v.* Biggs, 2 Car. & Kir. 31.

† Comment. Book II, ch. xviii, § 6, p. 281. See, also, the common law with regard to waste very learnedly expounded by Lord Chief Justice Eyre, in Jefferson *v.* Bishop of Durham, 1 Bos. & Pull. 120; and Story's Equity Juris. § 909.

‡ 52 Hen. III, ch. xxiii.

‖ 6 Edw. I, ch v.

¶ Sayer on Damages, ch. vii, 29; 2 Inst. 145, 299, 300, 305; Bl. Com. II, 282, ch. xviii.

[1] In an action in the nature of waste for cutting down trees on an estate, the damages are not necessarily confined to the value of the timber removed, but may include also the permanent injury to the inheritance. Harder *v.* Harder, 26 Barb. 409.

trebled.* Damages were not, however, recoverable for [147] waste committed pending the suit; and these were given in an action of estrepement.†

In New York, an action for waste is given by statute‡ against guardians, tenants by the courtesy, tenants in dower, for life or years, or their assigns; and by the same statute, if default be made, or if any issue of fact is awarded, "the jury that inquire of the waste done, shall also assess the damages occasioned thereby." If the action be brought by any other than a tenant in common or joint tenant, the plaintiff recovers the place wasted, and treble the damages assessed by the jury. If it be brought by a tenant in common, or joint tenant, against his co-tenant, the plaintiff may elect to take treble damages or to have partition of the premises; and in case he elects the latter, the object is to be effected by actual partition or sale, and in either case the single damages found by the jury are to be deducted from the defendant's share.‖ Damages were not recoverable at common law, as we have said, for waste committed pending the action of waste; and this is provided for by the same statute, which declares, that after the commencement of any action for the recovery of land or for its possession, the court may, by order, restrain the defendant from committing waste; but in the action of waste itself, the positive language of the above provision probably goes far enough to give damages for waste committed pending the suit. The effect of this statute has been said ¶ to be to give the Supreme Court the same power to restrain and prevent waste, which is exercised by the [148] Court of Chancery; and in this case, and in another,** it was held that the order might be made *ex parte*. And in a later case it has been said†† to be a copy of the statute of Marlbridge.‡‡ Independent of the statute, however, there is no doubt that an action on the case can always be maintained, in which the party injured will recover the damages which he

* *Statutum de Malberge.* Statutes made at Marlbridge, 52 Hen. III, A. D. 1267, ch. xxiii. "Also, Fermors, during their terms shall not make waste, etc. etc., ... which thing if they do, and thereof be convicted, they shall yield *full damage*, and shall be punished by amerciament grievously."

Statuta Gloucestr'. Statutes made at Gloucester, 6 Edw. I, A. D. 1278. "It is provided, also, that a man from henceforth shall have a writ of waste, etc., against him that holdeth, by law of England or otherwise, for term of life or for term of years, or a woman in dower. And he which shall be attainted of waste shall leese (*perde*) the thing that he hath wasted, *and moreover shall recompense thrice so much as the waste shall be taxed at.*"

† Sayer on Damages, ch. vii, 34.

‡ 2 R. S. 335, Part III, ch. v, Tit. V.

‖ By 1 R. S. 141, 2d edition, remaindermen and reversioners may bring waste, notwithstanding an intervening estate for years.

¶ Savage, J. in the People *v.* Alberty, 11 Wend. 162.

** Bush *v.* Phillips, 3 Wend. 428.

†† By Nelson, J. in Carris *v.* Ingalls, 12 Wend. 70.

‡‡ As to estrepement of waste in Pennsylvania, see Dickinson's Lessee *v.* Nicholson, 2 Yeates, 281.

has actually sustained.* In such a proceeding, however, the forfeiture of the place wasted is waived, at least as far as the proceeding itself is concerned.[1]

The question whether, as matter of law, waste has been committed, is very closely connected with the question of damages in this action; and on this point many cases have been decided. But the inquiry does not come properly within the scope of the present work.†

In Massachusetts, treble damages are given for waste, and they may be recovered in an action for debt.‡ And the statute of Gloucester, in regard to waste, has been declared to be a part of the law of the State, except in regard to tenants in dower.‖

"It is common learning," said Heath, J., in the English Common Pleas,¶ "that every lessee of land, whether for life or years, is liable in an action of waste to his lessor for all waste done on the land in lease, by whomsoever it may be committed." And this has been recently recognized in New York.** And so where land had been demised to the plaintiff at an annual rent, for years, with liberty to dig half an acre of brick earth annually, and the lessee covenanted that he would not dig more, or if he did, that he would pay an increased rent of £375 per half
[149] acre, "being after the same rate that the whole brick earth was *sold for*," and a stranger dug and took away brick earth, it was held that the lessee should recover of him the full value of it, on the ground that the brick earth was, by the terms of the lease, sold to the tenant, as well as that he would be liable over for the waste, to his landlord.

In the action of waste it was originally necessary, in order to entitle the plaintiff to judgment, that the damages found should be something more than nominal; and the sum of three shillings and fourpence appears to have been arbitrarily fixed on as the minimum of damage which would authorize a party to bring such action.†† This doctrine has been in England extended to the action on the case for injury to the reversion, though not in

* Winship *v.* Pitts, 3 Paige, 259.

† For cases of this nature, see Comyn's Digest, tit. Waste; Harrison's Digest; and Livingston *v.* Reynolds, 26 Wend. 115.

‡ Reed *v.* Davis, 9 Pick. 514.

‖ Sackett *v.* Sackett, 8 Pick. 309. See Padelford *v.* Padelford, 7 Pick. 152, and particularly as to what is waste. In Pennsylvania, as to what is waste, see Hastings *v.* Cruncleton, 3 Yeates, 261, and Shult *v.* Barker, 12 S. & R. 272.

¶ Attersoll *v.* Stevens, 1 Taunt. 182 and 198.

** Cook *v.* Champlain Transportation Co. 1 Denio R. 91.

†† Gov'r of Harrow School *v.* Alderton, 2 B. & P. 88.

[1] In an action brought by a remainder-man in fee for injury to the inheritance, the inquiry should not embrace the present damage to the property. Van Deusen *v.* Young, 29 N. Y. 9.

reason applicable.* The commutation was originally introduced on the ground that in the action of waste the place wasted was forfeited, and it was thought not just that the tenant should forfeit his estate for every trifling act of waste; but in actions for injuries to the reversionary interest, the injury complained of may be merely that the act in question will perhaps be afterwards relied on as evidence of the tenant's absolute property in the tenement; here the object of the action is simply to assert the reversioner's right of property, and not to recover damages.†

Case lies by reversioner against one who erects a dam on the adjacent land and backs the water on the plaintiff's mill race.‡ But this branch of our subject I have already considered, when treating of suits brought by reversioners.

Waste is well known by the name of *degradations* in the French Law, and it will be found treated of in the *Code Civil* under the proper head.‖

* Rigg *v.* Parsons, cited 2 East, 156.

† Pindar *v.* Wadsworth, 2 East, 154; V. Redfern *v.* Smith, 8 Moo. 443; 1 Bing. 392; 2 Bing. 262; Gibbons on the Law of Dilapidation and Nuisances, 78.

‡ Ripka *v.* Sergeant, 7 Watts & Serg. 9.

‖ See the titles of Usufruct, Art. 578, *et seq.*, et Le Contrat de Louage, Art. 1708, *et seq.* Under the first head are stated, with great care, the precise acts which the usufructuary can do without committing waste.

I am favored by the Hon. E. Fitch Smith, First Judge of the Ontario Common Pleas, with the report of the following case decided by him. Nottingham *v.* Osgood.

I. In an action on the case in nature of waste, where the court on the trial instructed the jury on the subject of damages, to "inquire whether, by reason of the additions and alterations made by the defendant, the premises were rendered less or more valuable; if less valuable by reason thereof, then the plaintiff would be entitled to recover the actual damage he had sustained, to be ascertained by the jury from all evidence in the cause; but if, from the evidence, the jury should be satisfied that the premises, by reason of such alterations and erections, were in point of fact more valuable,—that then, although the act of the defendant was a technical wrong, yet that the plaintiff, under such circumstances, would only be entitled to nominal damages." Held erroneous, and for that reason a new trial ordered.

II. Where a tenant, during the continuance of his term, made material and essential alteration of the buildings, and erected additions without the consent of his landlord—held, that he was not entitled to any remuneration for the materials and erections, even although the general value of the premises were thereby enhanced; upon the principle that, the act being tortious, he could not claim any benefit or remuneration for his own wrong.

III. In an action on the case in the nature of waste, the jury, in estimating the damages, are not to take into consideration whether the general value of the premises have been enhanced or depreciated by reason of the act of the defendant, but simply whether they are depreciated as to the plaintiff. In such action, on estimating the plaintiff's damages, where the alterations and changes made by the tenant are of such a nature as to admit of the premises being restored to their condition at the time of the demise, the jury may take into consideration what sum would be equivalent to the costs and expenses incident to the restoration of the demised premises to their original state at the time of the demise. Under a declaration properly framed for that purpose, if the premises are, at the time of their surrender, by the act of the defendant, rendered untenantable, the jury may also take into consideration the value of the rent, or the use of the premises, for such period of time as would be requisite to put them in a tenantable condition.

IV. If the changes amount to a total destruction of any part of the demised property, such as shade trees and ornamental shrubbery, the jury may also take into consideration the actual value of the property totally destroyed, with reference to their original state and condition at the time of the demise, and their value to the owner of the reversion.

In Tennessee, where land is sold at execu-

[150] The question of the measure of damages for waste committed by tenants, often arises in actions of covenant brought on the lease; and we may have occasion to recur to the subject when we come to consider personal actions of this class.

tion sale, and the purchaser takes possession, and the land is redeemed, the owner is not entitled to rent or damages for waste before the redemption, but he is entitled to rent for the time he was wrongfully kept out of possession after redemption. Kannon *v.* Pillow, 7 Humphreys, 281.

"Though a disseisee may have his action of trespass *quare clausum fregit* against the disseisor for the injury done by the disseisin, at which time the plaintiff was seised of the land, he cannot have it for any act done after the disseisin until he gain possession by reentry, and then he may maintain it for the intermediate damage done; for, after his reentry, the law, by a kind of *jus postliminii*, supposes the freehold to have all along continued in him." 3 Black. Com. 210; 4 Kent's Com. 119. Ex'rs of Stevens *v.* Hollister, 18 Verm. 294.

CHAPTER VI.

RULE OF DAMAGES IN ACTIONS BROUGHT FOR THE BREACH OF COVENANTS OR AGREEMENTS GROWING OUT OF THE CONVEYANCE OR OCCUPATION OF REAL ESTATE.

The Ancient Warranty.—Modern Covenants.—The *Stipulatio Duplex* and *Edictum Ædilium* of the Roman Law.—Rules of the modern Civil Law, in cases of Eviction.—Of the French Code.—Measure of Damages according to the Common Law, in Cases of Eviction.—On the Covenants for Quiet Enjoyment, and of Warranty.—Improvements.—Leases.—Rule in Different States.—Partial Eviction.—Measure of Damages on the Covenant of Seisin.—On the Covenant against Incumbrances.—On Covenants to convey Lands.—Landlord and Tenant.—Covenants to repair and rebuild.

I PURPOSE to discuss in this chapter the subject of agreements growing out of the conveyance or occupation of real estate. This will embrace Real Covenants, or the stipulations entered into by a seller, and incorporated into the conveyance; Contracts for the Sale of Land; and Agreements entered into by Landlord and Tenant for the Temporary Use or Enjoyment of Real Estate.

REAL COVENANTS.—And first, of *Real Covenants.* The warranty of the ancient English law was in substance a covenant, whereby the grantor of an estate of freehold and his heirs were bound to warrant the title, and either upon voucher or judgment in a writ of *warrantia chartæ*, to yield other lands to the value of those from which there had been an eviction by a paramount title.* Upon eviction of the freehold, no personal action lay at common law upon the warranty. The party had only a writ of *warrantia chartæ* upon his warranty to recover a recompense in value to the extent of his freehold.† For reasons assigned by Blackstone,‡ in modern practice the covenant has totally superseded the warranty; and to this end various statutes have contributed. Such is the statute ‖ making void all warranties by tenant for life, as against any reversioner or remainder-man; and as against the heir, all collateral warranties by any ancestor

* Co. Litt. 365 *a*, and Reeves' Eng. Law, vol. I, p. 448.

† Kent's Com. vol. IV, p. 469.

‡ Bl. Com. book ii, ch. 20, p. 300; and see, also, Co. Litt. 384 *a*, for "divers other diversities between warranties and covenants, which yield but damages."

‖ 4 and 5 Anne, c. 16.

who had no estate of inheritance in possession; and these statutes have been generally reënacted in this country.*

[152] PERSONAL COVENANTS IN DEEDS.—The usual personal covenants contained in a deed, the rule of damages in relation to which we shall now proceed to examine, are, *First*, that of seisin, or that the grantor is lawfully seised. *Second*, that he has good right to convey, which has been called synonymous with the covenant of seisin.† *Third*, that the premises are free from incumbrances. *Fourth*, for quiet enjoyment, or that the grantee shall quietly enjoy. *Fifth*, of warranty, or that the grantor shall warrant and defend the title against all lawful claims; and, *Sixth*, the covenant for further assurance,‡ or that the grantor will execute any further conveyances, to perfect the title, which the grantee can legally require.[1]

In regard to all these covenants the rule is general, that no substantial relief will be given till the party complaining has actually suffered injury. It is not sufficient that he is menaced by an outstanding title or incumbrance. The covenantee cannot have anything more than nominal damages until he has been damnified in consequence of a breach of the covenant.‖[2] But it often becomes a question what constitutes a breach, and what a damage, sufficient to found a claim for remuneration.

In regard to the three first, if the title is defective, or incumbrances exist at the time of the conveyance, there is a breach as

* It is certainly so, at least in New York. The statute of 4 and 5 Anne, c. 16, was reenacted in New York in 1788; and finally the Revised Statutes of the same State (vol. I. p. 739, § 146) have abolished both lineal and collateral warranties with all their incidents, and have made heirs and devisees answerable upon the covenant or agreement of the ancestor or testator, to the extent of the lands descended or devised, And it has been further declared (sec. 140), that no covenant shall be implied in any conveyance of real estate, whether such conveyance contain special covenants or not.

† Rickert *v.* Snyder, 9 Wendell, 416.

‡ Dimmick *v.* Lockwood, 10 Wend 149.

‖ Nyce's Ex'rs *v.* Oberts, 17 Ohio, 71.

[1] The general rule already considered in regard to breaches of contract, by which a party is liable for such damages as were or should have been contemplated by him at the time of the contract as the result of its breach (*ante*, 66, 67, 96), does not usually apply to the breaches of covenant in a deed so as to include consequential damages. The specific character of each covenant furnishes the rule, and necessarily excludes a less definite one. Thus the Supreme Court of Indiana refused to apply the general rule to the breach of covenants of title in a deed. Phillips *v.* Reichert, 17 Ind. 120; and, as will be seen hereafter, the general rule in relation to the breach of these covenants is the consideration money and interest. In Rhode Island, however, the rule referred to was applied to determine the extent of the damages sustained by a breach of the covenant against incumbrances. Greene *v.* Creighton, 7 R. I. (4 Ames) 1. See the subject discussed farther on in this chapter in relation with the different covenants.

[2] Willson *v.* Willson, 5 Fost. (N. H.) 229. In an action brought upon a warranty, by an assignee, the measure of damages is the sum which the assignor might have recovered had the action been brought in his name. The amount paid by the assignee for the right of action, is not the rule. The warrantor must make good his warranty. (Sweet *v.* Bradley, 24 Barb. (N. Y.) 549.

soon as the deed is executed. But those of warranty and quiet enjoyment are prospective, and an actual ouster or eviction is, in general, necessary to constitute a breach.* [1] It is of the rule of damages for eviction, in a suit brought to enforce these covenants, that we shall first speak.

It is apparent that the real covenants are, to some extent, cumulative; thus a covenant for quiet enjoyment is broken by an eviction under a prior mortgage, which would equally be a breach of that against incumbrances. The rules of damages on the various covenants consequently run into each other; but the most intelligible mode of treating the subject will be, as far as possible, to consider them separately.

CIVIL LAW ANALOGIES.—First, however, we will ex- [153] amine the analogies of the civil law. The *stipulatio duplex* was the remedy provided by the Roman law for cases of eviction,† and for the breach of warranties that were sometimes required on the sale of property under the *Edictum* [154] *Ædilium.*‡ And by the *stipulatio*, the rule of damage was

* Kent's Com. vol. IV, p. 471.

† Pothier, Pandectes, par Brèard Neuville, vol. VIII, p. 97.

‡ The *Edictum Ædilium* was applied more particularly to sales of chattels than to real estate; but it will not be considered out of place here.

Aiunt ædiles, "Qui mancipia vendunt, certiores faciant emptores quid morbi vitiive cuique sit; quis fugitivus, errove sit; noxave solutus non sit; eademque omnia cum ea mancipia venibunt, palam ac recte pronuncianto. Quod si mancipium adversus ea venisset, sive adversus quod dictum promissumve fuerit quum veniret, fuisset, quod ejus (nomine) præstari oportere dicetur, emptori, omnibusque ad quos ea res pertinet, judicium dabimus ut id mancipium redhibeatur. Si quid autem post venditionem traditionemque deterius emptoris opera, familiæ procuratorisve ejus factum erit; sive quid ex eo post venditionem natum, acquisitum fuerit, et si quid aliud in venditione ei accesserit, sive quid ex ea re fructus pervenerit ad emptorem; ut ea omnia restituat. Item si quas accessiones ipse præstiterit, ut recipiat.

"Item si quod mancipium capitalem fraudem admiserit, mortis consciscendæ sibi causâ quid fecerit, inve arenam depugnandi causâ ad bestias intromissus fuerit; ea omnia in venditione pronuncianto; ex his enim causis judicium dabimus. Hoc amplius, si quis adversus ea, sciens, dolo malo vendidisse dicetur, judicium dabimus." Dig. lib. xxi, tit. 1, first part, § 1, Ulp. ad Ed. Ædil.

This edict gave three species of actions; (1) the *actio redhibitoria*, which was similar to our action founded on the right to return the chattel and demand the price paid; (2) the *actio estimatoria*, or *actio quanti minoris*, analogous to our action for the difference between the actual value and the value that the article would have had if without blemish, or according to the warranty or representation; and, (3) the action grounded on the vendor's fraud, given by the last section. And the edict applied to all sorts of animals as well as to slaves. Pothier, Pandectes, ed. de Brèard Neuville, vol. VIII, pp. 8 and 10. And in certain cases to real estate, p. 55.

As to the rule of damages in the actions *redhibitoria et quanti minoris*, various cases are stated in the Digest.

Labeo scribit, "Si uno pretio plures servos emisti, et de uno agere velis, (inter) æstimationem servorum proinde fieri debere, atque ut fieret in æstimationem bonitatis agri, quum ob evictam partem fundi agâtur." Dig. lib. xxi, tit. 1, § 72, Pomp. lib. 17.

"Si plura mancipia uno pretio venierint, et de uno eorum ædilitia actione utamur, ita demum pro bonitate ejus æstimatio fiat, si confuse universis mancipiis constitutum, pretium fuerit. Quod si singulorum mancipio-

[1] But in actions on the covenant for quiet enjoyment, on the plaintiff's eviction, the right of action is immediate and complete, and the whole damages are to be recovered in one action. Van Zandt *v.* The Mayor, &c., 8 Bosw. (N. Y.) 375.

in most cases fixed at double the price of the article in question. *Quod autem diximus, duplam promitti oportere, sic erit accipiendum, at non ex omni re id accipiamus; sed de his rebus quæ pretiosores essent, si margarita forte, aut ornamenta pretiosa vel vestis serica, vel quid aliud non contemptibile veneat.**

Under the system of the civil law, as introduced into modern Europe, as no distinction was made on this subject between real and personal property, or *mobiles* and *immobiles*, so the remuneration was the same whether the claim was founded on the non-delivery of the article, or an eviction after possession.† And in all these cases the price of the article seems to have been the basis of the measure of damages; but as with chattels, so with land, the increased value of the property was taken into account, and for this the party evicted had a right to claim. A distinction was, however, made, to which we have already had occasion to advert, between the seller in good faith and the party who knew he had no title to convey. Thus, if by reason of circumstances, which could not have been foreseen at the time of the contract, the value should be very greatly augmented, the seller in good faith would be liable only for the highest sum to which the parties might have reasonably supposed that the value would rise;‡ in many cases, certainly, a difficult inquiry.

So, again, the seller in good faith was only liable for direct damages; while more remote loss would be charged upon the seller in bad faith. Thus, if after the purchaser entered into possession he should establish an inn on the premises and be subsequently evicted, the seller in good faith was not chargeable for the injury done to the business of the inn. But the seller in bad faith would in such a case be held liable.‖ And even the seller in good faith would be held answerable [155] under similar circumstances if, at the time of the bar-

rum constituto pretio, universa tanti venierunt, quantum ex consummatione singulorum fiebat, tunc cujusque mancipii pretium, seu pluris, seu minoris id esset, sequi debemus." — Dig. lib. xxi, § 36.

So interest was to be paid to the buyer on the price given; and if the slave had made anything while in the buyer's possession, but without his means or assistance, such acquisitions were to be returned with the slave to the purchaser. Poth. Pan. vol. VIII, p. 75.

And in certain cases both the vendor and purchaser were held to give each other guarantees, to which the rule of the *stipulatio duplex* applied. Poth. Pan. vol. VIII, p. 99. The rule of damages in the *actio redhibitoria* was not, however, always the double value.

Redhibitoria actio duplicem habet condemnationem modo enim in duplum, modo in simplum condemnatur venditor. Nam si neque pretium, neque accessionem solvat, neque eum qui eo nomine obligatus erit, liberet, dupli pretii et accessionis condemnari jubetur; si vero reddat pretium et accessionem, vel eum qui eo nomine obligatus est, liberet, simpli videtur condemnari. Dig. lib. xxi, tit. 1, § 82.

* Dig. lib. xxi, tit. 2, l. 37, § 1; Pothier, Pan. ed. Brèard Neuville, vol. VIII, p. 102.

† Pothier, Contrat de Vente, part II, ch. i, § 1; art. 5, § 69.

‡ Pothier, Contrat de Vente, part II, ch. i, § 2; art. 5, § 130.

‖ Pothier, Vente, part II, ch. i, § 1; art. 5, § 136.

gain, the property was intended to be used as an inn. In all these cases much was left to the discretion of the judge.*

It was held by the masters of the civil law, that the fortuitous depreciation of the property did not alter the rule; as if, after the contract, buildings were to burn down, and eviction subsequently take place, the measure of damages would still be the price paid; and so it would probably be held with us.†

FRENCH CODE.—In the French Code the subject of evictions is treated with the usual brevity, order, and precision of that great work. The clauses which relate to the subject are as follows:—

Where a warranty has been given, or where no stipulation has been made on this subject, in such case, if the purchaser is evicted he is entitled to demand from the seller,—

I. The restitution of the purchase money.

II. The restitution of any mesne profits which he may be obliged to pay over to the proprietor who evicts him.

III. The expenses incurred on the demand under the warranty of the buyer, and those incurred by the person originally making the demand.

IV. The damages and interest as well as the expenses and legal costs of the contract.

If, at the time of the eviction, the thing sold proves to be lessened in value or considerably injured, whether by the negligence of the buyer or owing to accidents resulting from superior force, the seller is in either case liable for the entire purchase money.

But if the diminution in the value of the article has produced any profit to the buyer, the seller has a right to deduct from the purchase money a sum equal to this profit.

In case the thing sold is increased in value at the time of the eviction, and even if such increase be independent of any acts of the purchaser, yet he is entitled to receive from the seller its actual value over and above the purchase money.

The seller is bound to reimburse the purchaser, or to cause him to be reimbursed by the party evicting him, for all actual improvements and beneficial repairs that he shall have made to the property.

If the seller has sold the lands of a third person in bad faith, he will be compelled to reimburse the purchaser for all sums which he may [156] have expended upon them, although such expenses be merely pleasurable or fanciful.‡

* Observez, says Pothier, § 138, que par la liquidation et estimation de ces dommages, on doit user de beaucoup plus de modération à l'égard d'un vendeur de bonne foi qu'à l'égard d'un vendeur de mauvaise foi.

This distinction between the vendor acting in bad faith and *bonâ fide*, will be found clearly illustrated in Lord Kaimes' Equity, 270; Erskine's Inst. 125; and see, also, Green *v.* Biddle, 8 Wheaton, 1.

† Pothier, Vente, Art. 69.

‡ 1630. Lorsque la garantie a été promise,

COVENANTS IN CONVEYANCES. ENGLISH CASES.—Very little learning is to be found in the English books on the subject of the measure of compensation for the covenants contained in conveyances,* and it will be more convenient at once to group together those authorities before we proceed to that fuller discussion of the matter which will result from the examination of the American decisions.

It was early held, in a case in which the eviction was by lease for years, that an action of covenant to recover damages could be founded on a clause of warranty real annexed to a freehold, and it was so agreed by all the judges in the Exchequer Chamber.

"Because that though the warranty was annexed to a freehold, yet the breach and impeaching was not of a freehold, but of a chattel; that is to say, of a lease for years, for which there could be neither a voucher, rebutter, nor *warrantia chartæ*. So, that though there had been a judgment in the *warrantia chartæ* in the case, yet neither upon entry nor upon recovery in *eject' firmæ* upon this lease, there would be neither a voucher nor rebutter, nor value upon the *warrantia chartæ;* and therefore a real warranty is a covenant real when the freehold is brought in question. But where a lease is in question, or any other loss that doth not draw away the freehold, it may be used as a personal covenant, [157] whereupon damages may be recovered; so it is both a real and personal covenant to several ends and respects." †

Another case well illustrates that want of any precise measure of damages which characterizes almost all the early English decisions.

"B. covenants that he was seised of Bl' acre in fee simple, when in truth it was copyhold land in fee according to the custom. By the court: The covenant

ou qu'il n'a rien été stipulé à ce sujet, si l'acquéreur est évincé, il a droit de demander contre le vendeur,—

I. La restitution du prix.

II. Celle des fruits, lorsqu'il est obligé de les rendre au propriétaire qui l'évince.

III. Les frais faits sur la demande en garantie de l'acheteur, et ceux faits par le demandeur originaire.

IV. Enfin les dommages et intérêts, ainsi que les frais et loyaux côuts du contrat.

1631. Lorsqu'a l'époque de l'éviction, la chose vendue se trouve diminuée de valeur, ou considérablement détériorée, soit par la négligence de l'acheteur, soit par des accidens de force majeure, le vendeur n'en est pas moins tenu de restituer la totalité du prix.

1632. Mais si l'acquéreur a tiré profit des dégradations par lui faites, le vendeur a droit de retenir sur le prix une somme égale à ce profit.

1633. Si la chose vendue se trouve avoir augmenté de prix à l'epoque de l'éviction indépendamment même du fait de l'acquéreur, le vendeur est tenu de lui payer ce qu'elle vaut au-dessus du prix de la vente.

1634. Le vendeur est tenu de rembourser ou de faire rembourser à l'acquéreur par celui qui l'évince, toutes les réparations et améliorations utiles qu'il aura faites au fonds.

1635. Si le vendeur avait vendu de mauvaise foi le fonds d'autrui, il sera obligé de rembourser à l'acquéreur toutes les dépenses, mêmes voluptuaires ou d'agrément, que celuici aura faites au fonds.

* "The cases on this point in England are very scanty." Mayne on Damages, 95.

† Pincombe *v.* Rudge, Hob. 3. See a learned note to this case by Mr. Williams, in his edition of these Reports.

is broken; and the jury shall give damages in their consciences according to that rate that the county values fee simple land more than copyhold land."*

In an action of covenant,† it appeared that one Grylls had made a lease of the moiety of certain tithes of corn and grain to the plaintiff for years, with covenant of title. The plaintiff was ejected by title paramount, and brought suit. On the trial it was contended for the plaintiff, that the true mode of estimating his damages was to ascertain the value of the interest in the term, and to add to the amount thereof the cost of defending the ejectment. But it was insisted by the defendants that the plaintiff was only entitled to recover the fine paid on the making of the lease, the interest thereon to the time of judgment, and the costs of defending the ejectment; and, without deciding the point, the King's Bench intimated such to be their opinion.[1]

Again, where the defendant had conveyed to the plaintiff with covenant of title, and the plaintiff had been sued by a party having title paramount, and had paid a sum of money to compromise the claim, it was held that in an action on the covenant he should recover the whole amount paid by way of compromise, together with the costs of the ejectment suit, and that, although no notice of the suit had been given to the defendant.‡[2]

Covenants for Quiet Enjoyment and of Warranty. Rule in American States. — In this country, the rule of damages in regard to eviction is generally presented under the covenant for quiet enjoyment or of warranty; and, in these cases, it is well established that the mere existence of a paramount legal title is not sufficient, but that the plaintiff must allege and prove an ouster or eviction by a paramount title.‖ [158]

It need not be, however, by process of law; the grantee may surrender possession, but in such case, he assumes the whole bur-

* Gray *v.* Briscoe, Noy's Rep. 142.

† Pomery *v.* Partington, Ex'r of M. Grylls, 3 T. R. 665.

‡ Smith *v.* Compton's Ex'r, 3 Barnwell & Adolphus, 407.

‖ See Kent's Com. vol. IV, p. 460, fifth edition; 2 Saunders, 181 b. n. 10; Foster *v.* Pierson, 4 T. R. 617, 621.

[1] This intimation was disapproved by the English Court of Common Pleas (per Mr. J. Blackburn), in the late case of Locke *v.* Furze, 1 L. R. (C. P.) 441.

[2] In Bunny *v.* Hopkinson, 1 L. T. R. (N. S.) 53, in an action for breach of a covenant for quiet enjoyment, the master of the rolls allowed the full amount of the vendee's expenditures in converting the land to the purpose for which it was bought, by erecting buildings on it. It does not appear from the report that the purpose was known to the vendee, except as might be inferred from the lots being building land. The value of the improvements and the actual expense of making them, seem to have been considered as identical.

den of proving that the title to which he surrenders without contest, is actually paramount to that derived from his grantor.* [1] That there must, however, be an actual loss of the land to support the plaintiff's claim, is clear; † otherwise he is entitled to recover nominal damages only.‡ [2]

North Carolina. — In North Carolina, where it appeared that at the time of the execution of the deed to the plaintiff, and previous thereto, a third person was in possession of the premises under a paramount title, it was held that this was sufficient to constitute a breach of the covenant for quiet enjoyment; ‖ and in another case,¶ the Supreme Court of the United States said, "If the grantee be unable to obtain possession in consequence of an existing possession or seisin by a person claiming and holding under an elder title, this would [159] certainly be equivalent to an eviction and a breach.**

New York.—In New York, it has been held †† that where the premises conveyed with covenant of warranty, had been subsequently transferred to another purchaser, the first grantee might proceed directly on the covenant against his grantor.[3]

The question as to the measure of compensation, came up

* St. John *et al v.* Palmer, 5 Hill, 599. And the rule is the same in Massachusetts. Hamilton *v.* Cutts, 4 Mass. 349; Sprague *v.* Baker, 17 Mass. 586.

† Marston *v.* Hobbs, 2 Mass. R. 433. In this case, Parsons, C. J., defines the effect of the various covenants with great clearness. See, also, Twambly *v.* Henley, 4 Mass. 441; Bearce *v.* Jackson, 4 Mass. 408; Chapel *v.* Bull, 17 Mass. 213.

‡ Waldron *v.* McCarty, 3 Johns. R. 471; [4] St. John *v.* Palmer, 5 Hill, 599, and cases there cited.

‖ Grist *v.* Hodges, 3 Dev. 198.

¶ Duval *v.* Craig, 2 Wheaton, 45, 61.

** It is very correctly stated by the learned reporter, in a note to the case of St. John *v.* Palmer, 5 Hill, 599, that these cases are opposed to the New York rule. Waldron *v.* McCarty, 3 J. R. 471; Kortz *v.* Carpenter, 5 J. R. 120; Kerr *v.* Shaw, 13 J. R. 236; Webb *v.* Alexander, 7 Wend. 281; St. John *v.* Palmer, 5 Hill, 599. The language in that State has uniformly been, that the covenant of quiet enjoyment goes to the *possession* and not to the *title*, and that a disturbance of the possession is indispensable. In the case last cited, Bronson, J., said, "If the covenantee *never had the possession*, or if he had the possession and retains it still, it is impossible that there should have been an eviction, and no action will lie, however hard the case may seem to be. The grantor should have protected himself by other covenants."

†† Withy *v.* Mumford, 5 Cowen, 137.

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[1] Brandt *v.* Foster, 5 Iowa, 287. But the adverse title must have been hostilely asserted. Ibid.

[2] In an action upon a covenant of warranty and quiet enjoyment, where the right of a prior mortgagee in possession existed at the time of the conveyance of the premises to the plaintiff, and the mortgagee could and did by virtue of that right resist the grantee's claim to the possession, it was held by the Supreme Court of New York, at Special Term, that the covenant of warranty was broken, and that the measure of the grantee's damages was the amount due on the mortgage with interest. Winslow *v.* McCall, 32 Barb. N. Y. 241.

[3] But no intermediate covenantee can sue his covenantor till he himself has been compelled to pay damages upon his own warranty, *Ib.* And the rule is the same in an action by a purchaser of personal property against his vendor for breach of implied warranty of title. Burt *v.* Dewey, 40 N. Y. 283.

[4] See this case disapproved in Brown *v.* Dickerson, 12 Penn. St. 372.

at an early day in the State of New York.* The defendant's testator, Ten Eyck, had conveyed certain lots in Albany to one Walsh, for £300. Walsh had conveyed to Staats—Staats to Chinn, who had been evicted, and had recovered against the plaintiff Staats. The covenants in Ten Eyck's deed were of seisin and for quiet enjoyment; and the two points were, first, whether the plaintiff was entitled to recover the value at the time of eviction, or only at that of the purchase, and to be ascertained by the consideration given; and, secondly, if the latter, whether the plaintiff was entitled to interest on the purchase money and the costs of the eviction. Kent, C. J., in the course of a very able opinion said, that the rule at common law on a warranty on a writ of *warrantia chartæ*, was that the demandant recovered in compensation only for the land at the time of the warranty made, and that he did not find that the law had been altered since the introduction of personal covenants.

"Upon the sale of lands, the purchaser usually examines the title for himself, and in case of good faith between the parties (and of such cases only I now speak), the seller discloses his proofs and knowledge of the title.

"The want of title is, therefore, usually a case of mutual error; and it would be ruinous and oppressive to make the seller respond for any accidental or extraordinary rise in the value of the land. Still more burdensome would the rule seem to be, if that rise was owing to the taste, fortune, or luxury of the purchaser. No man could venture to sell an acre of ground to a wealthy purchaser, without the hazard of absolute ruin."

Mr. Justice Livingston said,—

"To find a proper rule of damages in a case like this, is a work of some difficulty; no one will be entirely free from objection, or not at times work injustice. To refund the consideration, even with interest, may be a very inadequate compensation, when the property is greatly enhanced in value, and when the same money might have been laid out to equal advantage elsewhere. Yet to make this increased value the criterion where there has been no fraud, [160] may also be attended with injustice, if not ruin.

"A piece of land is bought solely for the purposes of agriculture; by some unforeseen turn of fortune it becomes the site of a populous city, after which an eviction takes place. Every one must perceive the injustice of calling on a *bona fide* vendor to refund its present value, and that few fortunes could bear the demand. Who, for the sake of one hundred pounds, would assume the hazard of repaying as many thousands, to which value the property might rise, by causes

* Staats *v.* Ten Eyck's Ex'r, 3 Caines, 111 (1805).

not foreseen by either party, and which increase in worth would confer no right on the grantor to demand a further sum of the grantee ?

. . . . . .

" To prevent an immoderate assessment of damages, when no fraud had been practiced, Justinian directed that the thing which was the object of the contract, should never be valued at more than double its cost. Rather than adhere to the rule of Justinian, or leave the matter to the opinion of a jury as to what may or may not be excessive, some more certain standard should be fixed on. However inadequate a return of the purchase money must be in many cases, it is the safest measure that can be followed as a general rule. This is all that one party has received, and all the actual injury occasioned to the other. I speak now of a case, and such is the present, where the grantee has not improved the property by buildings or otherwise, but where the land has risen in value from extrinsic causes. What may be a proper course when dwelling-houses or other buildings and improvements have been erected, we are not now determining. Without saying, then, what ought to be the rule, when the estate has been improved after purchase, my opinion is, that where there has been no fraud—and none is alleged here—the party evicted can recover only the sum paid, with interest from the time of payment, when, as is also the case here, the purchaser derived no benefit from the property, owing to a defective title. The plaintiff must also be reimbursed the costs sustained in the action of ejectment." *

In a subsequent case,† where land had been conveyed with covenants of seisin and quiet enjoyment, and both broken, [161] the questions were raised whether the plaintiff was entitled to recover damages for the improvements made by him, and for the increased value of the land itself.[1] As to the latter point, all the court appear to have concurred with the case last cited; but as to the question of improvements, there was a disagreement. Spencer, J., was disposed to allow for beneficial improvements.

He said, " Extravagant cases have been put hypothetically to show the enormous injustice of the rule that the vendor must be answerable for improvements.

* The language of one of the books, as to the rule on warranties, may be worthy of notice. Hil. Sexto. Ed. II, 187:—

En un breve de dower le tennant vouch agar' et le gar fist defaute le grand cape retorne ove la extent, ... que la terre est extend trop haut qe chescun acr' de terre est extendu a xv, a. ou ele ne voleit al' heure q'e ele passa hors de nostre seisine qe vii, et qe ele est bien compole marle et ovesque ceo bien edifié et ne fut pas en le temps de alienation p. qi nous prioins aver extente autr: qe n'est fait issi qe nous puissions farie a la value solom ceo que ele passa hors de nostre seisine. . . . . Et nota qe Ber' dit que si le vic fist estendre la terre plus haut qe ele ne volust en temps de alienation quant breve de seisine luy voudra qe le tennant poet avoir bon remidie sur luy apres ceo p. breve.

Et sic nota la terre le tennant q'est gar doit estre estendu solon ceo qe ele valust en temps de alienation at non pas en temps de recovery.

† Pitcher *v.* Livingston, 4 J. R. 1.

[1] In Willson *v.* Willson, 5 Fost. (N. H.), 229, it was held that the plaintiff was not entitled to recover for either. See *post*, 169, notes.

It has been asked if a piece of land, thus sold with covenants, should become the site of a flourishing city, what fortune could, under a rule allowing for improvements, withstand ruin? It may be retorted to such a question, what is to become of the industrious citizen or mechanic who has spent his hard earnings in erecting his little house or workshop, relying on the covenant in his deed, if he can only get back his purchase money and interest? I lay it down as a rule, which cannot require much illustration to enforce it on the score of analogy and justice, that, in actions for a breach of covenant, the damages are to be estimated according to the value of the thing when the covenant was broken. Thus, in a covenant for the delivery of specific property at a given day, in case of a failure, the rule invariably is to allow in damages the value of the thing on the day it ought to have been delivered, and when the covenant was broken. It follows, from the view I have taken of this question, that the plaintiff under the covenant for *quiet enjoyment*, may recover the improvements, and that under the covenant *of seisin*, he could not, unless the grantee was seized by virtue of the deed, and has been evicted under a title paramount. It has, however, been urged that the introduction of the covenants of seisin and for quiet enjoyment, were substituted for the covenant of warranty, and that the same rule ought to follow the substituted covenants. It appears to me much more proper to consider the introduction of personal covenants in the alienation of real property, as immediately assimilating themselves to other personal covenants and contracts, and as subject to the same rules of construction, and the same rule of damages whenever they are broken. If so, the covenant for quiet enjoyment was not broken until the eviction, and the rule of damages would be the property lost at that time, which would include the price paid for the land, and the value of those erections and improvements which had been added at the plaintiff's expense. It is supposed that though the covenants of seisin and for quiet enjoyment are distinct, and regard different objects, yet that where the first fails the latter is merged in it. This principle strikes me as illogical and unfounded in authority.

"There are authorities which show that, where in a deed a man covenants that he hath a good right to convey, etc., and that the party shall quietly enjoy, one covenant goes to the title, and the other to the possession; and why a person who has broken two distinct agreements should protect himself from a responsibility on both, and be liable only on the least extensive [162] one, surpasses my powers of comprehension."

The other members of the court were, however, of a different opinion. Van Ness, J., said,—

"This court has already determined that the plaintiff is not entitled to recover any damages on account of any increased value of the land. Here a distinction is attempted to be made between an appreciation of the land itself, and that appreciation of it which is produced by the erection of buildings, or the labor bestowed upon it in clearing and cultivating; a very nice, and, as I

apprehend, a speculative distinction, to which it would be difficult, if not in most cases impossible, to give any practical effect without danger of the most flagrant injustice.

"It is conceded that upon the covenant of *seisin* only, the recovery is to be confined to the consideration and interest. On the covenant for *quiet enjoyment*, therefore, the plaintiff must rely to recover compensation for his improvements, Let us, then, examine whether, consistently with certain fixed legal principles, the covenantee can recover a greater sum of damages in any case under the covenant for quiet enjoyment than under the covenant of seisin?

"An eviction must be shown before a suit can be maintained on the former covenant. Not so, however, as to the latter; for that is broken, if the grantor has no title, the moment the deed is delivered; and the grantee has an immediate right of action. Whenever the eviction is occasioned by a total want of title in the grantor, then both the covenants of seisin and for quiet enjoyment are equally broken; and the grantee has his remedy on both. If he proceeds upon the first, he shall recover the consideration expressed in the deed, and the interest. But if he proceeds upon the last, it is said he shall recover according to the value at the time of eviction, and as I have before remarked, he must be content to recover according to the then value, even though it amounts to one half only of the consideration expressed in the deed.

"The case would then stand thus: When the deed contained both these covenants, if the property at the time of eviction be worth one half of the consideration and interest, the grantee may, notwithstanding, upon the covenant of seisin recover the whole consideration and interest. But if the property happen to be worth double the consideration money and interest, by reason of the improvements made thereon, he may waive the covenant of seisin, and resort to the covenant for quiet enjoyment, and thus recover the whole amount. Can this be possible? It appears to me, to give such an effect to these covenants is not reconcilable with any principle of law or justice.

"My understanding of the nature of these covenants, when both are contained in the same deed, is this: that the covenant of seisin which relates to the title, is the principal and superior covenant; to which the covenant for quiet enjoyment, which goes to the possession, is inferior and subordinate. And I am not aware that a case can possibly occur where the grantee can recover [163] a greater amount in damages for the breach of the latter than of the former; though there are many cases where he may recover less. The suit here is brought upon both covenants; and both, in consequence of the total failure of the defendant's title and the eviction, have been broken. The plaintiff, accordingly, has a right to recover on both; but as the amount of the recovery would, according to my ideas, be the same on each, he must elect on which of them he means to rely, and take nominal damages on the other. The plaintiff is entitled to but one satisfaction, and he has his remedy on either of the covenants at his election to obtain it. It will hardly be said that he can have judgment for the same sum on both the covenants.

"But I consider the question arising in this cause as settled by authority,

and that, according to established rules of law, the plaintiff is not entitled to anything more than the value of the land as settled by the consideration in the deed.

"In suits upon the ancient covenant of warranty, beyond all dispute the recovery was restricted to the value of the land at the time of making the covenant.

"A personal action will not lie on the covenant of warranty upon eviction of the freehold (Bac. Abr. tit. Cov. C.); and for which reason, upon the introduction of alienations by bargain and sale, new covenants were devised, but solely for the purpose of securing to the bargainee the personal responsibility of the bargainor in case of a failure of his title. I think I am warranted in saying that it never was designed, by the insertion of these covenants, to establish any other rule of damages than what previously existed, because there is nothing in the terms of the covenants from which an intention to extend the liability of the covenantor can be inferred; but the contrary is to be presumed, as not a single case is to be found where such a construction of these covenants, which were in a great measure substituted for the covenant of warranty, has ever obtained.

"If, then, on the covenant of warranty, the satisfaction recovered in land was to be equivalent to the value of the lands granted, as it existed at the time when the covenant was made, I do conceive that we are bound to adopt a correspondent rule, when satisfaction is sought to be recovered in money in a personal action on the covenant for quiet enjoyment.

"Such a rule, moreover, I consider to be conformable to the intention of the parties. I question if one grantor out of ten thousand, enters into these covenants with the remotest belief, that he is exposing himself and his posterity to the ruinous consequences which would result from the doctrine contended for by the counsel for the plaintiff. By giving this doctrine our sanction, we should, in my apprehension, create a most unexpected and oppressive responsibility never contemplated by the parties, and inflict an equally unmerited punishment upon grantors acting with good faith, and having a perfect confidence in the validity of their title to the land, which they have transferred for what it is reasonably worth."

I have cited these cases at length, because they are [164] leading authorities on a very important branch of our subject. While we acquiesce in the doctrine, as far as regards increase of value resulting from accidental circumstances, we may be permitted to doubt as to the question of beneficial improvements.

The cases seem to have been mainly decided upon the analogy to the ancient real warranty, and the assumed impropriety of applying a different rule to the covenant of quiet enjoyment, from that which governs the covenant of seisin. But the rule adopted in regard to the real warranty was established when

improvements were much more rare and far less rapid than at the present day; and there seems no reason which forbids a grantor from giving a more effectual remedy against a prospective than an immediate failure of title; nor is it easy to say why the price should be arbitrarily fixed on as the absolute measure of value in regard to lands, when in regard to chattels it is only *primâ facie* evidence of that value.

There seems great doubt, too, whether sufficient attention has been paid to the words of the covenant. What is the meaning of the phrase "*quiet enjoyment*," in regard to a city lot, for instance, which is of no use but for buildings, on which erections must be contemplated at the time of purchase by both parties, and of which, without such erections, no *enjoyment* can be had? May not a distinction be well taken between this covenant applied to such property and to farming land?

We shall find, also, that in our sister States much diversity of opinion exists; though the rule is too well settled in New York to be shaken.*

In the case above cited (Staats *v.* Ten Eyck's Ex'ors), it had been said that the interest allowed should be commensurate with the legal claim to mesne profits. And in an action† brought by executors for a breach of the covenant of seisin, a verdict was taken by consent for the plaintiffs, for the [165] consideration money expressed in the deed, with interest from the date to the time of trial; but it appearing that the premises had been actually enjoyed, and the mesne profits taken by the grantee, they were only allowed six years' interest, and a deduction was accordingly made. The principle of these decisions was affirmed in a subsequent case,‡ where in an action of covenant, an eviction being proved, the plaintiff was only allowed to recover the consideration money paid, interest for six years thereon, and the costs of the eviction suit.[1] And

* It may be noticed here that the revisers of the Statutes of New York proposed to fix the measure of damages for eviction, at the value of the premises at the time *of eviction*, with interest and costs, and reasonable expenses of defending the title. But if the consideration were paid in money, it was to be taken as the value of the premises; and in case of partial eviction, the value of a part was to be estimated in proportion to the price paid for the whole. But this provision was not finally adopted. See the chapter on Alienation by Deed (part II, ch. i, art. iv, R. S. vol. III, p. 573), which suffered sadly in the hands of the legislature.

† Bennet *v.* Jenkins, 13 J. R. 50.

‡ Caulkins and others, Ex'rs of Albee *v.* Harris, 9 J. R. 324.

[1] See the same rule laid down in an action by an assignee of the covenant in Baxter *v.* Ryerss, 13 Barb. (N. Y.) 267. So also in Illinois, Harding *v.* Larkin, 41 Ill. 413. The costs, in Illinois, include counsel fees.

In California, also, counsel fees are allowed. Levitzky *v.* Canning, 33 Cal. 299, a case in which the eviction suit was unsuccessful.

the general rule has been since repeatedly recognized in New York.* [1]

LEASES.—In a recent case,† the principle which we have seen settled in regard to conveyances, was applied to leases. The plaintiff declared on a lease upon an implied covenant for quiet enjoyment. The court held, that no such covenant could be implied; [2] but that, if there were an express one, the tenant, not having paid any purchase money on obtaining the lease, would be entitled to nominal damages only, and this although he had made valuable improvements on the premises,—saying, "A lease where no purchase money is paid by the lessee, does not differ in principle in this respect from an ordinary conveyance in fee for a valuable consideration." [3]

In a subsequent case,‡ it seems to have been thought that

* Kane *v.* Sanger, 14 J. R. 89; Baldwin *v.* Munn, 2 Wend. 399; Dimmick *v.* Lockwood, 10 Wend. 149; Kinney *v.* Watts, 14 Wend. 38; Moak *v.* Johnson, 1 Hill, 99; and Kelly *v.* Dutch Church of Schenectady, 2 Hill, 105.

† Kinney *v.* Watts, 14 Wend. 38.

‡ Moak *v.* Johnson, 1 Hill, 99.

[1] That the law is thus settled in this and many other States is unquestionable. Combs *v.* Tarleton's Adm'rs, 2 Dana, 464; Hall *v.* Delaplaine, 5 Wisc. 206. But it must be regarded as a rule adopted rather from its expediency, or perhaps necessity, than from its abstract justice. In this country especially, where the rise in real property is often extremely rapid, and the expectation of it not infrequently forms to a shrewd purchaser the inducement to the investment, there seems no intrinsic equity in giving to a vendee as the sole compensation for his eviction from valuable real estate through the vendor's breach of covenant, even if an innocent one, the original purchase money and interest, which often together amount only to a small proportion of the actual value of the property. As far as *improvements* are concerned, the rule excluding the increased value accords with the general principles controlling damages for the breach of contracts, since, except where improvements are specially provided for in the contract, the vendor has no idea of ever being obliged to pay for them, and has of course no means of calculating their extent or cost. Similar considerations apply to a rise in the value of the property from other special causes unknown at the time when the agreement was made. In other respects, the rule must find its defence, perhaps a sufficient one, in considerations of public policy, since the amount of damages necessary to compensate the vendee might in some cases ruin an innocent vendor. We observe that the Supreme Court of Ohio, in a late case, while recognizing the rule stated in the text as settled in that State (see *post*, 170), say "that it will scarcely ever do exact justice to both parties, being more or less than a just compensation." Wade *v.* Comstock, 11 Ohio St. 71. See *post*, 166 *et seq.*

[2] The rule is now, however, settled otherwise in that State. Mack *v.* Patchin, 42 N. Y. 167–171. (*Post*, 166, *n.*) And in The Mayor, &c. of New York *v.* Mabie, 3 Kern. 151, it was held by the New York Court of Appeals that a covenant for quiet enjoyment might be implied from a *lease*, a lease not being a "conveyance" within the sense of 2 Rev. Stat. 738, § 140; and that in an action for rent, damages for breach of this implied covenant might be the subject of recoupment.

[3] In case of eviction from demised premises where there was no fraud or misrepresentation of the lessor inducing the taking of the lease, the measure of damages, if rent has been paid in advance, is so much of the advanced moneys as would be payable at the stipulated rate for the unexpired part of the lease, with interest. If no rent has been paid in advance, no damages can be recovered by the lessee. His liability to pay rent would cease from the time of the eviction. Upon an executory contract to give a lease, and a failure or refusal to give one, the rule of damages is the same, if the inability or refusal is without any fault or fraud on the part of the party promising to execute it. Where the refusal to give a lease results from the fraudulent conduct of the defendant, consequent special damages, on proper allegations in the complaint, may be recovered. Noyes *v.* Anderson, 1 Duer (N. Y.), 342. See *post*.

under the covenant for quiet enjoyment, the lessee might, on eviction, recover the value of the lease, less the rent reserved; but by a still later decision,* the arbitrary rule which in regard to conveyances, as we have seen, takes the price paid to be the value of the land, was laid down in regard to leases; and Mr. Justice Bronson said,—

"Following that analogy, the rents reserved in a lease where no other consideration is paid, must be regarded as a just equivalent for the use of the demised premises. The parties have agreed so to consider it. In case of eviction the rent ceases, and the lessee is relieved from a burden which must be deemed equal to the benefit which he would have derived from the [166] continued enjoyment of the property. Having lost nothing, he can recover no damages. He is, however, entitled to the costs he has been put to; and as he is answerable to the true owner for the mesne profits of the land for a period not exceeding six years, he may recover back the rent he has paid during that time with the interest thereon. If this rule will not always afford a sufficient indemnity to the lessee, I can only say, as has often been said in relation to a purchaser, he should protect himself by requiring other covenants."

This rule destroys the value of all the usual covenants in leases, and is against the general principle in regard to chattels, by which we shall see that if a warranty in regard to them fails, the plaintiff is entitled to recover the difference between their actual value and that which they would have had if the warranty had been complied with. It is very frequently the case, that the rent in leases, especially where ground-rent for a long term is reserved, does not represent their real value to the lessee; that the lease or its good-will, as it is sometimes erroneously termed, is of great actual value; and that on an eviction the tenant must suffer positive loss. Why should a covenant, using the expressive phrase *quiet enjoyment*, be frittered away by an arbitrary assumption that the price paid was the real value?[1]

* Kelly *v.* the Dutch Church of Schenectady, 2 Hill, 105.

[1] But the rule of damages for breach of this covenant in a lease was lately considered by the English Common Pleas, and the author's opinion approved. The very reasonable principle was laid down that the plaintiff is entitled to recover what he has actually lost. Locke *v.* Furze, 34 L. J. (N. S.) C. P. 201; 19 C. B. (N. S.) 96; 1 L. R. C. P. 441.

On general principles the measure of damages upon the breach of covenants for title is the value of the estate lost at the time of the breach. If the estate has been by improvement increased in value, such improvement cannot be recovered unless it were within the contemplation of the parties at the time of making the covenant. "In England, as also in New York and many others of the States, this rule has been departed from, and where there has been no fraud, an arbitrary rule has been established as best calculated generally to subserve the ends of justice. By this rule the damages upon breach of covenant of title is the price paid with interest

Indeed in a recent case in the same State the arbitrary valuation seems to have been abandoned, where an agreement in the nature of a lease, but without any covenants, was made to commence from a future day, and the owner, before the commencement of the term, leased the premises to another party; it was held, that the original lessee was not limited to his action of ejectment; that he might sue the lessor for the breach of the implied agreement to give him possession; and that in such action the measure of damages would be the difference between the rent reserved in the lease and the value of the premises for the term.* [1]

The general rule, as settled in New York, in regard to conveyances, was adopted at an early day in Pennsylvania, and the price of the land at the date of the deed was taken as the measure of damages.† [2] But it does not appear by the case to what cause the increased value was to be ascribed.

* Trull *v.* Granger, 8 N. Y. 115. † Bender *v.* Fromberger, 4 Dall, 436, 441.[3]

not exceeding six years. It was established partly in analogy to the ancient remedy on the warranty by which the demandant recovered of the warrantor other lands of equal value, computed at the time when the warranty was made, but probably more from the hardships and difficulties which it was conceived might attend the application of the natural rule. The same rule is applied in executory contracts to convey lands, where the vendor is unable to perform by reason of defective title, and has been guilty of no fraud. But I understand this distinction to be recognized and settled, that if the executory vendor has it in his power to perform his contract, and refuses to do so, or has wrongfully put it out of his power, he takes himself without this arbitrary rule, and becomes liable under the general rule for the value of the estate at the time it was to have been conveyed. So in the case of covenant for title in an executed conveyance, if the covenantor becomes himself an actor in ousting his grantee, he puts himself without the protection of this arbitrary rule of damages, and becomes liable upon his broken covenant for the value of the estate he was instrumental in taking from his grantee." Per Masten, J., Mack *v.* Patchin, 29 How. (N. Y.) 20. "As no consideration is paid in such case," observes Mr. Justice E. D. Smith, stating the general rule in delivering his opinion in the Court of Appeals of New York, in the same case (42 N. Y. 167), "the rent reserved has been regarded as a just equivalent for the use of the demised premises, and as in case of eviction, the rent ceases, and the lessee is discharged from its payment, he recovers nominal damages, and for such mesne profits as he is liable to pay the true owner, and any costs he may have been compelled to pay in defence of his title. But this rule has not been very satisfactory to the courts in this country, and it has been relaxed or modified more or less to meet the injustice done by it to lessees in particular cases." And the ruling of the court below, that the measure of damages for the breach of the covenant for *quiet enjoyment* was the value of the lease at the time of the eviction, over and above the rent reserved, was accordingly affirmed. So in Chatterton *v.* Fox, 5 Duer (N. Y.), 64, it was held, the eviction having been tortious, that the tenant might recover the difference between the value of his lease for the unexpired term, and the rent reserved. See, also, Marquart *v.* La Farge, 5 *Ibid.* 559. So where there is a covenant to indemnify the vendees in case of failure of title for increase of value of the real estate, the rule of damages in case of such increase in value against bargainors who have put it out of their power to convey according to their contract, is the difference in value between the value of the land when the conveyance should have been made and the sum agreed to be paid for it. Hall *v.* Delaplaine, 5 Wis. 206.

[1] Dean *v.* Roesler, 1 Hilt. 420.

[2] Hertzog *v.* Hertzog, 34 Penn. St. 418; McNair *v.* Compton, 35 Penn. St. 23; Dumars *v.* Miller, 34 Penn. St. 319; Cox *v.* Henry, 32 Penn. St. 18. And the rule is the same in that State as to leases. McClowry *v.* Croghan, 31 Penn. St. 22. Interest is added to the amount of the consideration unless it be improved land and the purchaser has been in possession. In such case his claim to interest is extinguished except for that part of the time for which he is liable to account for mesne profits. Cox *v.* Henry, 32 Penn. St. 18.

[3] Approved and followed in Brown *v.* Dickerson, 12 Penn. St. 372.

It has been otherwise held in Massachusetts, Connecticut, Virginia, and South Carolina.

Massachusetts.—In Massachusetts, in a case * in which the action was brought on the covenant of warranty, Parsons, C. J., delivering the judgment of the Supreme Court of that State, said, "The court were of opinion, conformably to the principles of law applied to personal actions of covenant broken, to the ancient usages of the State, and to the decisions of our predecessors, supported by the practice of the legislature, that the plaintiff in the action ought to recover in damages the value of the estate at the time of the eviction." The land in this case had risen from $9,000 to $15,000, but whether by reason of actual improvements is not stated.[1]

[167] In a later case,† it was held by the same court, that, as there was a covenant of warranty in the deed, if the plaintiff had been evicted, the jury should consider the value of the land at the time of the eviction as the proper measure of damages; but there being no eviction, it was held that the measure of damages on the covenant of seisin was the price paid, and interest.‡

* Gore *v.* Brazer, 3 Mass. 523, 534. (Decided in 1807.) See, also, Summer *v.* Williams, 8 Mass. 162, 222.

† Caswell *v.* Wendell, 4 Mass. 108. (1808.)

‡ In 1807 (ch. 75, § 3), an act was passed in Massachusetts, allowing the tenant in real actions, in certain cases, compensation for his improvements, and giving the demandant the increased value of the premises, less the improvements, the provisions of which are incorporated in the revision of 1836, ch. 101. Harris v. Newell, 8 Mass. 262; Knox *v.* Hook, 12 Mass. 329; see, also, Bacon *v.* Callender, 6 Mass. 303; Runey *v.* Edmonds, 15 Mass. 291; Shaw *v.* Bradstreet, 13 Mass. 241; Chapel *v.* Bull, 17 Mass. 213; Heath *v.* Wells, 5 Pick. 140; The Society *v.* Wheeler, 2 Gallison, 105.

[1] So in Vermont, in this class of actions, damages are measured with an unstinted hand. In a suit for breach of covenant of warranty in a deed, the rule of damages was lately held to to be the value of the land at the time of the eviction, the costs and damages which the plaintiff had been compelled to pay in the ejectment suit with interest, and his own costs with interest and necessary expenses, including counsel fees. Keeler *v.* Wood, 30 Vermont (1 Shaw). 242, see also Williams *v.* Wetherbee, 2 Aik. 329.

[2] If the action in that State be brought on the covenant of seisin and good right to convey, the measure is the consideration paid, with interest from the date of the deed. If the consideration cannot be ascertained, the value of the land at the time of the intended conveyance, with interest from the date of the intended deed, will be the measure. Smith v. Strong, 14 Pick. 128. And where, in such an action, the conveyance is made to the grantee at the request of a third person who has bought the land of the grantor after agreeing to convey it to the grantee in satisfaction of a debt, the measure, if no consideration was actually paid by the grantee to the grantor, is the value of the land with interest from the date of the deed. Byrnes *v.* Rich, 5 Gray (Mass.), 518. In the same State, in an action for breach of a covenant of warranty by eviction under a mortgage, it was held that the plaintiff, having paid the mortgage before judgment, might recover the whole amount of it, although he had previously conveyed the estate to one who assumed, as a part of the consideration of that conveyance, to pay part of the mortgage. Estabrook *v.* Smith, 6 Gray (Mass.) 572.

But the same court decided,* that where administrators had conveyed a defective title with this covenant, it was broken at the moment of execution, and that the measure of damages was the consideration in the deed and interest; "or, at most, that amount together with the plaintiff's expenses of defending the possession."

The rule as above established in Massachusetts, that where the covenant is in the future, and the estate in the meantime passes by force of the conveyance, and the grantee becomes seized, and is afterwards evicted by a paramount title, the value of the estate at the time of the eviction is the measure of the plaintiff's damages,—has been repeatedly since held in that State.† But it has been recently said,‡ that this rule may be modified by special circumstances, as, for instance, "a case may be supposed where an outstanding mortgage, though assuming the form of a paramount title, which, if not redeemed, would take the whole estate and evict the covenantee; yet, being very small in comparison with the value of the estate, it would be plainly for the interest of the owner and holder of the equity of redemption to redeem. In such case it would be quite unreasonable to hold that the covenantee in such an eviction should recover damages to the full value of the estate." And this doctrine has recently been re-affirmed.‖[1] It is to be borne in mind, that in Massachusetts the mortgagee obtains a conditional judgment, and is put in possession, after which the plaintiff may discharge the incumbrance, and restore himself to possession by paying the debt, with interest and costs of suit; and in such a case, the proper rule of damages was held to be the amount due on the mortgage, with the costs of the mortgage suit against the plaintiff.¶

Maine.—The State of Maine has adhered to the rule [168] of her parent, Massachusetts, that the value of the premises at the time of the eviction, forms the necessary damages; and to this have there been added the expenses reasonably and actually incurred in the defence of the suit in which the grantee was evicted.**

Connecticut.—In Connecticut, as early as 1786, the same

* Sumner *v.* Williams, 8 Mass. 162, 221.
† Norton *v.* Babcock, 2 Met. 510, 518.
‡ White *v.* Whitney, 3 Met. 81, 89.
‖ Donahoe *v.* Emery, 9 Met. 63.
¶ Tufts *v.* Adams, 8 Pick. 547.
** Hardy *v.* Nelson, 27 Maine, 525.

[1] See Byrnes *v.* Rich, 5 Gray (Mass.) 518.

rule was declared.* The Superior Court said that in suits on the covenant of warranty, the constant rule of the court had been to ascertain damages by the value of the land at the time of eviction. But the action being on a covenant of seisin, this rule was held not to apply.[1] It was said that the purchaser might bring his action immediately upon discovering that his title was defective; and the jury having computed the damages according to the consideration of the deed, the verdict was accepted by the court.

In the same State it was recently said, "We consider the rule to have been long since settled in this State, that upon the covenant of seisin the plaintiff has a right to recover the consideration money and interest, and on the covenant of warranty, the value of the land at the time of eviction. . . . . We think, too, that when the warrantor has been vouched in to defend his title, the cost which the plaintiff has actually been put to is a fair ground of damages."†[2]

South Carolina.—In South Carolina, the same rule was at first adopted.‡ It was held at Nisi Prius, in an action of covenant brought for a breach of warranty in a release of a lot of land in Charleston, by Pendleton, J., "that there can be no doubt but that the measure of estimating damages in a case like the present, is the value of the land at the time of the eviction;" but only a part of the lot being taken, it was left to the jury to apportion the damages according to the amount of injury sustained, or give the full amount of the value of the lot; which latter was done. In a subsequent action of cove-

* Horsford *v.* Wright, Kirby, 3.
† Sterling *v.* Peet, 14 Conn. R. 245.
‡ Liber *et al. v.* Parson's Ex'rs, 1 Bay, 19. (1785.)

[1] In the same State, for breach of covenant of seisin in an early case, the rule was held to be, for one piece of land which was under improvement, the consideration paid without interest; for another not improved, the consideration and interest. Castle *v.* Pierce, 2 Root, 294.

And in the same State, the rule as to the covenant of seisin is the same whether the grantee has been in possession or not, for the money due for rents and profits has no relation to the covenant broken, but constitutes a separate debt. Mitchell *v.* Hazen, 4 Conn. 495.

[2] The same rule as to costs obtains in regard to leases. In an action for breach of the covenant for quiet enjoyment in a lease, the plaintiff, who after giving notice of the ejectment suit to his landlord, who did not defend it, had himself defended it, although without express authority from the landlord, was adjudged to recover, besides compensation for the loss of the premises, the costs and expenses he had paid in the ejectment suit. These were held to be the natural and immediate consequence of the defendant's breach of covenant. Rolph *v.* Crouch, L. R. 3 Exch. 44; 37 L. J. Exch. 8.

So in an action by a sub-lessee against the executors of his lessor for breach of a covenant of quiet enjoyment, it was held that he might recover the value of the term lost and the mesne profits; and also the plaintiff's costs of defending the actions of ejectment brought by the remainder-man. Williams *v.* Burrell, 1 C. B. 402.

nant on warranty,* there was a difference of opinion on this point, Grimke, J., thinking the purchase money and interest was the true rule. But Waties and Bay, JJ., thought the value of the lands at the time of the eviction was [169] the best general rule; and on this principle the verdict was given.

In an action of warranty of negroes,† an attempt was made to apply the same principle to chattels; but while the general rule was acknowledged, the particular case was considered an exception, and the court left it to the jury to give what they thought reasonable. Finally, in a subsequent case, the prior decisions were distinctly overruled, and the New York rule was adopted.‡[1]

NEW HAMPSHIRE.—In New Hampshire, the rule of damages in the covenant of warranty, as to whether it should be the value of the land at the time of the purchase or of the eviction, was recently discussed, but left unsettled. ‖[2]

VIRGINIA.—In Virginia it was very early said,¶ that if a conveyance had been made with warranty, the value of the land at the time of eviction would fix the damages. This, however, was in equity; and the rule in that State seems to have been long involved in doubt. In a later case,** while the rule

* The Ex'rs of Guerard *v.* Rivers, 1 Bay, 265. (1792.)

† Eveleigh *v.* Stitt's Adm'rs, 1 Bay, 92. (1789.)

‡ Henning *v.* Withers, 3 Brevard, 458; Ware *v.* Weathnall, 2 M'Cord's Rep. 413; Bond *v.* Quattlebaum, 1 Ibid. 584, and statute of 1824; Furman *v.* Elmore, 2 Nott & M'Cord, 189.

‖ Loomis *v.* Bedell, 11 N. H. R. 74.

¶ Mills *v.* Bell, 3 Call, 323. (1802.)

** Nelson *v.* Matthews, 2 Hen. & Mun. 164. (1808.)

[1] The New York rule, from considerations of policy and convenience, is adopted in most of the States. So in Texas: Hall *v.* York, 22 Tex. 641; Sutton *v.* Page, 4 Tex. 142. Iowa: Brandt *v.* Foster, 5 Iowa, 287. Pennsylvania: McClure *v.* Gamble, 27 Penn. St. 288. And see *supra*, 166, note 2. Georgia: Martin *v.* Gordon, 24 Geo. 533; Richardson *v.* Keely, 22 Geo. 62. Missouri: Coffman *v.* Huck, 19 Mo. 435; Tong *v.* Matthews, 23 Ibid. 437. And the rule is the same in actions by the purchaser against the vendor for failure to convey. Fletcher *v.* Button, 6 Barb. 646. So also in an action on a bond of a grantor of land to record his title deeds. Brazier *v.* Wynkoop, 3 Johns. Cases, 2d ed. 440. In Wilson *v.* Drumrite (24 Mo. 304), the same rule of damages was applied to the eviction of a mortgagee; and in Dickson *v.* Desire (23 Ibid. 151), the purchase money was said to be the measure, no question as to interest being raised. In addition to the consideration money and the interest, the expenses of plaintiff in defending the possession have been allowed. Fernander *v.* Dunn, 19 Geo. 497; Willson *v.* Willson, 5 Fost. (N. H.) 229. See also, Phipps *v.* Tarpley, 31 Miss. 433; Baxter *v.* Ryerss, 13 Barb. 267. So also in House *v.* House, 10 Paige, 158; Blake *v.* Burnham, 29 Vt. 437; Adamson *v.* Rose, 30 Ind. 380.

[2] In this State it is now settled, that the measure of damages for a breach of the covenants of seisin and good right to convey, is the consideration money and interest. Nutting *v.* Herbert, 35 N. H. 120; 37 N. H. 346; Foster *v.* Thompson, 41 N. H. 373. And it seems the measure there is the same for the breach of the covenants of warranty and quiet enjoyment. Willson *v.* Willson, 5 Fost. & H. 229, *supra*. See Ela *v.* Card, 2 N. H. 175; Drew *v.* Towle, 10 Fost. N. H. 531. But rests are not allowable in computing interest. *Ibid.*

as just stated was again recognized, it was held not to apply to a conveyance of land with a general warranty of a specific quantity when the quantity fell short, and the value of the deficiency was fixed at the time of the contract. In another case,* the doctrine of the last decision was followed. But the rule we are considering does not appear to have controlled either of these cases; and more recently,† the whole subject was carefully examined by Green and Coalter, JJ., in able and conflicting opinions; but the case went off on another ground, Brooke, J., reserving his opinion. And the final decision seems to be that the purchase money, interest, and costs of eviction, fix the measure of compensation.‡

TENNESSEE.—In Tennessee, the purchase money with interest makes the measure of remuneration.‖

KENTUCKY.—So, too, in Kentucky, where it was held by the Court of Appeals, that in case of a covenant of war-
[170] ranty and eviction, "the value of the land at the time of sale to be ascertained by the purchase money, if expressed in the deed or known, together with interest thereon, and the costs extraordinary, as well as legal expenses in defence of the title, is the measure of damages to be recovered; but if the purchase money be not expressed in the deed, other means may be used to ascertain its value." The case was in chancery.¶

* Humphrey's Adm'r *v.* McClenachan's Adm'r, 1 Mun. 493.

† Stout *v.* Jackson, 2 Randolph, 132. (1823.)

‡ Threlkeld *v.* Fitzhugh, 2 Leigh, 451.

‖ Talbot *v.* Bedford, 5 Hall's Am. Law J. 330, cited in notes to Duvall *v.* Craig, 2 Wheat. 45, 61, and Shaw *v.* Wilkins, Adm'r, 8 Humphreys, 647. See, also, in Sumner *v.* Williams, 4 Hall's Am. Law J. 129, 147, the opinion of Luther Martin.

¶ Cox's Heirs *v.* Strode, 2 Bibb. 273. These questions have been much considered in the various States of the Union; and the following cases may be noted. In North Carolina, Wilson *v.* Forbes, 2 Dev. N. C. Rep. 30. In Kentucky, Seamore *v.* Harlan, 3 Dana's Ken. Rep. 410, 415. In Illinois, Buckmaster *v.* Grundy, 1 Scammon's Rep. 312; McKee *v.* Brandon, 2 *Ibid.* 339. In Maine, Swett *v.* Patrick, 3 Fairf. 9. In Vermont, Drury and Strong *v.* Shumway, D. Chipman's Rep. 110; Park *v.* Bates, 12 Vermont Rep. 381. In Louisiana, Bissell *v.* Erwin, 13 La. Rep. 143. In Tennessee Talbot *v.* Bedford, 5 Hall's Am. Law J. 330; Hopkins *v.* Yowell, 5 Yerger, 305. In Virginia, Lowther *v.* Commonwealth, 1 H. & Munf. 202; Crenshaw *v.* Smith, 5 Munf. 415; Wilson *v.* Spencer, 11 Leigh, 261. In New Jersey, Stewart *v.* Drake, 4 Halsted's Rep. 139. In Arkansas, Logan *v.* Moulder, 1 Ark. R. 323. In Indiana, Blackwell *v.* The Justices of Lawrence County, 2 Blackford's Ind. Rep. 143, *in notis;* Sheets *v.* Andrews, 2 *Ibid.* 274. In Ohio, Adm'r of Backus *v.* M'Coy, 3 Ham. Ohio, 211; Dustin *v.* Newcomer, 8 Ohio, 49; Foote *v.* Burnet, 10 Ohio, 317. "The ultimate extent," says Chancellor Kent (vol. IV, p. 476), to whose laborious research I am indebted for the authorities in this note, "of the vendor's responsibility under all or any of the usual covenants in the deed, is the purchase money with interest; and this I presume to be the prevalent rule throughout the United States." Supposing this to be so, subject to the above exceptions, it may still be doubted whether interest should be allowed in any case where the property has been enjoyed by the grantee, unless he has been actually compelled to pay the mesne profits. Interest is given to coun-

OHIO.—In Ohio, in actions on the covenants of seisin and quiet enjoyment, the measure of damages, as a general rule, has been adjudged to be the consideration money and interest; and this rule has been applied to suits on the warranty of title. But in that State, in an action on a covenant of warranty of title, where the plaintiff had occupied the premises from the date of the conveyance, the enjoyment was declared to be equivalent to the interest upon the consideration, and no interest as such to be recoverable. But as the plaintiff might be compelled to account for the rents and profits for *four years*, to the true owner, he was held entitled to recover [171] *interest* for four years in the suit on the covenant.*[1]

In the same State, where the covenant of warranty is broken by reason of an assignment of dower by metes and bounds, the damages will be, not to the extent of the consideration money, or of one-third of the consideration money of the deed, but the extent to which the value of the estate is diminished by carving out the life estate, taking one-third of the consideration money to be the value of one-third of the fee simple interest.†[2]

PARTIAL EVICTION.—Where the eviction complained of is partial, the recovery is proportioned to the value of the part of

terbalance the claim of the true owner for mesne profits; but even after eviction, the loss of the mesne profits does not necessarily follow; and, as we have heretofore seen, the law does not give *actual compensation* for *probable loss*. *Ante*, 108.[3]

* Clark *v.* Parr, 14 Ohio, 118.

† Johnson *v.* Nyce, 17 Ohio, 66.

[1] Wade *v.* Comstock, 11 Ohio St. 71. So in Vermont, where the plaintiff in an action for the breach of his covenant of seisin, had had the use of the premises without the liability to account for the mesne profits, the purchase money alone without interest was held to be the measure of damages. Flint *v.* Steadman, 36 Vermont, 210.

[2] In the same State, the grantee's costs and counsel fees in defending the widow's claim are also allowed. McAlpin *v.* Woodruff, 11 Ohio St. 120.

The conveyance of two-thirds of a piece of real estate by one who is seized in fee, subject to an outstanding right of dower, does not affect that right. The covenant of warranty is broken on the delivery of the deed, and if the part subsequently set off to the widow for her life exceeds in value one-third of the whole, the grantee will be entitled to damage equivalent to the proportionate diminution in value of the estate conveyed. If the part set off does not exceed one-third in value, the damages will be nominal only. Blanchard *v.* Blanchard, 48 Maine, 174.

[3] By reference to the cases cited in the above note, in the text, and in the preceding notes, it will be seen that the measure of damages for the breach of the covenant of warranty is governed by the value of the land at the time of the eviction in the following States: Maine, Vermont, Massachusetts, Connecticut and Louisiana, which last inherits the rule from the civil law. In the following States the consideration money and interest determine the measure of damages in cases of breach of the covenants of warranty and quiet enjoyment. New York, New Hampshire, New Jersey, Pennsylvania, Ohio, Indiana, Virginia, Kentucky, Tennessee, Missouri, Arkansas, Texas, Wisconsin, and Iowa. To these may be added Georgia. See Davis *v.* Smith, 5 Georgia, 285. In South Carolina the same rule is established by statute. VI South Car. Stat. at Large, p. 238, § 4; Stat. Dec. 17, 1824. But the general rule in New York, as we have seen, is modified where the eviction is caused by the act of the grantor himself, or by his bad faith. *Ante*, 166, *n.* 1.

the premises to which the title has failed. So in New York,*[1] where action was brought on the covenant of seisin, the title to part of the premises having failed, it was insisted, on the authority of an English case,† that this partial failure of title gave the plaintiff a right to recover the entire purchase money. But the court held otherwise: that it was competent for the defendant to show that the part in regard to which the title had failed was of inferior quality to the other portion conveyed, and that the true measure of damage was the value of the part to which the title had failed, taken in proportion to the price of the whole; the whole computation being on the basis of the consideration money.[2] This rule was deduced by Kent, C. J., from the Year Books,‡ and enforced by the analogies of the civil law. "*Quod enim*," says Ulpian, "*si quod in agro pretiosissimum, hoc evictum est; aut quod fuit in agro vilissimum? æstimabitur loci qualitas, et sic erit regressus.*" ‖ The same principle is also recognized by Pothier.¶

In a recent case in Massachusetts, it was contended that the damages should be determined by the proportion in quantity which the part to which the title had failed bore to the residue; but the court said, "This is not a just rule, for the value may be unequal. The true and just rule is, that the proportional *value*, and not the *quantity*, of the several parts of the [172] land should be the measure of damages." **[3]

Assuming it to be settled that the consideration paid furnishes the rule of damages, it still remains to be seen how far the price named as paid and received in the deed, is conclusive proof of that consideration. In England the cases are

* Morris *v.* Phelps, 5 J. R. 49; recognized in Guthrie *v.* Pugsley, 12 J. R. 126.

† Farrar *v.* Nightingal, 2 Esp. C. 639.

‡ 23 E. III, 4, and 13 E. IV, 3. See, also, Gray *v.* Briscoe, Noy, 142; *ante*, 162.

‖ Dig. 21, 2 l. 1, l. 13, and l. 64, § 3.

¶ Contrat de Vente, No. 99, 139, 142.

** Cornell *v.* Jackson, 3 Cush. 506. See also, in Ohio, Michael *v.* Mills, 17 Ohio, 601.

[1] Hunt *v.* Orwig, 17 B. Monr. (Ky.) 73; Beaupland *v.* McKeen, 28 Penn. St. 124; Walker *v.* Johnson, 8 Eng. (Ark.) 522; Kerly *v.* Richardson, 17 Ga. 602.

[2] See Griffin *v.* Reynolds, 17 How. 609; Furniss *v.* Ferguson, 15 N. Y. 437. So in Indiana, Hoot *v.* Spade, 20 Ind. 326; Phillips *v.* Reichert, 17 Ind. 120; Wiley *v.* Howard, 15 Ind. 169; Iowa, Brandt *v.* Foster, 5 Iowa, 287; and Illinois, Major *v.* Dunnavant, 25 Ill. 262. Interest also is allowed on the proportion of the consideration paid for the part of the land to which the title has failed. *Ibid.* Compensation will be given only for what is lost, and the damages made to correspond with the real injury. If there is a partial breach of the covenant of seisin, the grantee may recover *pro tanto*. If he has been obliged to buy an outstanding title, he may deduct from the purchase money the amount necessarily and *bona fide* paid for that purpose. Brandt *v.* Foster, 5 Iowa, 287.

In the tenant's action against his landlord for damages for expulsion from the premises before the end of his lease, improvements placed on the premises by the tenant rendering them more productive, are properly considered by the jury as showing the extent of his damage. Ricketts *v.* Lostetter, 19 Ind. 125.

[3] See King *v.* Pyle, 8 Serg. and R. 166, *post*. 184 n.

conflicting, and the rule appears to be against the admission of parol proof to contradict the deed.* In a recent case,† the Court of King's Bench said: "The deed states the whole purchase money to be well and truly paid. The parol evidence is that it never was paid, but a great part of it kept back; and that fact is wholly inconsistent with the statements in the deed, and therefore ought not to have been received in evidence." But it seems to be well settled in this country, that, as between the original parties to the transfer, the consideration clause is open to parol proof,‡ at least so far as to permit the grantor to show that the price of the property was not, in point of fact, paid.[1]

ADMISSIBILITY OF PAROL PROOF.—But however the rule may be in general, there may again arise a question whether the consideration clause is open to parol proof, for the purpose of reducing or enhancing the damages; as, for instance, if a mere nominal consideration be inserted, will that defeat all but a nominal recovery, or can the party evicted show the actual price paid? A very accomplished judge has held this language:‖ "Where the deed contains no covenant but that of seisin or general warranty, the consideration is [173] not inserted as a mere matter of form, nor for the sole purpose of giving effect and operation to the deed; but it is inserted for the further purpose of fixing the amount of damages to which the grantee will be entitled, in case he is evicted. At least, such are my present impressions, though my brethren are inclined to a different conclusion. But it is not now necessary to decide the question."

I submit, however, with deference, that any distinction as to the purpose for which parol proof is admitted, cannot be maintained. If good for one end, it must be good as to all. It

* King *v.* Inhabitants of Scammonden, 3 T. R. 474; Rowntree *v.* Jacob, 2 Taunt. 141; Villers *v.* Beamont, 2 Dy. 146 *a*; Mildmay's Case, 1 Rep. 176; Vernon's Case, 4 Rep. 3; Peacock *v.* Monk, 1 Ves. sen. 128; Craythorne *v.* Swinburne, 14 Ves. 159; Lampon *v.* Corke, 5 Barn. & Ald. 606.

† Baker *v.* Dewey, 1 Barn. & Cres. 704.

‡ See the English and American cases elaborately reviewed in the Court of Errors in New York, in McCrea *v.* Purmort, 16 Wend. 460. See, also, Grout *v.* Townsend, 2 Hill, 557. In New Jersey, see the subject examined in Bolles *v.* Beach, 2 Zabriskie, 680, where it is said, "When the deed acknowledges the payment of the consideration, it cannot be denied by the grantor, for the purpose of destroying the effect and operation of the deed; though it may be denied for the purpose of recovering the consideration money. This doctrine is now, in this court, supported by such a weight of authority as not readily to be disturbed."

‖ Greenvault *v.* Davis, 4 Hill, 643, per Bronson, J.

[1] And where the rule of damages is not the consideration paid, but the value of the premises at the time of the conveyance, the consideration expressed in the deed is, nevertheless, evidence of such value. Parker *v.* Brown, 15 N. H. 176.

would be a solecism for the tribunal to admit evidence to influence their minds as to one result, and to exclude it as to another. If a fact be established, all its legitimate results must follow, whether as to rights or remedies; and so it seems to be now at length definitely settled in New York. In a recent case, Jewett, J., delivering the opinion of the Court of Appeals, said: "It is well settled that for the purpose of ascertaining the damages to which a plaintiff may be entitled in an action at law for the breach of the covenant of seisin in a deed, the true consideration, and that all or any part remains unpaid, may be shown, notwithstanding a different consideration is expressed in the deed, and although it contains an acknowledgment, on the part of the grantor, that it has been paid at the time of or before the execution of the deed." * In the sister States of the Union, also, it seems to be now generally held that parol proof is admissible as to the quantum of consideration paid.†

But, though parol proof may be admitted as between the original parties, it is well settled in New York that if the grantee has transferred the land, the consideration named is conclusive as between his assigns and the original grantor, at least as against the latter. In a case already cited,‡ Bronson, J., said "It would work the grossest injustice to allow the covenantor to go into the question of how much was actually paid for the land, when the title has failed in the hands of an assignee." In this case it was held the *grantor* could not be allowed, as against the assignee, to show that the price paid was less than that named in the deed; but perhaps the same reasons do not apply against the *assignee*, if desirous to [174] prove the price greater.

Actual Compensation the Fundamental Rule.—In regard to all the real covenants, although the courts have felt themselves bound to adopt the arbitrary rules which we have stated, as to the price paid, still the constant effort is to give compensation for what is actually lost; not to allow any remuneration for a mere technical breach of agreement; to make the measure of damages correspond with the real injury sustained, and not to permit an action where no loss has been suffered. So in Massachusetts, it has been held that "the grantee of land with warranty, who has conveyed all his interest therein with warranty, cannot maintain an action against his grantor for a breach

* Bingham *v.* Weiderwax, 1 Comstock, 509.

† Garrett *v.* Stuart, 1 M'Cord, 514; Bullard *v.* Briggs, 7 Pick. 533; Morse *v.* Shattuck, 4 N. Hamp. R. 229; Belden *v.* Seymour, 8 Conn. R. 304.

‡ Greenvault *v.* Davies, 4 Hill, 643, 649.

of the warranty, subsequently occurring, unless he is compelled to pay damage on his own covenant of warranty or obtains a release of the same from his grantee;" and the court said, "The plaintiff has not suffered any damage, and he may never sustain any. He is liable on his warranty, it is true; but before he has suffered he cannot sue for indemnity, there being no certainty that he ever will be damnified."* So, in an action on this covenant in New York, where the plaintiff had been ousted of a portion of the premises by a third party, who had a superior title, but for a term of years only, it was held by the Supreme Court that the measure of damages was not the consideration money of the land of which the plaintiff was dispossessed and interest, but the annual value thereof, or the interest of the consideration money paid for the land for the period of the term; and that the costs and counsel fees of the plaintiff's defence to the termor's suit, were all properly included.† In Massachusetts, in a similar case, we have already seen that counsel fees were not allowed.‡[1]

In New Hampshire, it appears to be well settled, that in a suit brought on the covenant of warranty, where the grantee has purchased in the paramount title, he can recover no more than the amount paid, with compensation for his trouble and expenses.‖[2]

COVENANTS OF SEISIN.—Having thus examined the [175] covenants of warranty and for quiet enjoyment, we come next to that of seisin, or that the grantor has good right to convey, for they are substantially the same.

In regard to this covenant, it is not necessary to allege by way of breach, an ouster or eviction. All that is requisite is to negative the words of the covenant.¶ If, at the time of the execution of the deed, the grantor does not own the land, the covenant is broken, as we have seen, immediately; and in such a case, in Massachusetts, it was said,** "The rule for assessing the damages arising from this breach, is very clear. No land

* Wheeler *v.* Sohier, 3 Cush. 219.

† Rickert *v.* Snyder, 9 Wend. 416. See this case commented on in Batchelder *v.* Sturgis, 3 Cush. 201, where the Supreme Court of Massachusetts say they are not prepared entirely to adopt it.

‡ *Ante*, 99, *et seq.*

‖ Loomis *v.* Bedel, 11 N. H. R. 74.

¶ Rickert *v.* Snyder, 3 Wend. 416; Kent's Com. vol. IV, p. 479.

** Bickford *v.* Page, 2 Mass. 455, 461.

[1] In Ohio, a grantee evicted of a part of the conveyed premises by the assignment of a widow's dower, is entitled to his costs and counsel fees in resisting the widow's claim. McAlpin *v.* Woodruff, 11 Ohio St. 120.

[2] And it has been held in the same State that if the grantee cannot remove the incumbrance he may recover damages for his injury. Willson *v.* Willson, 5 Fost. (N. H.) 229.

passing by the defendant's deed to the plaintiff, he has lost no land by the breach of this covenant; he has lost only the consideration he paid for it. This he is entitled to recover back, with interest to this time."*[1] In New York,† in an action for the breach of this covenant, it appeared that there was only a partial failure; the grantors having the fee in two sixths of the premises conveyed, and a life estate in the remainder. The court said, "There is no settled rule of law to ascertain the damages in such a case, without having a jury to assess them, as they must depend principally upon the value of the estate during the lives of the defendants, which must be deducted from four sixths of the consideration money. Nor ought interest to be allowed during their lives; for no one, during that time, will have a right to turn the plaintiff out of possession, or call on him for the mesne profits."

In New Hampshire, in an action on the covenants of seisin in fee and right to convey, it was said, that "the two covenants were synonymous, and each amounts only to a stipulation that the grantee has such a seisin, that the land will pass by the deed."‡ And the court proceeded to say, "It has been settled in this State too long to be now questioned (and [176] it is deeply to be regretted that it is so settled), that he who has a good title to land which is in the adverse possession of another, has, so long as he has a right of entry, such a seisin that the land will pass by his deed."‖

The general rule on the covenant of seisin undoubtedly is, that the vendee recovers his consideration money and interest upon the ground that this is his actual loss. But where it is apparent that his loss has been really less, he is limited to the amount of injury sustained.[2] So in Maine, where land was conveyed with covenant of seisin, and it appeared that, at the time of the conveyance, there was an outstanding paramount

* See, to the same point, Caswell *v.* Wendell, 4 Mass. 108; Chapel *v.* Bull, 17 Mass. 213; Jenkins *v.* Hopkins, 8 Pick. 346.

† Guthrie *v.* Pugsley, 12 Johns. R. 128.

‡ This, however, is not absolutely true; for if husband and wife convey with covenants of seisin, and of right to convey, and they are seised in fee, but the wife is under age, the one covenant would be broken and the other not. Sugden, Vend. & Purch. 404, 406.

‖ Willard *v.* Twitchell, 1 N. H. R. 177.

[1] See Smith *v.* Strong, 14 Pick. 128; Byrnes *v.* Rich, 5 Gray, 518, *ante*, 167, note 1.

[2] Herndon *v.* Harrison, 34 Miss. 486; Blossom *v.* Knox, 3 Chandl. (Wis.) 295; Weiting *v.* Nissley, 13 Penn. St. 654; Nutting *v.* Herbert, 37 N. H. 346. If no consideration is paid, nominal damages only are recoverable. Ibid.

So, where the grantor, after breach of the covenant, and even after suit brought for the breach, acquires the title, such subsequently acquired title, enuring to the grantee, goes in mitigation of damages. King *v.* Gilson's Adm'rs, 32 Ill. 348.

In Indiana, in an action for breach of the covenant of seisin, while the purchaser retains the deed and possession, the want of title in the vendor will not entitle him to recover more than nominal damages. Hacker *v.* Blake, 17 Ind. 97; Small *v.* Reeves, 14 Ind. 164.

title, and about seventeen years after the purchase, the plaintiff, who had been all the time in possession, was obliged to purchase in the outstanding title, it was held that he was not entitled to recover the whole original consideration money with interest, but only the amount paid to perfect the title, with interest from the time of payment. In this case, it was urged that the plaintiff derived no rents or profits from the premises; but the court said, "We think that cannot be taken into consideration to affect the rights of the parties. If a person purchase real estate, it is to be presumed that he does so because the rents and profits of it will be equivalent to the interest of the money he may be content to pay for it. Whether the vendee turns his purchase to a profit or a loss, is no concern of the vendors." * [1]

So, also, in New York, where the defendant, being tenant for life, with remainder over, conveyed with covenant of seisin in fee, in a suit on this covenant, the plaintiff, having been in possession from the time of the conveyance, was allowed to recover the consideration money without interest, deducting therefrom the value of the life estate.†

So in Maine, in an action on this covenant, it appeared that the grantor was not seised at the time of execution of the deed, and the covenant was therefore broken; but [177] that he had subsequently acquired a title which was held to enure to the grantee by estoppel; and the grantee not having been disturbed in his possession, it was considered that the plaintiff could recover nominal damages only, and the Supreme Court said,—

"The rules which have been established to determine the measure of damages, upon the breach of covenants in deeds for the conveyance of real estate, have been framed with a view to give the party entitled a fair indemnity for the damages he has sustained. Thus, if the covenant of seisin is broken, as thereby the title wholly fails, the law restores to the purchaser the consideration paid, which is the agreed value of the land, with interest. But in this, as well as in other covenants usual in the conveyance of real estate, if there exist facts or circum-

* Spring *v.* Chase, 22 Maine, 505.

† Tanner *v.* Livingston, 12 Wend. 83. In Spring *v.* Chase, 22 Maine, 505, it is said, speaking of this case, "to have been held," that interest was not recoverable; but there was no discussion or decision as to the matter of interest; it was the ruling at the trial; the tenant for life, however, not having died, and the plaintiff not being evicted, there was evidently no ground for any allowance of interest, which is only given to cover the value of the mesne profits that it is supposed the grantee may be obliged to refund to the true owners.

[1] Where the covenantee after eviction has purchased the paramount title, the measure of damages is the sum actually and in good faith paid therefor and the amount expended in defending his possession, provided such damages in no case exceed the purchase money and interest. McGary *v.* Hastings, 39 Cal. 360.

stances which would render the application of the rule inequitable, they are to be taken into consideration by a jury. The covenant was intended to secure to the plaintiff a legal seisin in the land conveyed. If it is broken, and he fails of that seisin, he has a right to reclaim the purchase money. But if, in virtue of another covenant in the same deed, which was also taken to assure to him the subject-matter of the conveyance, he has obtained that seisin, it would be altogether inequitable that he should have the seisin, and be allowed besides to recover back the consideration paid for it." * [1]

But a release of land without warranty to a third person has been held in Massachusetts not to prevent a grantee from recovering full damages against his grantor for a breach of the covenant of seisin.†

If the grantor on a deed containing covenants of seisin and warranty, after the execution of the deed, recover land included in it of which he was not in fact seised at the time of making the deed, it will go to reduce the damages *pro tanto*.‡

It has been frequently decided in actions on this covenant, that where a former suit has taken place which the covenantee has been obliged to defend, not only his costs, but his counsel fees may be recovered in the proceeding on the covenant itself.‖

Where the breach of the covenant consists of an outstanding life estate, it has been held not to be erroneous to give [178] the jury printed tables to compute its value by, as, in Vermont, those of Dr. Wigglesworth.¶

Covenant against Incumbrances.—We proceed now to consider the rule in regard to the covenant against incumbrances.

And on this subject the Supreme Court of Massachusetts has used this general language, that the defendant is to make good his warranty; that is, he is to pay a sum of money which will put the plaintiff in as good a state as if he had kept his covenant.** [2] The cases arising under the covenant against incumbrances resolve themselves into three general heads. *First*, where the incumbrance consists of a mortgage or other debt

* Baxter *v.* Bradbury, 20 Maine, 260. See also, Whiting *v.* Dewey, 15 Pick. 428.

† Cornell *v.* Jackson, 3 Cush. 506.

‡ Ibid.

‖ States *v.* Ex'rs of Ten Eyck, 3 Caines' R. 111; Kingsbury *v.* Smith, 13 N. H. R. 122; Swett *v.* Patrick, 3 Fairf. 9; Beale *v.* Thompson, 3 B. & P. 407; Pitkins *v.* Leavitt, 13 Verm. R. 379; Allen *v.* Blunt, 2 Woodb. & M. 121.

¶ Mills *v.* Catlin, 22 Verm. 98.

** Thayer *v.* Clemence, 22 Pick. 490.

[1] Overhiser *v.* McCollister, 10 Ind. 41.

[2] And when a vendee with covenants of warranty buys in an outstanding or paramount title, the rule of damages for the breach of the vendor's covenant is the amount so paid. Hurd *v.* Hall, 12 Wis. 112; Bailey *v.* Scott, 13 Wis. 618; Fawcett *v.* Woods, 5 Iowa, 400; Lawless *v.* Collier, 19 Mo. 480.

which is already due and which the plaintiff has paid off. *Second*, where the plaintiff has not discharged the incumbrance, though it might have been done. *Third*, where the incumbrance consists of a mortgage or lease not expired, or servitude of any description, which the plaintiff cannot discharge. In Massachusetts, the general rule has been laid down as follows: "If the covenantee has fairly extinguished the incumbrances, he ought to recover the expenses necessarily incurred in doing it. If they remain and consist of mortgages or attachments, and such liens on the estate as do not interfere with the enjoyment of it by the covenantee, he can only recover nominal damages.[1] But if they are of a permanent nature, and such as the covenantee cannot remove, he should recover a just compensation for the real injury resulting from their continuance."*[2] And this seems the law as generally received.

Cases in New York and New England.—So in New York,† it was held, that if the plaintiff had actually extin-

* Harlow *v.* Thomas, 15 Pick. 66, 69; Batchelder *v.* Sturgis, 3 Cush. 201.

† Delavergne *v.* Norris, 7 J. R. 358.

[1] In accordance with the great principle of *compensation*, which will constantly furnish the clue to lead us out of any seeming maze in the application of the rules of damages, the grantee, on a breach of a covenant against incumbrances, can recover such damages only as he has actually sustained. If by it the title has failed and the premises have been lost, he may recover to the full extent of the covenant; or if he has removed the incumbrance, he may recover the sum paid for the purpose, unless it exceeds the limits of the covenant. But if he has not been disturbed in his title, or has paid nothing to remove the incumbrance, he can recover nominal damages only for the breach. Willets *v.* Burgess, 34 Ill. 494.

Whether the incumbrance be a judgment, mortgage, right of dower, or a paramount right to the land or some part of it, if the plaintiff has not paid off the mortgage or judgment, or extinguished the right of dower or paramount right, as the case may be, he shall recover nominal damages only. The reason of the rule is, that he shall not be permitted to recover back the consideration paid for the land while he still holds it, and may never be disturbed in his possession. He must first extinguish the incumbrance, so that it cannot afterward prejudice the grantor, before he will be permitted to recover its amount, or the amount fairly and necessarily paid to extinguish it. Greene *v.* Tallman, 20 N. Y. 191; Giles *v.* Dugro, 1 Duer's R. 331; Stowell *v.* Bennett, 34 Me. 422. See Porter *v.* Bradley, 7 R. I. 538; *post*, 182, note 1.

But where the vendor agrees to pay all claims against the lot sold, it is not necessary for the purchaser to prove that a judgment which is a lien upon the premises has been enforced, or that he has been evicted. The non-payment of the judgment is all that is necessary in order to show a breach; and the rule of damages upon a breach is the amount of the judgment with interest. Cady *v.* Allen, 22 Barb. (N. Y.) 388.

The grantee may sue immediately on the breach of the covenant, and may recover substantial damages for the incumbrance if discharged before the trial. Preble *v.* Baldwin, 6 Cush. (Mass.) 549.

[2] The qualification of this rule, that such "real injury" must be the injury to the market value of the estate, is not erroneous. Wetherbee *v.* Bennett, 2 Allen, 428. This rule is reaffirmed in Woodbury *v.* Luddy, 14 Allen, 1, an equity case, in which, on account of special circumstances, the rule was held inapplicable.

Where the premises were sold under a judgment which was a lien on them at the time of the conveyance, and were bid in by the vendee, the measure of his damages was held to be the amount paid by him with interest, and "perhaps necessary incidental expenses." Burk *v.* Clements, 16 Ind. 132.

guished the incumbrance, he was entitled to recover the amount so paid;[1] but if not extinguished, that then he could only recover nominal damages;[2] and the doctrine has been uniformly adhered to in that State.*[3] And on the same principle, in regard to the mode in which the breach of this covenant must be set out, it is held in New York† not to be sufficient to aver that the premises are not unincumbered, but that the plaintiff must allege the extinguishment of the incumbrance.

[179] So in Massachusetts, in an early case, Parsons, C. J., said, "A purchaser from one seised is not obliged to wait in painful suspense until he be evicted, before he can obtain an adequate remedy; but as soon as he can extinguish the incumbrance, he may call on his grantor for an indemnity." So held again in the same State, that the damages in a suit on the covenant against incumbrances are merely nominal, if the plaintiff has paid nothing towards their discharge.‡ So in Maine, it has been decided that the plaintiff can recover nothing more than the nominal damages for a breach of covenant by an incumbrance no longer existing, and not removed at his expense.‖

In New York,¶ in an action on this covenant, the plaintiff having been defeated in an ejectment suit, and judgment obtained against him, the Supreme Court held that he was entitled to recover the consideration named in his deed, with interest, and also the costs of the proceeding in which he was evicted.[4]

* Hall *v.* Dean, 13 J. R. 105; Standard *v.* Eldridge, 16 J. R. 254.

† Deforest *v.* Leete, 16 J. R. 122.

‡ Prescott *v.* Truman, 4 Mass. 627; Wyman *v.* Ballard, 12 Mass. 304; and Tufts *v.* Adams, 8 Pick. 547.

‖ Herrick *v.* Moore, 19 Maine, 313.

¶ Waldo *v.* Long, 7 J. R. 173.

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[1] So in Iowa. Fawcett *v.* Woods, 5 Iowa, 400. So in Alabama, in reference to money paid to remove a paramount equitable title. Lewis *v.* Harris, 31 Ala. 689. So in Missouri. City of St. Louis *v.* Bissell, 47 Mo. 157; Henderson *v.* Henderson, 13 Mo. 161.

[2] So in Wisconsin. Noonan *v.* Ilsey, 21 Wisc. 138.

[3] But this is no longer the rule in that State, where, by the terms of the covenant, it is broken by the non-payment of the incumbrance. In an action for damages for breach of a covenant to pay all such taxes and assessments as should be imposed during the term of the lease, it was held by the Superior Court of New York city, that nominal damages only could be recovered for the non-payment of an assessment, where the plaintiff had not actually paid it. Rector, &c. of Trinity Church *v.* Higgins, 4 Robertson, 1, 372. But this judgment was reversed by the Commission of Appeals, which held that the covenant was not one for indemnity merely, and that the plaintiffs were entitled to judgment for the amount due on the assessment. s. c. 48 N. Y. 332. See *post*, 306, note. And where in the same State a grantor had covenanted that there were incumbrances on the estate to the extent of $12,400 only, and they amounted in fact to $12,800, the grantee having paid a portion of them to an amount exceeding $400, was held entitled to recover that sum, and was not restricted to nominal damages. Braman *v* Bingham, 26 N. Y. 483.

[4] "All the reasoning of our own judges," says Mr. Justice S. B. Strong in the New York Court of Appeals, "goes to limit the responsibility of the grantor to the consideration, with interest and costs." Greene *v.* Tallman, 20 N. Y. 191.

So in Indiana, the rule is the purchase money and interest. Burton *v.* Reeds, 20 Ind. 87. Nor is the grantor in that State entitled to recoup the rents and profits, unless he actually paid them to the holder of the paramount title. *Ib.*

In Massachusetts, where the grantee was evicted under a paramount title, it was held that the proper measure of damages was the value of the land, with interest thereon from the time of the eviction.* [1]

In New York, the following question was raised.† Suit was brought on the covenant against incumbrances; the declaration averred that the plaintiff purchased the land in question for two hundred and fifty dollars, and put on improvements to the value of two thousand dollars; that at the time of the deed, the premises were not free from incumbrances, but that they were subject to a judgment for upwards of three thousand dollars on an undivided moiety of the lot, under which incumbrance one half was sold. Plea, that the plaintiff was only entitled to recover one hundred and twenty-five dollars, one half of the consideration money paid; and tender of that sum; demurrer and joinder.

This plea proceeded on the ground, that under the covenant against incumbrances the plaintiff can only [180] recover the consideration paid, and nothing for his improvements. So the court held, and gave judgment for the defendant. It was even intimated that if he had discharged the incumbrance, he could not recover the amount paid. "Suppose the plaintiff," said Savage, C. J., "instead of building a house, had paid the $3,000, and brought this suit to be reimbursed, he would bring himself within the language of some of the judges who say that a purchaser is entitled to recover what he has paid; and yet I apprehend he would not be permitted to recover that amount." The court laid stress on the admitted fact, that under the covenant of quiet enjoyment, only the consideration money and interest could be recovered, and asked why more should be obtained in the action before them.

This case appears open to much observation: it may not be contrary to the spirit of the rule in regard to the covenant for quiet enjoyment, but if generally applied, it appears greatly to diminish the value of the covenant against incumbrances. By surrendering the property to the previous incumbrance, a valid claim may always be created to the extent of the consideration

* Barrett *v.* Porter, 14 Mass. 143.

† Dimmick *v.* Lockwood, 10 Wend. 149.

[1] In Louisiana, under the Civil Code, a purchaser who has gone into possession is entitled only to recover from his warrantor the price paid, with interest from the time of the eviction. The warrantor is not liable for taxes paid by his vendee, nor his counsel fees in the action. Hale *v.* New Orleans, 13 La. Ann. 499. Nor for improvements on the land made by the vendee after the bringing of a suit to evict him, where it is not shown that the improvements increased the value of the land or benefited the warrantor. Coleman *v.* Ballard, 13 La. Ann. 512.

money, and to this it seems the recovery under this covenant is in every instance to be limited. A case may, however, easily be imagined, where the incumbrance is well known, where the consideration money is a fair representative of the value without the incumbrance, where the grantor agrees to remove it, and the covenant against incumbrances is inserted for the express purpose of making it certain that he will do so. In such a case the application of this principle would be extremely inequitable. For it must not be forgotten that the severity of the arbitrary rule which declares the consideration named in the deed to be the actual price paid, is but little mitigated by the permission given to the parties to contradict it by parol proof. Such evidence, after the lapse of a few years, will generally be difficult of production, in may cases impossible, and the mere burden of proof is always a serious responsibility. In Massachusetts, also, it has been said, that the general rule that the covenantor against incumbrances is liable to refund the sum paid by the grantee to extinguish the incumbrance, must be taken subject to the qualification that the amount thus paid does not exceed that which the grantor would be bound to pay in case of eviction. In other words, he cannot be made liable for
[181] more than the value of the estate. But it will be observed, that where the value is fixed by the consideration money paid, as in New York, the rule becomes a very different one in its effect from what it is where the actual value at the time of eviction is taken, as in Massachusetts. In this latter case there appears no objection to it.*

In Massachusetts, in an action on the covenant against incumbrances, and of warranty,† there was proved a deed by defendants to plaintiffs; that in the conveyance to the defendants, the land was supposed to be embraced, but it was not; that subsequent to the conveyance by defendants to plaintiffs, the original owners entered, and plaintiff surrendered, and afterwards paid divers sums to extinguish the original title. The plaintiffs claimed the sums paid to extinguish the adverse titles, with charges for their time spent in extinguishing them, incidental expenses for horse and carriage hire, and sums paid for advice of counsel after suit brought. The latter item (*counsel fees*) was disallowed; but the other expenses, subsequent to the service of the writ, were allowed.

In New Hampshire, in an action brought on the covenant against incumbrances, the breach being the existence of a highway, to contest which the plaintiff, induced by the representa-

* Norton *v.* Babcock, 2 Met. 510, 516. † Leffingwell *v.* Elliott, 10 Pick. 204.

tions of the defendant, had brought a suit and been defeated, it was held that the jury *might* include the costs of that suit in the damages.*

In Maine, it has been decided in a suit on the covenant against incumbrances, that the plaintiff may recover the amount paid by him to free the title, although so paid after suit brought.† And so it has been held in Massachusetts: ‡ and in both States no doubt on the correct ground that, the cause of action accruing before the commencement of the suit, by reason of the existence of the incumbrance, and thus a claim for nominal damages being created, the payment [182] of the incumbrance was mere matter of consequence, which the jury should take into consideration.

INCUMBRANCES NOT DUE.—The most difficult questions as to the measure of compensation on this covenant, arise under the third head; where the incumbrances are still outstanding.[1] In New York it has been held, that where the covenant has been broken by reason of an unexpired lease, the rule of damages is the annual value of the estate, or the annual interest on the purchase money.‖[2] The Supreme Court of Massachusetts, while refusing to adopt this as a general rule, have said that in some instances it may be correct; and in case of a lease outstanding, they have said, "That the effect of such a lease *on the sale of*

* Haynes *v.* Stevens, 11 N. H. R. 28. Would it not have been more proper to say that these costs *should* have been included?

† Kelly *v.* Low, 18 Maine, 244.

‡ Leffingwell *v.* Elliott, 10 Pick. 204; Brooks *v.* Moody, 20 Pick. 474; *ante*, 109.

‖ Rickert *v.* Snyder, 9 Wend. 416.

[1] This covenant being one of indemnity only, the general rule is that the covenantor shall recover as damages a sum equal to the injury actually sustained at the time the action is brought. If he has removed the incumbrance, the measure of damages is the amount paid not exceeding the consideration money and interest. If the incumbrance is outstanding he is ordinarily entitled to nominal damages only, though where the incumbrance is continuous, as in the case of easements, servitudes, and unexpired terms, this rule does not apply. Here, although he has paid nothing; he has sustained, and is constantly sustaining, injury, to the whole extent of which he is entitled to be compensated in damages. In the case of an unexpired term or lease, the proper rule is the fair rental value of the land to the end of the term. Porter *v.* Bradley, 7 R. I. 538.

[2] In the absence of fraud in an action brought by a grantee of land against his grantor for breach of a covenant against incumbrances, the measure of damages is the actual amount or value of the incumbrance, and where the purchaser has not enjoyed the premises, the interest. No consequential damages are allowed. "The reason is that when the incumbrance is actually unknown to the vendor, as is generally the case where he covenants against them, the means of discovering them are, or with proper exertions may be, equally accessible to both parties. If the intended purchaser should make proper examination, he would ordinarily discover an incumbrance which must be in writing, and the evidence on record; and should he neglect to do that, he cannot reasonably claim more than an exemption from positive loss." Per Strong, J., Greene *v.* Tallman, 20 N. Y. 191. So in Illinois, Claycomb *v.* Munger, 51 Ill. 373.

Where there is a paramount title in a third party not purchased by the vendee, the measure of the plaintiff's damages in Iowa is the consideration paid and interest. Fawcett *v.* Woods, 5 Iowa, 400.

the estate could not be taken as the true rule; that such effect must in its very nature be imaginary, and supported only by speculative opinions and conjectures;" and that "it was quite too loose and uncertain a mode of estimating damages." Nor will, in such a case, the fact that the estate was purchased by the grantee for resale, be allowed to be proved in order to augment the damages, unless this was known to the grantor.*[1]

Instead of the general covenant that the premises conveyed are free from incumbrances, we sometimes find a special agreement to remove certain existing incumbrances; and in such a case in England it has been held that the amount of the incumbrance becomes the measure of damages. So in an action by the trustees of the defendant's wife on a covenant to pay off certain incumbrances to the amount of £19,000, no special damage was laid in the declaration, nor proved, and judgment having gone by default, the sheriff's jury gave only nominal damages; but on motion the inquisition was set aside; Lord Tenterden, C. J., saying, "If the plaintiffs are only to recover a shilling damages, the covenant becomes of no value;" and Patterson, J., said, "At law the trustees were entitled to have this estate unincumbered. How could that be enforced unless they could recover the whole amount of the incumbrances, in an action on the covenant?"†[2]

I have already ventured to suggest,‡ that the verdict [183] in such a case should be for nominal damages only.

And so, I apprehend, it would certainly be held in this country, in conformity to those general rules fixing the measure of damages upon this covenant which we have above considered.[3]

* Batchelder *v.* Sturgis, 3 Cush. (Mass.) 201.

† Lethbridge *v.* Mytton, 2 B. & Adol. 772.

‡ *Ante*, 111.

[1] See Creene *v.* Creighton, 7 R. I. I.

[2] In a recent case in Ohio, the plaintiff, after exchanging with the principal defendant certain lands in Ohio for lands in Indiana, discovered that the Indiana land was subject to an attachment levied by the creditors of the defendant, who thereupon executed and delivered to the plaintiff a written undertaking to cancel all incumbrances on the Indiana land within six months. The other defendant at the same time executed a written guaranty of this undertaking. The Indiana land having been sold in the attachment suit, the plaintiff was held entitled to recover its value when lost, with interest from that time. Manahan *v.* Smith, 19 Ohio St. 384.

[3] Such is the rule in Iowa. Linder *v.* Lake, 6 Iowa (Clarke), 164; Funk *v.* Cresswell, 5 Iowa, 62. In Indiana, on the breach of a contract to remove incumbrances, the measure of the recovery is now held, in reversal of previous decisions in that State (Schooley *v.* Stoops, 4 Ind. 130, and Tate *v.* Booe, 9 Ind. 13), to be the amount due on the incumbrance, notwithstanding the grantee had neither paid it nor been evicted. Johnson *v.* Britton, 23 Ind. 105. The decision is based in part on the provisions of the new Code of Procedure, under which courts of law have equity jurisdiction, the distinction between actions at law and suits in equity is abolished, and all having an interest in a controversy may be made parties to the suit.

In Maine, where a covenant was given to pay, or allow in account, a certain sum, provided certain incumbrances were removed by a given day, and they were removed, but not till a year afterwards, it was held, that such deduction must be made from the stipulated sum, as any change that had in the interim taken place in the value of the property might render just and proper.* In Pennsylvania it is held,† that if a vendee covenant to pay an incumbrance out of the purchase money, and fail to do so, by reason of which the land is sold for the payment of the incumbrance, and sells for a price exceeding it, he is liable to the vendor for damages, the measure for which is the difference between the amount for which the land is sold, and the price which he agreed to pay for it.‡

We shall be obliged to discuss in a separate place the rule of damages in regard to covenants generally; but this appears the proper time to examine the measure of compensation in regard to contracts to convey or purchase real estate, or any interest therein.[1]

CONTRACTS FOR SALE OF LAND.—These agreements usually under seal, may be broken either by the vendor refusing to convey, or by the vendee refusing to pay the price.

ACTIONS BY VENDEE.—*First*, where the vendor refuses or is unable to convey. We have already had occasion to notice a case of this kind where all profit for the loss of the bargain was denied, and the vendee's damages limited to his deposit. ‖[2]

This would, of course, if the vendee made no advance, reduce his recovery, independent of actual expenses, to a merely nominal sum. That case seems to have gone on the ground that "contracts of this description are on the condition frequently expressed, but always implied, that the vendor has a good title."[3] And as to such cases the principle seems well set-

* Roberts *v.* Marston, 20 Maine, 275.

† Young *v.* Stone, 4 Watts & Serg. 45.

‡ In New York, under the new system of procedure, in an action to recover damages for the breach of the covenant against incumbrances, it has been held that the defendant may show, by way of defence, that the incumbrance referred to was by mistake omitted to be excepted from its operation; and that, as the defendant in such action could not have affirmative relief on his answer, he might bring a cross-action to reform the covenant. Haire *v.* Baker, 1 Seld. 357.

‖ Flureau *v.* Thornhill, 2 W. Blackstone, 1078.

[1] In an action on a bond to convey within a stipulated time certain lands to be selected by the plaintiff's intestate, where it proved that the lands had been sold when the obligee applied for the conveyance, the measure of damages was held to be the value of such land as the obligee might have selected. Loomis *v.* Wadhams, 8 Gray, 557.

[2] Dumars *v.* Miller, 10 Casey (Penn.) 319, *ante*, 166 n.; Bowser *v.* Cessna, 62 Penn. St. 148.

[3] "That is the true and only principle upon which Flureau *v.* Thornhill can be supported,"

tled; so in a more recent case, where the vendor, acting in good faith, contracted with the plaintiff to sell certain real es-
[184] tate, and proved unable to give a good title, the plaintiff was permitted to recover only his expenses for investigating the title,[1] and not the advance at which he could have sold the property, Parke, J., saying, "In the absence of any express stipulation the parties must be considered as content that the damage, in the event of the title proving defective, shall be measured in the ordinary way; and that excludes the claim of damages on account of the supposed goodness of the bargain." *[2]

And these cases have recently been reviewed and adhered to. So, where the plaintiff entered into possession of premises as tenant for two years, with liberty to make improvements (which he did), and to purchase at the end of the time, the vendor having acted in good faith, but proving unable to complete, the plaintiff claimed to recover for the improvements he had made; but it was held, he was only entitled to the value of the lease, and not of the improvements. †[3]

Rule where Vendor has no Title.—But where the vendor has no title whatever, and holds himself out as the proprietor when he is not, the rule is otherwise. So, where the vendor had no title whatever, although acting *bonâ fide*, the Court of King's Bench permitted substantial damages to be given.‡ And again, where a party agreed to grant a lease, with full knowledge that he had no title, the plaintiff was allowed damages for the loss of his bargain. ‖[4]

* Walker *v.* Moore, 10 B. & Cres. 416.

† Worthington *v.* Warrington, 8 Man. Gr. & S. 134.

‡ Hopkins *v.* Grazebrook, 6 Barn. & Cres. 31.

‖ Robinson *v.* Harman, 1 Exch. R. 850. See, to same point, Bitner *v.* Brough, 11 Penn. St. R. 127. See Tyrer *v.* King, 2 Car. & Kir. 149, where damages for loss of bargain were refused.

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say the English Court of Common Pleas after citing the above language, "namely, that the parties have tacitly agreed that this should be understood as a term of the bargain between them." Lock *v.* Furze, 1 L. R. (C. P.) 453.

[1] See as to the items of expense allowed in such a case, Hodges *v.* Litchfield, 1 Bing. N. C. 492. The expenses of a previous suit between the parties, in which the vendor was defeated, beyond the costs taxed in that suit, cannot be recovered. *Ib.* Where the vendee declares on the original contract, and lays the expenses incurred as special damages, he will be entitled to recover them. Richards *v.* Barton 1 Esp. N. P. 268. But he cannot recover them under a count for money paid. Camfield *v.* Gilbert, 4 Esp. N. P. 221.

[2] Nominal damages only can be recovered for the vendor's breach of a contract to convey land made in good faith, where such breach is occasioned simply by his honest inability to make a good title. Conger *v.* Weaver, 20 N. Y. 140.

[3] This case is a marked exception to the present general rule of damages for breach of a contract, as the agreement contemplated that the improvements should be made.

[4] Although the cases of Flureau *v.* Thornhill, 2 W. Bl. 1078, and Hopkins *v.* Grazebrook, 6 B. & C. 31, and Robinson *v.* Harman, 1 Exch. 850, taken together, still furnish the elements of the rule of damages in England in respect to the breach of contracts for the convey-

It has been supposed that the plaintiff in an action against the vendor in default might include the costs of a suit in equity,

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ance of real estate, yet these cases have been each in turn repeatedly criticised. And the rule has been so variously applied, so frequently extended, restricted, and explained by later decisions, and at times so grudgingly acquiesced in, that the editor may be excused for grouping the authorities chronologically, in the hope of showing, with some exactness, what the rule is as now modified and understood, and to what, if any, extent it depends on the seller's motive.

In an early case, where one had paid a fine for a lease, the intended lessor was evicted before the lease was made, and an action having been brought in the Court of Marches, in Wales, a prohibition was sought from the King's Bench; it was said by this court that an action of debt would not lie, but that an action on the case would lie for loss of the benefit of the intended lessee's bargain, in which he could recover not only what he had paid for the fine, but damages also for the breach of the contract. Brigs' Case, Palmer, 364 (xxi James I), 1628. But the rule of damages in actions of this sort was not considered until the case of Flureau *v.* Thornhill, 2 W. Bl. 1078 (1776), in which it was held that contracts for the sale of real estate are on the condition, always implied if not expressed, that the seller has a good title, and that if without fraud he fail to convey by such a title, the vendee is not entitled to damages for the loss of his bargain.

In the case of Bratt *v.* Ellis, 1805, (App. to Sugden on Vendors, 11th ed. No. 4), the English Court of Common Pleas, and in that of Jones *v.* Dyke, 1807 (*Ib.* No. 5), Macdonald, B., at *nisi prius*, applied this principle to the case of auctioneers selling real estate without authority from the owners, but in good faith, and the plaintiff in each case recovered merely his expenses.

But as has been seen in the text, it was held in Hopkins *v.* Grazebrook, 6 B. & C. 31 (1826), that this principle did not apply when the vendor, though apparently acting in good faith, had in fact no legal title. In this case he was held responsible for the whole damage sustained by his breach of contract. Hopkins *v.* Grazebrook in one aspect does not consist with Bratt *v.* Ellis and Jones *v.* Dyke, as in each of these cases also the defendant had no title, and if these cases are not to be considered as overruled by that, they must be distinguished on the ground that auctioneers do not hold themselves out as owners, and are not therefore in *consimili casu* with vendors who do.

In the case of Walker *v.* Moore, 10 B. and C. 416 (1829), (*supra*), a defect was discovered in the title of the vendor, who had acted in good faith. In consequence of this defect, the purchasers from the plaintiff at a resale refused to complete their purchase, and the plaintiff was not allowed to recover the profit he would have made. Bayley, J., one of the Judges who decided the case, distinguished it from that of Hopkins *v.* Grazebrook on the grounds that "there the defendant had sold property as his own, which was not so," and that the court was of opinion that "the defendant was in fault by representing himself as the owner of the property." "If there was *mala fides* in the original vendor," observes the learned Justice in regard to the case before the court, "I am not prepared to say that the purchaser might not recover the profit which would have arisen from the resale." In the same case, Littledale and Parke, JJ., rested their opinion on grounds not directly involving good or bad faith in the seller, although Parke, J., remarked, "*As there was no fraud*, negligence in preparing the abstract is the only thing that can be imputed to the defendants, and the plaintiff by exercising ordinary care might have averted the loss that has arisen from negligence." But the learned Justice declared the rule in the language cited in the text (*supra*, 184), and Littledale, J., said, "when a contract for the purchase of lands is made, each party cannot but know that the title may prove defective, and must be taken to proceed on that knowledge." In this case it will be observed that there was a positive though not fraudulent misrepresentation by the vendor, who delivered an abstract showing a good title, on the faith of which the plaintiff resold the property. Again, in the case of Tyrer *v.* King, at *nisi prius*, 2 C. and K. 149 (1845), one Dale, an auctioneer, under instructions which had been given him about two years before to sell certain premises belonging to the defendant, sold them to the plaintiff. By the terms of the sale the plaintiff was to have immediate possession. The defendant declined to execute the contract, his solicitor stating that the property was actually sold to another. The defendant having paid into court the amount of the plaintiff's deposit and expenses, the plaintiff was non-suited by Cresswell, J., who held that he was not entitled to recover for the loss of his bargain.

In the case of Robinson *v.* Harman, 1 Exch. 850 (1848), cited in the text above, and *ante*, 69, the premises had belonged to the defendant's father, who was recently dead, and in consequence the defendant's solicitor, while preparing the agreement of sale, asked the defendant whether he was sure that he had power to grant the lease without the concurrence of other parties, and suggested that the will might have vested the legal estate or the power of leasing

to compel specific performance, the bill having been dismissed without costs, as is the practice of the English Court of Chan-

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in trustees. The defendant replied that there was nothing of the sort; that it was his property out and out, and that he alone had the power of leasing. It appeared, however, that the defendant's father had devised the premises (subject to an annuity to his daughter) to trustees, to pay the defendant a moiety of the rent during his life only. Denman, C. J., on the trial, under a plea which admitted the contract, rejected the offer of evidence to show that the plaintiff, when he entered into the agreement, had full knowledge of the defendant's incapacity to grant the lease, and was of opinion that the plaintiff was entitled to damages for the loss of his bargain, which the jury found accordingly. The Court of Exchequer discharged the rule *nisi* for a new trial, the learned barons all agreeing that the case came within the general rule of law as applied in Hopkins *v.* Grazebrook, that "where a person makes a contract and breaks it, he must pay the whole damage sustained." But the principle of Flureau *v.* Thornhill, which that of Robinson *v.* Harman tended to restrict, was reaffirmed by the Court of Common Pleas in Worthington *v.* Warrington, 8 C. B. 134, cited in the text (*ante*, 184), 1849, and again by the Irish Court of Queen's Bench, in the case of Buckley *v.* Dawson (4 Ir. C. L. 211) 1854. In this case, the defendant having recovered possession of certain lands by an ejectment, brought to get rid of a reversionary lease, and in ignorance of the law, supposing he had got rid of it, agreed to demise the lands to the plaintiff. The plaintiff entered into possession and was ejected by the person entitled to the reversionary lease. The case was considered as controlled by Flureau *v.* Thornhill, and the plaintiff was not allowed to recover damages for the goodness of his bargain. The decision was put partly on the seller's good faith. The Lord Chief Justice, in delivering his opinion, observed: "The whole matter was *bonâ fide*, and no issue was sent to the jury or required to be sent *as to fraud*." Crampton, J., said, distinguishing the case from Robinson *v.* Harman, "In the case before the court *no fraud is imputed*." Perrin, J., concurred, and Moore, J., the remaining Justice, said, "*There was no fraud or misrepresentation.*"

The same principle was soon after carried still further in the case of Pounsett *v.* Fuller, 17 C. B. 660 (1856). Here the defendant having agreed to sell the plaintiff the right of shooting on a third person's manor for a specified term, it turned out that he had no title which he could convey, but a mere agreement from the owner of the manor to let him the shooting for five years at a stipulated rent, he supplying the owner with game. The court considered that the case came within the authority of Walker *v.* Moore, 10 B. & C. 416, *supra*. Jervis, C. J., observing that though the defendant "had not a right to sell what he professed to sell," yet, that "as a layman, he had a fair right to believe he had the power to sell which he professed to have." And the ruling of the learned judge at the trial, that the plaintiff was entitled to recover "nothing beyond the expenses in investigating the title down to the time when the contract was broken, and nominal damages for the breach," was accordingly sustained.

Again, in the case of Sikes *v.* Wild, 1 B. and S. 587, affirmed by the Court of Exchequer, 4 B. & S. 421, 32 L. J. (N. S.) Q. B. 375; 5 L. T. (N. S.) 422 (1863), the same exceptional principle was stretched still further. In this case real estate had been devised in trust to the defendants to sell. The solicitor employed in the affairs of the trust knew that the devisor held the estate subject to a settlement, by which the legal estate was in trustees for the purpose of securing an annuity to the widow of the devisor, and that no unincumbered title could be made to any part of the estate unless she and her trustees would discharge the part sold from the trust. This she verbally agreed to do, but afterwards exercising the privilege of the sex, changed her mind. The solicitor was of course aware that she was not bound by her verbal agreement.

In an action for damages for the breach of the contract to sell, the jury having found that the defendants *bonâ fide* believed they would be able to make a good title free from incumbrances, and had reasonable grounds for so believing, the Court of Queen's Bench, Cockburn, C. J., *dissentiente*, held that the purchaser was not entitled to damages for the loss of his bargain, and this decision was affirmed on appeal by the unanimous judgment of the Exchequer Chamber. The grounds of the Lord Chief Justice's dissent, in the court below, were that the case came within the principle of Hopkins *v.* Grazebrook and Robinson *v.* Harman, which were "direct authorities for holding that a person disposing of real estate, to which he had no present right, although under a *bonâ fide* belief that the right will be acquired in time to fulfil the contract, will be liable to the full extent." And Mr. Justice Blackburn, in delivering the opinion of the majority of the Queen's Bench, in this case explained the exceptional rule in Hopkins *v.* Grazebrook, on the ground that in that case the defendant had entered into a contract to sell, "without the power to confer even the shadow of a title," and that under the law as it was then understood by Lord Tenterden, who delivered the opinion in that case (see Bryan *v.* Lewis, Ry. & M. 386; E. C. L. 81; May, 19, 1826), and which opinion was retained by his Lordship to his death, and not shown to

cery when the defendant cannot make a title. But the Court of Queen's Bench has recently held that these damages are too remote.*

* Malden *v.* Tyson, 11 Q. B. 292. See Jones *v.* Dyke, Appendix to Sugden on Vendors, 1078.

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be erroneous till after that event (Hibblewhite *v.* McMorine, 5 M. and W. 462), such a contract was illegal. Again, as the learned justice explained, the transaction in Robinson *v.* Harman was impeachable either because the defendant was guilty of a fraud in stating as he did for the purpose of effecting the bargain, that the property was his out and out, or else on the ground that his conduct was illegal because he was not in possession. The learned justice further observed, "My brother Williams expresses doubts in which I fully sympathize as to the soundness of the exception in Hopkins *v.* Grazebrook, in any point of view. I do not see how the existence of misconduct can alter the rule by which the breach of a contract is to be assessed: it may render the contract voidable on the ground of fraud, or give a cause of action for deceit, but surely it cannot alter the effect of the contract itself." Sikes *v.* Wild, 1 B. & S. 594. The view thus expressed by the learned justice is approved by Lord St. Leonards, in the last edition of his great work. Sugden on Vendors, 14th ed. 361. In commenting on the case, he observes: "The right of the sellers stood simply thus: they had not the legal estate, and they could not obtain it during the widow's life without her consent, nor could they discharge the estate of her 100*l.* a year. But subject to that, they were the owners in possession of the equitable fee simple with a right to call for the legal estate upon her death. The devise, so far from being inoperative, passed this equitable estate in fee, and the devisees had not an expectancy or even a reversion, but the entire equitable fee, and could make a good title to it, subject to the annuity of 100*l.* The widow's promise might be considered as a full justification of the trustees in selling the estate as if free from this annuity, and if after the sale they could have procured her concurrence, the purchaser would have been compelled to take the title, and if a bill had been filed, time would have been allowed, if there was a fair prospect that a release of the annuity could be obtained." On the appeal (4 B. & S. 421), Erle, C. J., commenting on the doctrine of Flureau *v.* Thornhill, remarks: "If that principle is to be established, whenever it comes to be well analysed, it will be time to consider if actual fraud is necessary to take away the protection."

Where one who had executed to a tenant in occupation of premises a reversionary lease of them for a term of years, for which he had received a premium, died before the commencement of the intended term, and the reversionary lease proved void for want of power in the decedent to grant it, and the intended lessee was compelled to accept another lease from another party for a much shorter term and at a higher rent, it was held by the English Court of Common Pleas, in an action by the lessee against the legal representatives of the original lessor, that the measure of the plaintiff's damages was the premium paid for the void lease together with the difference in the value of the two leases, and the excess of expenses of the new lease over those of the first. The cost of consulting counsel and surveyors was deducted by consent.

Erle, C. J., used the following language: "It appears from Sedgwick on Damages, that although in many of the American Courts the rule is as contended for by the defendant (which was the premium and expenses on the first lease which had been paid into court), yet the impression of the writer is the other way. There is therefore no authority against our judgment; there is an authority for it, and there is the almost universal rule, that a party who breaks his contract, ought to pay the damages arising from such breach."

On appeal this case was affirmed on full consideration by the Exchequer Chamber the court holding that the rule in Flureau *v.* Thornhill, 2 W. B. 1078, (*ante*, 69) could not be extended to the case of a lease granted by one who had no title. "The true measure for the breach of a contract such as this," said Mr. Justice Blackburn, "is what the plaintiff has lost by the breach. There is no real difference in this respect between a contract for the sale of real property and a contract for the sale of a chattel. The same conclusion was reached by all the members of the court. Locke *v.* Furze, 34 L. J. (N. S.) C. P. 201; 19 C. B. (N. S.) 96; 1 L. R. (C. P.) 441 (1865.)

In the case of Williams *v.* Glenton, L. R. 1 Ch. Ap. 200, (1866), in the Court of Appeal in Chancery, Sir G. J. Turner, L. J. said "The vendor is bound to complete the contract; and heavy damages would be given if, having the means of completing the sale, he should decline to take the proceedings necessary for that purpose."

Still again in the case of Engel *v.* Fitch, 9 B. & S. 85; L. R. 3 Q. B. 314, (1868), affirmed by the Exchequer Chamber, 10 B. & S. 738; L. R. 4 Q. B. 659 (1869), the views of Lord

The same distinction, growing out of the motives influencing the vendor, has been taken in this country. So in a case in

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C. J. Cockburn, who had dissented in the case of Sikes *v.* Wild, (*supra*), regained the ascendant. In this case, the defendants who were mortgagees of the lease of a house, sold it by auction to the plaintiff, but the mortgagor who was in possession refused to give it up, and the defendants declined to fulfil the contract on account of the expense of obtaining possession. The plaintiff having meantime resold the premises to a third party at an advance, was allowed to recover an amount equal to the profit which would have accrued from this re-sale besides his expenses. In delivering the opinion of the Court of Queen's Bench after a careful review of the decisions, Cockburn, C. J., declared that the principle of the cases of Hopkins *v.* Grazebrook, and Robinson *v.* Harman, although materially intrenched upon by the judgment of the Court of Common Pleas, in the case of Pounsett *v.* Fuller, and that of the courts of the Queen's Bench, and of the Exchequer Chamber in Sikes *v.* Wild, had not been overruled. The general rule of the common law as declared by Lord Wensleydale, (Parke, B.) in the case of Robinson *v.* Harman, (*supra*), that "where a party sustains a loss by reason of a breach of contract, he is so far as money can do it, to be placed in the same situation in respect to damages as if the contract had been performed," was approved by both the Courts of Queen's Bench and the Exchequer Chamber as applying to this class of cases, and the plaintiff was held entitled to recover in addition to his deposit and the expenses of investigating the title, damages for the loss of his bargain, the measure of which was the profit he would have made on the re-sale. This profit was considered not too remote to be recovered within the rule in Hadley *v.* Baxendale, (9 Exch. 341.) "The purchaser of real property sold by auction for the purpose of a re-sale" said the Lord Chief Justice, is a matter of every day occurrence, and the possibility of a re-sale cannot be taken to be beyond the contemplation of the parties to such a contract." In the course of the opinion his Lordship observes, (p. 93.) "However firmly settled the law as laid down in Flureau *v.* Thornhill may be, it must be admitted that that case is anything but satisfactory." In delivering the opinion of the Exchequer Chamber in the same case however, affirming the judgment below, Kelly, C. B., observed, "I am not prepared to agree with all the expressions used by the court below, to the effect that the purchase of real property sold by auction being of common occurrence, a re-sale is to be taken as within the contemplation of the parties; but it may be taken to be within the contemplation of the parties that an increase in the value of the property sold would take place." The learned Chief Baron laid down the general rule in such cases, in the following language. "When a vendor not by reason of any defect of title, but from his not thinking fit to give possession, refuses to complete, and the action is really for breach of contract to deliver possession, the purchaser is entitled to recover the difference between the contract price and the market value, at the time of the breach in all cases except those within Flureau *v.* Thornhill, which is confined to the case of the vendor not being able to complete by reason of defect of title."

But again in a late case in the English Court of Exchequer, Bain *v.* Fothergill, L. R. 6 Exch. 59, the defendants being possessed of an iron ore mining right subject to a royalty, agreed to sell and assign it, but could not do so without the consent of their lessors which although at one time promised, could not ultimately be obtained. There having been as was said by Mr. Baron Martin, in delivering the leading opinion of the court, "*no suggestion of bad faith,*" in the defendant; and the learned barons sitting in the court, having been all of opinion that the case came within the principle of Flureau *v.* Thornhill, gave judgment for the defendants. Channel B. in distinguishing Hopkins *v.* Grazebrook, observed that "the circumstances there show conduct amounting to what the law would consider *fraud* on the a defendant's part." And the learned Baron referred to Pounsett *v.* Fuller, and Sikes *v.* Wild, as going "to prove that the rule in Flureau *v.* Thornhill applies, wherever fraud is not suggested." Mr. Baron Cleasby in his opinion, without directly touching the question of fraud, remarked that the contract was quite different from that in Hopkins *v.* Grazebrook, "where the defendant undertook to make a good title by a day certain."

In the English cases, therefore, it will be seen, a strong effort is made by the Lord Chief Justice of England and other eminent judges, to put the exceptional rule restricting the damages on the sole ground that where a party having some sort of title to or legal interest in real estate, undertakes to convey such estate, and fails to do so, he will not, quite irrespective of his good or bad faith, be held liable for any damages which the other party may sustain by his breach of the contract beyond the mere expense of examining the title. If he have no title at all, although he act in entire good faith, he will be held liable to the other party for his loss of the bargain. According to this rule all consideration of the defendant's motives is excluded as not properly entering into the measurement of damages in cases of contract. But with extreme deference, it may be observed that this effort is not altogether successful. The language of the learned judges does not always accord with this principle, nor, as it appears to me, do the decisions. In Robinson *v.* Harman, a layman misrepresents his title, and he is

New York,* in which the covenantor had acted in good faith, and refused to convey because his title had in part [185] failed, the plaintiff insisted that he was entitled to re-

* Baldwin *v.* Munn, 2 Wend. 399.

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held liable for all the vendee would have made had the contract been performed, notwithstanding as appears, the vendee's solicitor knew the real state of the case. In Pounsett *v.* Fuller, another layman misrepresents his title with similar consequences, and is excused from liability for them. Both decisions are maintained by the English tribunals; and yet, in our humble judgment, it is impossible to reconcile them, except on the ground that in one case it was considered that the defendant acted in bad faith, and in the other in good faith,—without doing, in fact, what the Court of Queen's Bench, as a court, whatever may be the opinions of individual judges, seems unwilling to do, namely, admit that the motives of a defendant in cases of contract can affect the rule of damages.

Indeed, it will be found very difficult to explain or harmonize the cases without admitting to some extent a rule which varies with the motives and conduct of the defendant as wilfully wrong or grossly culpable on the one hand, or on the other, well-meaning and reasonably free from exception. In other words, if the party breaking the contract has done so ignorantly and in good faith, he is in general chargeable only with what the other is actually out of pocket; if he has acted knowingly, he is liable besides for what the circumstances plainly show, and he foresaw the other would have made had the contract been fulfilled. This class of cases furnishes a further illustration of the tendency to be more and more and more observed as forms of action become comparatively unimportant and subordinated to the real facts of the case, (and elsewhere adverted to, *vide*, pp. 206, 208, *in notis*) to introduce the principle of punitive damages into cases of contract.

It may further be observed on this subject, that the remark of Lord Wensleydale in Robinson *v.* Harman, approved by the Justices of the Queen's Bench and the Barons of the Exchequer, that the party whose contract is broken "is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed," (Engel *v.* Fitch, *supra*), must be taken as controlled by the principles established in Hadley *v.* Baxendale, 9 Exch. 341. If, by a peculiar and special use which the vendor did not, and could not reasonably have been expected to anticipate, the injured vendee might have made a fortune out of the property which should have been conveyed, the vendor will not be expected to supply the lost fortune. He can only be required to make good the loss which he had reason to expect would result from his breaking his agreement, or which, "according to the usual course of things," would have so resulted. See the observations of Kelly, C. B., in Engel *v.* Fitch (on appeal), 10 B. & S. 743.

But whether or not the principle of the British decisions, so far as it rests on the mere question of title, is destined to be maintained in Great Britain, it has not, as we think, although occasionally recognized, been generally asserted to the same extent in the American decisions, and it should seem, indeed, to be hardly applicable in this country, where the titles are almost invariably matters of record, and accessible to the investigations of the purchaser.

The limitation of the general rule of damages for breaches of contract in its application to agreements concerning real estate seems to have been adopted here from the decisions in the mother country without much consideration of the reason for it; and once adopted, has been retained, we think, almost as a matter of necessity. In our growing towns and cities, and in many districts of country also, the enforcement here of the general rule would probably seriously interfere with sales of real property, and thus check the growth of the community. (See *ante*, p. 165 note.)

In the United States, the principles governing the measure of damages in these cases are also, it is true, far from settled, and the decisions are perhaps equally with the English, wanting in uniformity. But we think that until one or two recent decisions which go farther, and will be noticed presently, the awards of damages to the vendee for the loss of his bargain are more commonly put expressly by the judgment of the court, and not merely as an inference from the observations of particular judges on the ground of fraud or equivalent misconduct in the vendor. Such damages are given where there is explicitly or by legal presumption a want of good faith; otherwise, not. The seller's want of good faith, actual or presumed, is the basis and the justification of the enhancement of the damages, and, notwithstanding occasional remarks of learned judges not in accord with the general language of the bench, the rule is not usually made to depend, as in England, on questions growing out of the mere difficulty of the title.

But a party who, having no title, undertakes to convey, or having no authority to sell, makes a contract of sale, or having made such a contract, and having the power to perform it, wilfully neglects or refuses to perform it, is usually not regarded as entitled to the presumption that he acts in good faith, and is put on the same ground as to his legal liability with one who is guilty of actual fraud.

cover the increased value of the land on the day when the deed was due, beyond the contract price. It was held, that where

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Cases may, doubtless, occur where a vendor may be free from fraud, or from gross fault, and yet unable to perform his contract; and in such cases we think that, although in New York and New Jersey it is now held otherwise (see *infra*), yet, according to the general course of decision in the United States, he will be relieved from the full weight of damages attending corresponding breaches of agreement in cases not relating to real property.

The following cases, in addition to those cited in the text and elsewhere in the notes, declare or recognize the principle that where there is *fraud* on the part of the vendor in executory contracts for the sale of land, the measure of the damages is the value of the land at the time of the breach of the contract instead of the mere consideration paid, which is the rule where there is no fraud. 1816, Davis *v.* Lewis, 4 Bibb. 456; 1819, Rutledge *v.* Lawrence, 1 A. K. Marsh. 396. [In this case the court observes, "An inability to convey may and frequently does happen without fraud, and fraud is odious and ought never to be presumed."] 1822, King *v.* Pyle, 8 Serg. and R. 166. [In this case, which was an action of debt on bond for a sum of money which was part of the consideration, of a tract of land sold by the plaintiff below to the defendant below, the fraud consisted in a representation by the plaintiff that six acres of valuable woodland were included in the tract conveyed. The court having charged the jury at the trial if they should be of the opinion that the plaintiff had imposed on the defendant by false representations respecting these six acres of land, that they should make a deduction from the plaintiff's bond, measured by the average price per acre which the plaintiff had agreed to pay for the whole tract, the judgment entered on the verdict found by the jury in accordance with the charge was set aside. Tilghman, C. J., in delivering the opinion of the court, says, "In *cases of fraud*, the jury are not bound in assessing the damages, by the price which has been stipulated between the parties. The jury should have been instructed that if there *was fraud*, they might deduct from the plaintiff's bond *the amount of the injury sustained* by the loss of the six acres of woodland," which it was evident "might be much more than the average price of the whole land."] 1840, Good *v.* Good, 9 Watts, 567. [This was a similar action to the preceding, and the same rule was recognized, though the case was decided on a different ground.] 1838, Lee *v.* Dean, 3 Wheat. 316. [In this case the jury were permitted to include in their verdict the plaintiff's necessary expenses in addition to the value of the premises.]

In the following cases the same rule is applied to the case of a wilful breach of the contract to convey land, or of the obligation to make a title to it. 1808, Cock *v.* Taylor, 2 Tenn. 50; 1823, Stephenson *v.* Harrison, 3 Litt. 170; 1829, Duncan *v.* Tanner, 2 J. J. Marsh. 399; 1839, Robinson *v.* Heard, 15 Maine, 296; 1848, Lee *v.* Russell, 8 Iredell, 826; 1849, Russell *v.* Copeland, 30 Maine, 332; 1855, Barbour *v.* Nichols, 3 R. I, 187; 1863, Bush *v.* Cole, 28 N. Y. 261; 1868, Pringle *v.* Spaulding, 53 Barb. 17. 1871, Griswold *v.* Sabin, 51 N. H. 167.

So in Michigan, the measure of damages for a wilful breach of a contract to sell and convey a lot of land, was held to be the difference between the actual value of the land at the time of the breach, and the sum agreed to be paid, less the amount of the consideration received for the waiver of the right to a specific performance. Allen *v.* Atkinson, 21 Mich. (3 Clarke), 351. Again in the case of Hammond *v.* Hannin, 21 Mich. 374, the court regard it as settled that while the ordinary measure of damages for breaking a covenant to sell real estate, continues the consideration money and interest, with perhaps also the cost of investigating the title; yet, that where a party contracts to sell, knowing he cannot make a title, or having a title, refuses to convey, or disenables himself from conveying, or otherwise acts in bad faith, the vendor is remitted to his general liability; the exception introduced by Flureau *v.* Thornhill (2 W. Bl. 1078, *ante*, 69), does not apply; the rule is, then, the same in relation to real as to personal property, and the measure of damages is the value of the land at the time of the breach.

By a late decision of the Court of last resort in New York, however, the rule is put on the same grounds by which, as we have seen, it is explained in England. Pumpelly *v.* Phelps, 40 N. Y. 60. Indeed, it goes beyond the English tribunals, and applies the reasoning in some of the decisions of those tribunals already cited, by which, where the vendor was aware of the defect of his title, damages were allowed for the vendee's bargain to a case where the seller acted with unquestioned good faith, and which were like those of one to which the Courts of Queen's Bench and Exchequer, as we have seen refused to extend it. Sikes *v.* Wild, 1 B. and S. 587; 4 B. and S. 421; Bain *v.* Fothergill, L. R. 6 Exch. 59, *supra*.

In the case in question, a trustee, authorized to sell land only on the written consent of the *cestui que trust*, who was a married woman, was told by her that he need not consult her about the sale of any of the land belonging to the trust estate, but to confer with her husband on the subject, she promising to assent to what they should agree upon. Accordingly the defendant, with the concurrence of her husband, made an agreement in good faith for the sale to the

the vendor acted *in bad faith*, the plaintiff would be entitled to

plaintiff, not suspecting in doing so any unwillingness on her part to assent to it, but believing she would assent. She had, in fact, in many previous instances assented to the conveyance of parcels of land included in the trust, and had in no case objected to what her husband and the defendant thought proper to be done.

Mr. Justice Mason, in delivering the opinion of the majority of the court, made the following observations: "The general rule certainly is that where the vendor has the title, and for any reason refuses to convey it, as required by the contract, he shall respond in law for the damages, in which he shall make good to the plaintiff what he has lost by his bargain not being lived up to. This gives the vendee the difference between the contract price and the value at the time of the breach, as profits or advantages, which are the direct and immediate fruits of the contract. Where, however, the vendor contracts to sell and convey in good faith, believing he has a good title, and afterwards discovers that his title is defective, and for that reason, without any fraud on his part, refuses to fulfil his contract, he is only liable to nominal damages for a breach of his contract. The rule is otherwise, however, where a party contracts to sell lands, which he knows at the time he has not the power to sell and convey, and if he violates his contract in the latter case, he should be held to make good to the vendee the loss of his bargain, and it does not excuse the vendor that he may have acted in good faith, and believed, when he entered into the contract, that he should be able to procure a good title for the purchaser." And accordingly the ruling below, that the plaintiff was entitled to recover as damages the difference between the value of the land and the price to be paid for it, was affirmed. This case, as will be seen, affirms the rule adopted in the same case by the Supreme Court of this State, (although in the court below, the defendant's good faith was not regarded as free from question, Brinckerhoff *v.* Phelps, 24 Barb. 100; 43 Barb. 469,) and elsewhere recognized by that court, (Pringle *v.* Spaulding, 53 Barb. 17); and goes materially beyond that previously established by the court of last resort. (Trull *v.* Granger, 8 N. Y. 115; Conger *v.* Weaver, 20 N. Y. 140.)

It will be observed that the circumstances of this case were like those of Sikes *v.* Wild, *supra*, in which, as we have seen, a different rule was adopted, except that in the present case, by the terms of the trust, the trustees could make no conveyance without the assent of the *cestui qui trust*, and in the former the trustees held the equitable fee and could make a good title to it, subject to the incumbrance by which the widow's annuity was secured. But it is difficult to see on principle why the rule of damages should be more lenient where the party who agrees to convey knows his title is fatally defective, although he believes he can cure the defect, than where he makes the agreement, knowing he has no title at all, but expects to procure one. The knowledge of the parties contracting to sell puts them in the same relative position, and the reason founded on the possible obscurity of the seller's title does not apply where its actual condition is known to him.

But again, in New Jersey, however, where a vendor agreed to furnish a title in fee-simple free from incumbrances, and his wife refused to sign the deed, it was held in an action for damages for breach of this contract, that as the vendor knew at the time of entering into the contract that it was doubtful whether he could fulfil it, since his ability to do so depended upon that uncertain thing, his wife's consent, the purchaser was held entitled to substantial damages for the loss of his bargain. Drake *v.* Baker, 34 N. J. (5 Vroom.) 358.

If the decisions in Pumpelly *v.* Phelps and Drake *v.* Baker, therefore, are to be taken as declaring the law as recognized in the United States, it will be seen that in the class of cases to which they refer, they modify the general principle already stated as to the rule of damages for the breach of executory contracts to convey real estate made in good faith, and that no degree of such faith will shield the vendor from making compensation for the loss of the vendee's bargain, if the fault in the title to the estate to be conveyed or the defect in his right to convey be known to him when the contract of sale is made.

It will be seen from the foregoing review that the decisions in England approach, at least, very near to a conflict. If the rule there is to be regarded as consistent, a very great degree of elasticity must be ascribed to it, reminding one of Pari Banou's remarkable pavilion, which had the property of extending or contracting itself to the exact size of what it was wanted to cover. Several of the leading cases have been the subject of very opposite or inconsistent criticisms from eminent judges, in illustration of which that of Hopkins *v.* Grazebrook (6 B. and C. 31) may be referred to. Cockburn, C. J., says of this case that it has not been overruled. (Engel *v.* Fitch, *supra*). His learned colleagues, Blackburn and Williams, question its soundness. (Sikes *v.* Wild, 4 B. and S. 594; Pounsett *v.* Fuller, 17 C. B. 666.) Lord St. Leonards declares that it has been in effect overruled (Sugden on Vendors, 14th ed. 360), while other learned judges, like Mr. Justice Bayley, (who had participated in the decision), Walker *v.* Moore, 10 B. and C. 416, distinguish it on the ground that the defendant was guilty of actual fraud, or like Mr. Baron Cleasby, on the ground that he undertook to make a good title by a day certain, Bain *v.* Fothergill (L. R. 6 Exch. 64). Flureau *v.* Thornhill,

recover, by way of damages, the difference between the con-

the leading decision representing the opposite aspect of the law, though never overruled or disobeyed, and though declared by Mr. Baron Martin "as binding as any statutory enactment." (Bain *v.* Fothergill, L. R. 6 Exch. 66), has been repeatedly by equal authority restricted or followed with reluctance. Hopkins *v.* Grazebrook, 6 B. & C. 31, Pr. Abbott C. J.; Simons *v.* Patchett, 7 El. & Bl. 572 Pr. Campbell, C. J.; Engel *v.* Fitch, 9 B. & S. 93 Pr. Cockburn, C. J.; Bain *v.* Fothergill, L. R. 6 Exch. 68, Pr. Channell, B.)

Guided, however, by the express adjudications, we find the rule in England as follows: By the general law (and without reference to the nicer questions relating to consequential damages elsewhere considered), a party breaking a contract is bound to make good to the other party the damages occasioned by such breach. The latter is to be placed in the same position pecunarily he would have been in, if the contract had not been broken. In a contract to convey real estate, however, if the breach is occasioned by a fault in the vendor's title, the measure of the vendee's damages is in general reduced to the repayment of the purchase money, with interest; if, however, the defect was known to the vendor when he agreed to sell, or if he had no colour of title to the property or no shadow of authority to convey it, he will not come within the exception to the general rule. But if, again, the defect in the title was one which he, although aware of it, had good reason to believe he should be enabled to remove, or if the obstacle was one of a purely legal nature, which he not only was not aware of in fact, but as unversed in the law, might well have been ignorant of, he will be brought back within the exception.

In the United States, as we have seen, by the earlier authorities fraud or misconduct actual or *presumed* was a necessary ingredient in the act or default constituting the breach, to subject the offending party to the full measure of damages, and this is still we think the general rule. But lately in New York, and apparently also in New Jersey, the English rule has been asserted on the same ground as in England, but without the exception there recognized. That is to say, the party who is liable for a breach of his contract to convey real property, caused by his want of authority to make the contract, or his want of title to the property, cannot save himself from making good the whole loss by merely showing that in point of fact he acted in good faith and that the obstacle was one he had good reason to believe he could remove. By the rule, therefore, as it now seems to exist in New York, we have this remarkable anomaly. If a party having made a contract to convey real estate, knowing that he has no legal title to it at the time, but not doubting his ability to obtain such a title, discovers that he cannot do so, and, on making the discovery, promptly apprises the other party of his inability to carry out the contract, and accordingly does not execute it, intending to do as little harm as possible, he will be obliged to pay for the loss of the others bargain. But if he proceed to execute and deliver the conveyance, covenanting that he has a good title, while knowing he has not one, and cannot make one, he will be liable on this solemn covenant for the consideration paid, and interest only.

We cannot but think that the only way of harmonizing and fixing the rule will be that prescribed by the earlier American authorities. The rule of damages in cases of the simple breach of executory contracts to convey lands without fraud, will then be the same as for the breach of a covenant of title in a conveyance—namely, the consideration paid and interest. If, however, the contract be broken from bad faith, including in bad faith all selfish or perverse motives, the party breaking it should be regarded as a wrong doer, and made to pay for all the injury he occasions. This is open it is true to the objection so strongly urged by the author and by several eminent judges, that the measure of damages for the breach of a contract cannot properly be affected by the motives of the offending party; and where the old forms of action are retained, this objection is perhaps conclusive. But, as has been repeatedly pointed out, where a contract has been fraudulently broken, an action of deceit will lie for the wrong done, as distinct from that for the recovery of compensation for the simple breach; and where there are no rules of pleading or forms of action which will prevent these issues from being tried together, there seems no reason why the whole damages should not be ascertained and compensated in the same proceeding. The difficulty is one of form not of substance.

The common law system of pleading is distinguished above all corresponding systems for the logical exactness with which it compels the production of a single, certain, and material issue. With the precision of a machine it throws off all matter irrelevant to a single point, till the opposing parties are forced to put their quarrel on that point. It avoids the tendency to discursiveness which belongs to those systems by which the statements of the contestants are made at large. But to effect this object much has to be sacrificed. Matters of substance may be controlled by matters of form. The merits of the controversy are sometimes subordinated to the making of the issue, and when the issue is made and tried, the whole of the controversy may still not be determined. To correct these faults, various expedients are resorted to, such as notices of special matter, amendments, bills of particulars and verbal statements of counsel. But these additions to the system are incongruous, and deprive it in a

tract price and the enhanced value when the conveyance should have been made;[1] but that in a case of *good faith*, the contract price would be considered conclusive, and the plaintiff having paid nothing could recover nothing.[2]

In this decision the court proceeded on the analogy of eviction, where the plaintiff is, as we have seen, limited to the consideration paid, and disregarded the authorities in regard to chattels, where it is well settled, as we shall see, that the plaintiff is entitled to recover the enhanced value without being driven to any investigation into the good or bad faith of the vendor.*

And to this the courts of New York have adhered. So in a recent case the defendant in consequence of a defect in his title failed to comply with his contract to convey certain property, the plaintiff who was to pay on the delivery of the deed had advanced nothing, but he had removed to the property and done some work on it; and in the declaration he claimed to recover his expenses of removing and also his labor. No bad faith was alleged or pretended. The judge, who tried the cause, told the jury that if the defendant *wilfully* and *designedly* neglected to convey, the plaintiff was entitled to recover *all the damages* which he had sustained by the breach of his contract; but that unless the non-performance was wilful and

* The language of the court was as follows: "If the vendor acts in bad faith, and refuses to convey because the property has increased in value, and with a view of putting the enhanced value in his own pocket, it becomes a case of fraud, and the plaintiff would clearly be entitled either to compel a specific performance in equity, or to recover by way of damages the difference between the contract price and the enhanced value when the conveyance should have been made." We shall, however, hereafter, when we come to the subject of contracts generally, consider the propriety of this suggestion, that in an action on contract damages will vary according to the intention of the party.

measure of its peculiar merit and beauty. They tend also to substitute for the faults intended to be removed those belonging to the opposite system. Of the advantages and defects, however, of the two systems it is not our province to speak more fully. But it is obvious that the practice of setting forth, as in a bill in equity, all the facts and considerations material to the controversy, is attended by great advantages, and among these is that of putting the rule of damages in the class of cases we have been considering on the harmonious and intelligible basis for which we have expressed our preference.

[1] So in Pennsylvania, as against a fraudulent vendor of real estate, damages may be given for all the expense in which his fraud involved the plaintiff. McNair *v.* Compton, 35 Penn. St. 23. He is entitled in such a case to have the loss of his bargain made good. Meason *v.* Kaine, 67 Penn. 126 *infra*. And see Ellett *v.* Paxson, 2 W. & S. 418.

[2] See Brinckerhoff *v.* Phelps, 24 Barb. (N. Y.) 100; and 43 Barb. 469; affirmed by the Court of Appeals, *sub. nom.* Pumpelly *v.* Phelps, 40 N. Y. 60 (*ante*, 193, note 1). The vendor's knowledge of the defect in his title was held to distinguish this case from that of Conger *v.* Weaver, 20 N. Y. 140; *ante*, 184, note 4. In a peculiar case in Tennessee, where one got up void proceedings in partition under which a sale was had, it was held that the purchaser's measure of damages against him, whether the intention had been fraudulent or not, was in either case the consideration money and interest. Key *v.* Key, 3 Head (Tenn.), 448. Where three verbally agreed to buy land together, and two of them paid all the purchase money, it was held that these two might recover against the third. "The measure of damages would be," say the court, "the difference between the price he had agreed to pay and the present market value of one-third of the land." Meason *v* Kaine, 63 Penn. St. 335; 67 Penn. St. 126; see *ante*, 185, *n.*

intentional, the plaintiff was entitled to *nominal damages* only; that if the omission to convey was accidental or inadvertent, and the defendant had fairly tendered him all the title [186] he could make the plaintiff could not recover any of the special damages. A verdict was found for nominal damages; and on exceptions, this was held right, the court saying, "That on an executory contract for the sale of lands which the vendor believes to be his own, and where there is no fraud on his part, if the sale falls through in consequence of a defect of title, the measure of damages is substantially the same as it is in the case of an executed sale," or on the covenants for seizin and for quiet enjoyment.*[1]

RULE IN THE SUPREME COURT OF THE UNITED STATES.—But the Supreme Court of the United States have disregarded the analogies deducible from the actions on real covenants, and have resorted to those to be derived from executory contracts for the sale of chattels. In a case somewhat similar to the last, the following language was held by that high tribunal:†

"The rule is settled in this court, that in an action by the vendee for a breach of contract on the part of the vendor for not delivering the article, the measure of damages is its price at the time of its breach. The price being settled by the contract, which is generally the case, makes no difference, nor ought it to make any; otherwise the vendor, if the article have risen in value, would always have it in his power to discharge himself from his contract, and put the enhanced value in his own pocket; nor can it make any difference in principle whether the contract be for real or personal property; if the lands, as is the case here, have not been improved or built on. In both cases the vendee is entitled to have the thing agreed for at the contract price, and to sell it himself at its increased value. If it be withheld, the owner ought to make good to him the difference. This is not an action for eviction."‡[2]

* Peters *v.* M'Keon, 4 Denio, 546. See the authorities collected and referred to in a recent case: Fletcher *v.* Button, 6 Barb. S. C. R. 646.

† Hopkins *v.* Lee, 6 Wheat. 109, 118.

‡ In Baldwin *v.* Munn, 2 Wend. 399, 407, speaking of this case, Sutherland, J., said, "It will be perceived that this was substantially a case of exchange of lands. Very different considerations may be applicable to such a case from the ordinary case of a mere failure to convey where the consideration money has not been paid."

[1] See Sweem *v.* Steele, 5 Iowa, 352. "If the person is honest," say the court, "and is prevented from making the conveyance by unforeseen causes, and which he could not control, the plaintiff should recover only nominal damages. If he has paid the price or any part thereof, then of course in such a case he should recover that sum with interest. But if the person selling is in fault, and either did know or should have known that he could not comply with his undertaking, or, having the title, refuses to convey, as having the title at the time of the agreement afterwards disables himself from completing it by a sale to a third person, or at the time of the agreement knew he had no title,—in these, and all cases where the inability arises from fraud in the covenantor, the purchaser should recover substantial damages, including compensation for any actual loss, as by the increased value of the land to the time when the contract should have been executed." See, also, Foley *v.* McKegan, 4 Iowa, 1.

[2] See Case *v.* Wolcott, 33 Ind. 5. It sometimes occurs in sales of land that the quality of

RULE IN CASES OF FRAUD.—In Virginia, in general, upon the breach of an executory contract to convey land, the vendee is not entitled to more damages than the purchase money actually paid and interest thereon.* But this rule will not be applied when the fraudulent conduct of the vendor makes it unreasonable to limit the vendee to that measure of damages. If, for example, a vendor who has the title in him at the time of sale, shall, after his contract, disable himself [187] from performing it by conveying the land to another, he will be held liable for the value at the time of the breach, and interest may be allowed on such value for that time.†

In Kentucky it is held by the Court of Appeals, that on a covenant to convey, where the vendor is *without fraud* incapable of making a title, the rule of damages is the purchase money, with interest from the time it was paid; and the court approved the English case of Flureau *v.* Thornhill.‡ But in the same State, in a case where the vendor fraudulently sold land, to which he knew he had neither a good title nor claim, it was held by the Court of Appeals in *equity*, that the value of the land should be fixed at what it was worth at the time of impaneling the jury.‖

And again, in the same State, in an action on a covenant to convey land, the jury were told that if they found for the plaintiff, they must give the value of the land at the time it should have been conveyed, and interest. But, on review, this was held erroneous; and the Court of Appeals said, "When there is a fraudulent refusal to convey, less damages than the value of the

* Thompson's Ex'rs *v.* Guthrie's Adm'rs, 9 Leigh, 101.

† Wilson *v.* Spencer, 11 Leigh 261.

‡ 2 W. Black. 1078; Allen *v.* Anderson, 2 Bibb. 415.

‖ M'Connell *v.* Dunlop, Hardin. 41. And the principle was recognized in Patrick *v.* Marshall, 2 Bibb. 40; and Fisher's Heirs *v.* Kay, 2 Bibb. 434. These are all in *equity*, however.

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the land actually conveyed is inferior to what it was represented to be. In such case in Iowa the same rule is applied as in the case of sales of personal property, and the measure of the vendee's damages is the difference between the actual value of the land and what it would have been had the representations been true. Likes *v.* Baer, 8 Iowa, 368; Gates *v.* Reynolds, 13 Iowa, 1. So in Indiana, where the vendor of an undivided half of real estate falsely and fraudulently represented to the purchaser that there was a house on the land of a particular description, the measure of the vendee's damages was held to be one-half of the increase there would have been in the value of the land if there had been such a house on it at the time of the sale, and not merely half the amount it would have taken to put it there. Sangster *v.* Prath, 34 Ind. 504. And where the land is not in quantity what it was represented to be, the measure of damages is determined by the average value of the tract. Thus, where A sold B several parcels of land for an aggregate sum, and represented that one of them contained two hundred acres, which representation was fraudulent, the rule of damages was found by multiplying the average value per acre of the parcel in question by the number of acres in the deficiency. Thompson *v.* Bell, 37 Ala. 438. But where no question of fraud arises, the vendee's damages will be the purchase money paid for the deficient quantity and interest. Profits which might have been made on this quantity are too remote to be allowed. Hiner *v.* Richter, 51 Ill. 299.

land, at the time the conveyance ought to have been made, should never be given; and the jury would, no doubt, be at liberty to find damages equivalent to the value and interest down to the assessment. But in such a case, the giving or withholding interest is a matter in the discretion of the jury, and, consequently, instead of instructing the jury as a matter of law to give interest, the court should have left them to exercise their discretion free from any intimation of opinion."* [1]

In these cases it will be noticed that the courts have recognized a difference in the rule of damages, growing out of the motives of the party in default. This distinction has crept in from the civil law without, as I believe, sufficient consideration being given to the point. There may be room for the suggestion in equity, on a bill filed for performance or for general relief. But when I come to consider the rule of damages on contracts generally, I think I shall be able to prove, that at law [188] the motive of the party can never be taken into consideration in an action of contract; that the intent cannot be averred in pleading except as matter of form, nor evidence given in regard to it; and that, consequently, the damages cannot be made to depend upon it.† [2]

VALUE WHEN RECOVERABLE HOW DETERMINED.—In Maine, in an action by the vendee on an agreement to convey land, it has been held that the jury are not confined to the value of the land for agricultural or pastoral or other useful purposes, nor to be controlled by the probability that the land would be in demand for building lots; but that they might take into consideration *the marketable value* also at the time; and that their result should be arrived at by taking into view all the objects for which the landi s desirable.‡ [3]

* Handley *v.* Chambers, 1 Littell's Rep. 358.

† Newsom *v.* Harris, Dudley's Georgia Reports, August, 1832, 180. In an action on a bond to make titles to land, a breach was proved, and the question was as to the measure of damages. The plaintiff gave three hundred dollars for the land, and the defendant sold it for six hundred dollars. The verdict was for the price paid for the land by plaintiff; and the question argued was, whether the price paid with interest or the value at the time of the breach, was the true measure of damages. The court adopted the latter rule, and set aside the verdict.

‡ Warren *v.* Wheeler, 21 Maine, 484. The action was assumpsit, being on an unsealed agreement.

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[1] This seems to be nearly the rule in Maryland. See Marshall *v.* Haney, 9 Md. 194; s. c. 4 *Ibid.* 498. And see Runnells *v.* Webber, 59 Maine, 488.

[2] But the exception to the general rule, in the case of contracts for the sale of real estate, seems now too well settled to be shaken. *Ante*, 186; *post*, 209. Lawrence *v.* Chase, 54 Me. 196.

[3] In estimating the value of land at a given time, evidence of its value six or seven months later is not inadmissible. The law has no presumptions on the subject of changeable values of real estate, and such proof, though liable to be overcome by evidence of a previous change in the interval is not too remote. Abell *v.* Munson, 18 Mich. 306.

In the same State, in an action brought by the vendee of land who had paid the purchase money, and received a bond conditioned to execute a deed of the premises at a reasonable time after request, the jury were instructed at the trial,—

"That the rights of the parties must be determined by the state of the facts at the time the action was brought, and that all subsequent proceedings might be laid out of the case; that the obligation of the defendants required them to convey the title to the land disputed; that if they had not complied with it, the injury to the plaintiff was the loss of the title to the land; and that the proper and legal compensation was the value of the land at the time of a demand made and a refusal or neglect to perform; and that in finding that value they ought to take into consideration the price agreed by the parties, and such other evidence as there was in the case."

Under this charge the jury found a verdict for the consideration money and interest. A motion was made to set it aside for misdirection; but the court said,—

"When a party has a covenant for a title, he may in a proper case, if the other party can perform, obtain a specific performance in chancery. If the other party cannot perform, he must be content with his remedy [189] at law. If he elect to proceed at law, and recover damages, that is a satisfaction of the contract, and he cannot afterwards in chancery obtain the title. He has an election, and may proceed at law; and when he does, he is entitled to an indemnity, and no more. By a performance he would have recovered the land, and such recovery, that is, if he obtain the value at the time, is the exact measure of his loss. As the plaintiff had performed on his part, he was entitled to the land, or to its value; and the instructions were correct." *

Rule where Title is to be Made by Third Party.—In Iowa, in an action on a title bond, or bond conditioned to create a good title of lands, the measure of damages is the consideration money and interest.†[1] But where a covenant is given that a third person shall make a title, the measure of damages is not the price or value of the land, but the value of the title at the time it was to have been made.‡[2]

* Hill *v.* Hobart, 16 Maine, 164.
† Stewart *v.* Noble, 1 (Greene) Iowa, 26.
‡ Pinkston *v.* Huie, 9 Ala. 252. Dyer *v.* Dorsey, 1 Gill & J. 440; Gibbs *v.* Jemison, 12 Ala. 820.

[1] But this does not accord with the general rule in the case of the wilful breach of contract to convey real estate, and it is held otherwise in Georgia; Newson *v.* Harris, Dudley Geo. R. 180, *supra*, 188, *n.*; Bryant *v.* Hambrick, 9 Gell. 133, *supra*, 184, *n.*; Tennessee, Coek *v.* Taylor, 2 Tenn. 50. North Carolina, Nichols *v.* Freeman, 11 Iredell, (N. C.), L. R. 99; Alabama, Whiteside *v.* Jennings, 19 Ala. (N. S.), 784; and Maryland, Carwell *v.* McLean, 6 Har. & Johns. 297.

[2] So in Illinois, where one agreed to procure a deed of land from another who refused to

PAYMENT IN ADVANCE.—It has been said in Vermont, "that when the entire consideration for the conveyance has actually been received by the party who was to give the deed, the value of the land at the time it should have been conveyed, with interest, is obviously the proper rule;[1] and so where a tender

convey, the measure of damages was held to be the value of the land at the time it ought to have been conveyed. Gale *v.* Dean, 20 Ill. 320. So in Massachusetts, where a land agent of the Commonwealth who, as such, had sold its bond for the conveyance of land, wrongfully caused the title to be transferred to other parties than the vendee, the assignee of the vendee (claiming through various mesne assignments) was held entitled to recover the value of the land at the time of the wrongful transfer. Pingree *v* Coffin, 12 Gray, 288.

The defendant and four others jointly owned an estate which they desired to sell, and had advertised for sale. The defendant representing that he had authority from his co-owners to do so, contracted to sell the estate to the plaintiff, and sent him an abstract of title. The co-owners repudiated the contract and sold at a higher price to another person. The plaintiff, nevertheless, conceiving that the four owners had bound themselves by the terms of the advertisement which they had issued, sued them for breach of contract, and continued his action after they had all sworn in answer to interrogatories, that the defendant had no authority to make the contract. In an action against the defendant for misrepresentation of authority, held, that the proper measure of damages was:. 1st. The costs of investigating the title. 2nd. The costs incurred and paid by the plaintiff down to the time when the answer to the interrogatories had been received, and considered by the plaintiff's legal advisers. 3rd. The difference between the contract price and the market price of the estate, and that the sum for which the estate was afterwards sold was *prima facie* evidence of the latter. But that the plaintiff could not recover for the loss on the re-sale of cattle bought for the purpose of stocking the land without notice to the defendant, and before the title had been investigated, or possession of the land given. Godwin *v.* Francis, L. R. 5 C. P. 295.

The plaintiff being in occupation of a house and shop, as assignee of a term which would expire in March, 1867, at a yearly rent of £65, the defendant, who had for several years acted as agent of the freeholder in collecting the rents of the property, agreed, in writing, November 16th, 1863, on behalf of the freeholder, to grant the plaintiff, at the expiration of the existing term, a renewed lease for twenty-one years at a rent of £70, the plaintiff agreeing to put in a new shop front at her expense. The plaintiff put in the new front at an expense of £50, and expended £10 more in permanently improving the premises, and in June, 1865, agreed with one Budd, to sell him her interest in the existing and future leases at a premium of £150. The defendant had no authority from the freeholder (his brother) to make the agreement, and the latter refused to ratify it. The plaintiff, who had no notice of the defendant's want of authority, thereupon, in conjunction with Budd, filed a bill against the defendant's brother for a specific performance, and this was dismissed with costs. Budd then sued the plaintiff an her contract with him, and recovered damages to the amount of £280, as follows: £205 assessed by the arbitrator as the value of the lease; £22.10*s.* for the loss incurred by Budd on the re-sale of the fixtures, which he had bought upon the premises; £35 for loss of business by removal; £17 for solicitor's charges. These damages, together with the costs of the action and reference, were paid by the plaintiff.

Held, that the plaintiff was entitled to recover against the defendant all the costs paid and incurred by her in the Chancery suit, and also the value of the lease which she had lost through the non-performance of the agreement of 16th Nov. 1863, (assumed to be £205), but not the damages and costs which arose out of the re-sale of the lease to Budd; these not having necessarily resulted from the defendant's wrongful act were consequently too remote. Spedding *v.* Nevell, L. R. Vol. IV (C. P.), p. 212.

[1] So in Pennsylvania, in an action on an executory contract for a refusal to convey land after payment of the purchase money, the measure of damages is the value of the land at the time when it should have been conveyed. Cox *v.* Henry, 32 Penn. State R. 18.

And where the law permits an action for breach of agreement on the part of the government to make a grant of land, it seems the rule of damages is the same. An army officer employed in the civil service of the government of Australia, received from the governor of that colony, a promise of a grant of land on condition that he settled in the colony. His claim having been defined, but the grant not made, he took proceedings under a local act against the governor of the colony to obtain compensation. It was held that he was entitled to compensation measured by the value of the specific land at the time of bringing the suit. Robertson *v.* Dumaresq, 2 Moore P. C. C. (N. S.) 66; 13 Weekly R. 280.

of personal chattels has been duly made, according to previous contract, in payment for the land; because by our law such a tender passes the property in the chattels over, against the will of the party to whom they are tendered, so that in fact and in law, he has the consideration stipulated for."

PAYMENT IN SERVICES.—But the rule was held different where the land was to be paid for in work and labor, and the plaintiff's services had been performed only in part, and as to the remainder, had been tendered but refused. Here it was held "that the recovery should be restricted to the extent of the plaintiff's actual damage; that the value of the land was important in estimating the damage, as far as the land had been paid for, and the stipulated services performed; but for the residue, it was an open question as to what the party had lost by being prevented from completing the execution of his contract." *

RULE WHERE LAND HAS DECLINED IN VALUE.—But how will it be when the land has fallen in value? In North Carolina the plaintiff purchased a lot of land for $8,000, and paid the greater part of the purchase money. The plaintiff [190] was let into possession, and the defendant executed a bond in the penalty of $10,000, conditioned to convey upon the payment of the balance of the purchase money. The plaintiff was evicted by the judgment creditors of the defendant, and the property sold by the plaintiff for $2,500, which was admitted to be the real value of the property at the time. Here the court refused to allow the plaintiff to recover the amount of the purchase money, as if he had repudiated the contract and sued for money had and received. "Here the plaintiff seeks to recover compensation; what sum will put him in as good a condition as if the contract had been performed? In this case he would have got property which is worth $2,500, but he would have been forced to pay the balance of the purchase money and interest. He has not paid this latter amount, and his damage is the difference between that sum and the value of the property, which by the case agreed is $207.80;" and to that sum the redress was limited.† [1]

* Boardman *v.* Keeler, 21 Vt. 77.

† Nichols *v.* Freeman, 11 Iredell, 99.

[1] If the vendor under a parol agreement to sell land, refuse to fulfil his contract, in a case where the vendee has had possession, the vendor should be allowed interest by way of

ACTIONS BY VENDOR.—We come now to actions against the purchaser. In England, when the vendee refuses to perform, the measure of damages is held to be the difference between the price fixed in the contract, and the value at the time fixed on for delivering the deed.[1] It follows that if the property does not fall in value, the vendor can recover nothing. So, where the plaintiff and defendants had agreed that the plaintiff should sell, and the defendants should buy a piece of land, the defendants refused to pay the price. The plaintiff insisted that the amount of the purchase money agreed on, with interest, was the proper measure of damages. But the judge who tried the cause, Rolfe, B., held that the plaintiff was entitled to such damages only as had resulted from the defendant's breach of the contract; and on argument of a rule to show cause why the damage should not be increased to the amount of the purchase money, it was said, "The question is how much worse is the plaintiff by the diminution in the value of the land or the loss of the purchase money, in consequence of the [191] non-performance of the contract. It is clear that he cannot have the land and its value too." *

This question, although raised, does not appear to have been absolutely decided in this country. In New York, in an action on an agreement of this nature, the plaintiff, the vendor, was allowed to recover the agreed price of the land, with interest. But although the case went up on other points, the question was not argued.† [2]

In Maine, where suit was brought for the price of a pew, a deed having been tendered and refused, it was said, though the point does not appear to have been discussed by counsel, that "the measure of damages was, as the judge instructed the jury, the price agreed to be paid for the pew by the defendant, who will be entitled to the deed whenever he chooses to accept it." ‡

* Laird *v.* Pim, 7 Mees. & Wels. 474, per Parke, B. But see Hawkins *v.* Kemp, 8 East, 410, and Chitty Pl. vol. II, p. 290.

† Franchot *v.* Leach, 5 Cowen, 506.

‡ Alna *v.* Plummer, 4 Greenleaf, 258.

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rent, on the price agreed on for the land, and also for waste; and he should be charged with the value of improvements. Bellamy *v.* Ragsdale, 14 B. Monr. (Ky.) 364.

Where the defendant, holding a bond from the owner of a land certificate, had covenanted to "locate" the same so as to cover certain land, and convey the tract thus acquired to the plaintiff, but was compelled to break his covenant through the default of the obligor, it was held in Texas, in an action by the vendee for breach of this covenant, that the fact that the plaintiff had "located" another certificate on the same land, would go in mitigation of the damages. King *v.* Gray, 17 Tex. 62.

[1] This rule is adopted in Massachusetts. Old Colony Railroad *v.* Evans, 6 Gray, 25.

[2] This was reluctantly held to be the settled rule, on a review of the cases, in Richards *v.* Edick, 17 Barb. (N. Y.) 260. The rule is the same in Pennsylvania. Tripp *v.* Bishop, 56 Penn. 424.

This decision has been cited with approbation in New York, in a case in which the following language was held:—

"Suppose in the case of a covenant to convey a farm for a specified sum, and a deed tendered but refused, and the vendors sells to another, shall he yet recover the whole price of the original vendee? I admit that *in some cases*, where property is so tendered, and the tender is not withdrawn, the price may be recovered; but this is on the ground that the thing sold has an independent existence, and the *corpus* not being perishable, and having legally passed by the tender and subsequent recovery, may still be actually delivered over whenever the vendee shall demand it." *

On the other hand, it has been said in Vermont, although the precise point was not before the court, "Where a party agrees to make a purchase of property, and then refuses to proceed in the bargain and take the property, the loss of the bargain constitutes the proper rule of damages; because the property never passed." †

The question is evidently not free from perplexity: on the one hand it is said that the vendor by making a tender has performed his contract so far as it lies in his power, that his right is complete to the performance of the contract by [192] the vendee, and that this performance is the payment of the purchase money. But on the other side, it is replied with great force, that the recovery cannot pass the fee of the land, that the legal seizin still remains as at first, that the vendor has not parted with his property, that if the land has not fallen in price, he has lost nothing, that the common law gives damages for none but actual loss; and it is insisted that the true measure of damages in such case, is the difference between the stipulated price and the actual value at the time of breach,[1] or perhaps at the time of trial.[2] I shall have occasion again to consider this question, when we come to the subject of the sale of chattels. ‡

* Shannon *v.* Comstock, 21 Wend. 457. But in this very case, it was held, where a plaintiff had agreed to take certain freight for a stipulated sum, and averred a readiness and offer to perform on his part, that he could not recover the contract price, but only as much as he had actually lost by the defendant's neglect; the court saying, "A tender and offer to perform is equivalent to performance for the purpose *of sustaining an action*. It is *quasi* performance, and *does not regulate the amount of damages*." See also Hecksher *v.* McCrea, 24 Wend. 304; and Costigan *v.* Mohawk & Hudson R. R. 2 Denio, 610.

† Sawyer *v.* M'Intyre, 18 Verm. 27.

‡ In the case of Williams *v.* Field, vendor *v.* vendee, MS., in the Superior Court of New

[1] So held in Old Colony Railroad Co. *v.* Evans, 6 Gray (Mass.), 25; Sanborn *v.* Chamberlain, 101 Mass. 409. In a suit for a breach of covenant to convey land, its value at the time of *the breach*, and not at the time of *the execution* of the covenant, is the measure of damages. Marshall *v.* Haney, 4 Md. 498; s. c. 9 Ibid. 194. See also, Whiteside *v.* Jennings (19 Ala. 784), where various American cases on this subject are cited and examined.

[2] Where the guarantors in a contract, one of whom was the vendor of certain real estate, guaranteed the vendee that it would be worth $2,800 on a specified day, and that they would

In contracts of purchase of this description, a clause is often inserted, for a deposit and a forfeiture of that deposit if the purchaser do not fully carry out his agreement. In a case of this kind, where it was declared that the deposit was to be forfeited as liquidated damages, it was still held that the plaintiff could go for damages at large, and was not confined to the deposit.*

INTEREST.—As to the interest, it has been held that where the vendee in a contract for the purchase of real estate, takes possession of the property as owner, without having paid the purchase money, he is bound to pay interest. The act of taking possession is an implied agreement to pay interest.†

CONTRACTS TO PAY IN LAND.—We have here to take notice of a class of cases of not unfrequent occurrence in the country, growing out of contracts to pay for work or services in land.

Where a contract is made to pay for work by the transfer of certain property, and the agreement is not performed, the value of that property, as a general rule, is the measure of [193] damages; because that is the stipulated reward for the services of the party, whatever may be their intrinsic value.[1] This question has presented itself in New York and in

York, July, 1846, this precise question was raised and much examined, and the court arrived at a conclusion adverse to the English rule. I should have entertained little doubt that the English rule was correct, had it not been for this adjudication; in addition to which, however, being engaged for the defendant, my mind may have received an undue bias to the technical and strict application of the general principle. And see, in England, Goodisson *v.* Nunn, 4 T. R. 761, and Glazebrook *v.* Woodrow, 8 T. R. 366, where it certainly seems to be assumed, that if a proper tender be made of the deed the consideration money will be recoverable.

* Icely *v.* Grew, 6 Nev. & Man. 467, and vide *post*, ch. xvi.

† Fludyer *v.* Cocker, 12 Vesey, 27; Stevenson *v.* Maxwell, 2 Comstock, 409.

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pay that sum for it on that day if he should then elect to sell it, and on the day stipulated he elected to sell and tendered them a deed of the property; it was held in an action on the guaranty that the measure of damages was the price named, without regard to the value of the land. Goodpaster *v.* Porter & Courtney, 11 Iowa, 161. And where one sold land for $5,000, the parties agreeing that the seller should have all the advance the property could be sold for over that sum within five years with interest, and on a certain day the seller notified the purchaser to sell the property, as it could bring a large advance, it was held that the price it would have brought on that day was the measure, not the highest value for five years. Means *v.* Milliken, 33 Penn. State, 517.

[1] BARTER CONTRACTS.—Generally, in what may be called barter contracts, that is, contracts whereby one thing is to be exchanged for another, or property for services, the measure of damages in case of a breach, is in the one case the difference in value between the two things, and in the other between the property and the service (*post*, 203). So, in an action of covenant on a contract by which the defendant agreed to build a house for the plaintiff, and the plaintiff to convey to the defendant a house and lot in payment, the breach being the neglect to build the house, the measure of damages is the difference between the value of the house to be built and that of the house and lot to be conveyed. Laraway *v.* Perkins, 10 N. Y. 371. Where the property to be exchanged is real estate, if the plaintiff have conveyed that which he agreed to convey, his damages are the value of that he should have received. Devin *v.* Himer, 29

Pennsylvania on parol contracts to pay for service in land. Such contracts are in the former State void, under the statute of frauds; and consequently if the party rendering the service sue, he must count generally for work and labor, without reference to the special agreement. If the contract be to convey land in consideration of a *specified sum* payable in work, the party can recover the value of his services, not exceeding, however, the sum fixed by the agreement; and the value of the land is not the measure of damages. But if in a contract of this kind no amount is specified, and the payment is to be in a designated piece of land, the plaintiff fixes the value of his services by proving the value of the land.[1] Such, also, is the rule in Pennsylvania,[2] where parol contracts for the sale of land are valid; subject, however, to the modification, that if before the work be done the other party give notice, *bonâ fide*, of his inability to perform, as when he cannot make a title, and of his determination to rescind the contract, and the vendee still goes on to do the work, the measure of damages is not the value of the land, but the amount of injury sustained under all the circumstances.* [3]

* Burlingame *v.* Burlingame, 7 Cow. 92; King *v.* Brown, 2 Hill, 485; Rohr *v.* Kindt, 3

Iowa, 297. In such contracts the damages include the injured party's expenses of examining the other's title. Fagen *v.* Davison, 2 Duer (N. Y.), 153. See Thomas *v.* Dickinson, 23 Barb. (N. Y.) 431; 12 N. Y. 364. In a peculiar case, where one who held a paramount title to land, having recovered the land against the grantee of another, had sold and conveyed it to the latter for a specified sum of money, in lieu of the payment of which the grantee executed to the other an assignment of his right of action against his grantor on the covenants in the latter's deed to him, this assignment was held equivalent to the payment of the specified sum; and the measure of the damages of the holder of the paramount title, in his action against his assignor's grantor for the breach of these covenants, was the same that the original grantee's would have been—namely—the consideration named in his original grantor's deed and interest, subject to the limitation that the assignee could recover no more than the consideration or price agreed between him and the original grantee, with perhaps the costs of the ejectment suit paid by the grantee, added. Eaton *v.* Lyman, 24 Wisc. 438; 26 Wisc. 629; see Kirschmann *v.* Lediand, 71 Barb. (N. Y.) 573, *post*, 203, *n.* 290, *n.*

[1] Where a subscription was made to the stock of a railway company on the condition that the railway should pass by a certain place, which condition the company failed to comply with, but before their failure the subscriber had paid his subscription by a transfer of land to the company: in an action by the subscriber against the company for breach of the agreement, the measure of damages was held, the value of the land at the time of the transfer. Jewett *v.* The Lawrenceburgh Railway Co. 10 Ind. 539.

[2] But although the rule in Pennsylvania, as stated in the text, has been twice followed since the decisions cited by the author (Malaun's Ex'rs *v.* Ammon, 1 Grant's Cases, 123; Beach *v.* McClintock, not reported), it is now definitely reversed. Hertzog *v.* Hertzog's Adm'r, 34 Penn. St. 418. Again, in a late case in that State, it was held that for the breach of a decedent's promise to convey a part of an estate, in payment for services, the measure of damages was the value of the services and not of the land. Graham *v.* Graham, 34 Penn. St. 475. The court say, "Jack *v.* M'Kee is no longer the rule. The court has returned from the departure which was made in that case. The measure of damages even for breach of a covenant of seizin, or for quiet enjoyment, is the consideration paid." And see M'Nair *v.* Compton, 35 Penn. St. 23, where it is again declared that "the law in this class of contracts is brought back to the old rule of looking for the measure of damages to the actual consideration passing between the parties." *Ante*, 185, *n.*; also Ewing *v.* Thompson, 66 Penn. St. 382.

[3] But a parol contract for the sale of land is so far void under the laws of that State, that it

COVENANT TO MAKE PARTITION.—The effect of a covenant to make partition and execute releases, was much considered in a case in New York,* which was an action of assumpsit for money paid to induce a party to enter into an agreement.[1]

The plaintiff and defendant were joint proprietors in the proportion of one-third and two-thirds of certain lands, of which the plaintiff had conveyed a part by deed, with covenants for quiet enjoyment and of warranty; they then agreed, under seal, to partition the tract, so that the part conveyed by the plaintiff should be set off as his portion, appointed three persons to divide the lands, and covenanted to execute mutual releases. Partition being made, the defendant refused to execute the release agreed on: the plaintiff had paid the defendant four hundred dollars to induce him to enter into the agree-
[194] ment. The judge charged at the trial, that the plaintiff was entitled to recover as damages all that he had been obliged to pay, or was liable to pay to the purchasers of the land from him, and the expenses of the partition; in other words, two-thirds of the amount of the consideration money, with interest, and one-third of the expenses of partition, together with four hundred dollars and interest. A verdict was taken for this sum; but the court set it aside, holding, that so long as the

Watts & Serg. 563; Jack *v.* M'Kee, 9 Barr, 235; Bash *v.* Bash, *Ibid.* 260.

The subject has been recently reviewed in Pennsylvania in an able and elaborate opinion, per Black, J., and the doctrine adhered to. M'Dowell *v.* Oyer, 21 Penn. 417.

* Shepherd *v.* Ryers, 15 J. R. 497.

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passes no interest in the land and furnishes no right to demand a specific performance. Damages may, however, be recovered for the breach of such a contract, the measure of which is ordinarily "the sum promised to be paid," (Tripp *v.* Bishop, 56 Penn. St. 424), but which, where the contract is broken by the vendee, is thus specifically stated by Lowrie, C. J., in delivering the opinion of the court in the case of Bender's Adm'rs *v.* Bender, 37 Penn. 419,—"Compensation for all that the plaintiff did in pursuance of the contract and in satisfaction of his part thereof, and for all permanent improvements on the land in reliance on the contract with the knowledge of the defendant, deducting the value of the rents and profits during the plaintiff's occupancy." So in California, in an action on a contract for the conveyance of land, which is void for the purpose of giving a legal right to the conveyance, but is valid as entitling one party to it to damages for the other's breach of it, the measure of the intended vendee's damages is the money he has advanced, with interest, or the reasonable value of the services rendered, without reference to the express contract; and evidence of the value of the land is inadmissible. Fuller *v.* Reed, 38 Cal. 99.

In New Hampshire it is held that where such contracts are within the statute of frauds, the value of the land is not the necessary measure of damages, because to make it such would be to give conclusive effect in one respect to an agreement which the law declares void. But the actual loss sustained and expense incurred under all the circumstances of the case, taking the agreement into consideration, furnish the measure of the damages which the jury, if they see fit, may make equal to the value of the land. Ham *v.* Goodrich, 37 N. H. 185.

In Mississippi, where the proposed vendor of land in bad faith refuses to consummate a parol agreement for the sale of land, the proposed vendee is entitled to compensation for the trouble and loss of time incurred in consequecce of his confidence in the other, but not for the loss of his bargain. Welch *v.* Lawson, 32 Miss. 170.

[1] The rule respecting the measure of damages for breach of contract to transfer and deliver *land certificates*, is that which applies to the breach of contracts for the sale of chattels, not of lands. Randon *v.* Barton, 4 Tex. 289.

original covenant subsisted, the money paid by the plaintiff (*i. e.* the four hundred dollars) could not be recovered back; that no eviction being shown, the plaintiff could only recover, at most, nominal damages; and it was suggested that the partition without any conveyance might have the effect of estopping the defendant to set up any title to his two-thirds. The court said, "The plaintiff might possibly apply to the Court of Chancery, and compel a specific performance of the defendant's agreement to release his claim to these farms; but as long as he chooses to rest upon his covenant for damages at law, he must show himself damnified, or he can only recover nominal damages."[1]

AGREEMENTS BETWEEN LANDLORD AND TENANT.—Having thus disposed of the covenants in deeds, and in contracts to convey land, we shall next examine those contained in leases, or in agreements between landlord and tenant.[2] So far as they are similar to the covenants in deeds, we have already considered

[1] Where the plaintiff, holding another's obligation to advance him $10,000 on receiving security for its repayment by a mortgage of certain property which was subsequently, by agreement of all parties, transferred to the defendant, who was to execute the mortgage, while the plaintiff was still to receive the $10,000 for his own benefit, and the defendant declined to execute the mortgage, the plaintiff was held to be *prima-facie* damnified to the extent of $10,000. Rider *v.* Pond, 19 N. Y. 262.

[2] In case of a failure on the part of a lessor to give possession of the demised premises, pursuant to the lease, the measure of damages has been held in New York to be the difference between the value of the premises for the term and the rent reserved. This is the rule also in Iowa, Adair *v.* Bogle, 20 Iowa, 238, and holds good where the rent is payable in kind. It applies equally, whether the action is brought upon the agreement, express or implied, or in tort for the violation of the duty arising from the relation of landlord and tenant. Trull *v.* Granger, 8 N. Y. 115 (*ante*, 166). The same rule of damages was also laid down in Newbrough *v.* Walker, 8 Gratt. (Va.), 16, where it was also held that conjectural profits which might have been realized by the lessee from the use of the demised premises, could not be allowed. See also Cilley *v.* Hawkins, 48 Ill. 308.

In Williams *v.* Oliphant (3 Ind. 271), which was an action of assumpsit by lessee for lessor's refusal to give possession, the defendant on the trial asked the court to instruct the jury that the rule of damages in the case was the difference between the rent which plaintiff was to pay, and the market value of the rent of the premises at the time they were to be delivered to him; and that, if the rent to be paid was the highest in the neighborhood, and no greater rent could be had for the premises by plaintiff, he was only entitled to nominal damages. The court refused to give the instruction; but gave the following: "Remote or special damages, such as expenses for removing to a more remote farm, are not to be allowed; but for all such as legitimately and directly arise from the breach, you are to give the plaintiff the equivalent of performance in money. If the defendant is delinquent, or in fault by breaking his contract, he is bound to repair the loss of the plaintiff thereby." Held, that the refusal was correct, and that the instruction given was, so far as it went, substantially correct. The rule as to the measure of damages upon a breach of a contract for the sale of goods, is not applicable to a case like the present. In Adair *v.* Bogle, above, it was held that the plaintiff might recover special damages caused by the breach of contract, as loss of employment, and expense incurred in preparations for removal on to the premises.

On the breach by the lessor of two contracts for the lease for the season of navigation, of the bars of four steamers, two of which were laid up for a part of the season, and the others not finished till it was far advanced, the measure of the lessee's damages was held to be the amount of rent paid for the saloons while he was deprived of their use, with interest from the close of the season. McCleary *v.* Edwards, 27 Barb. 239. In an action upon a guaranty that a lessee should perform his covenant to surrender the premises at the end of the lease, the rent stipulated in the lease furnishes presumptively the measure of damages, to be com-

them;* but leases frequently contain additional agreements, the rule of damages in regard to which we shall now proceed to discuss.

COVENANT TO PAY RENT.—In regard to the principal stipulation on the part of the lessee, to pay rent, a question sometimes presents itself in regard to its apportionment; and it appears that where the plaintiff fails to prove title to the whole estate, as, for instance, when there are several assignees [195] of the original lessor, the apportionment must be according to the value of the several parts held by each, and not according to the quantity or number of acres.†

In an English case,‡ one Theobald had demised to the plaintiff certain brick earth for twenty-one years, with full power to the lessee to dig annually one-half acre, and if he dug more, to pay £375 to the lessor for every half-acre so dug, being after the rate that the whole brick earth *was thereby sold, or intended to be sold.* The suit was trespass by the lessee for digging; and the jury found for the plaintiff with £550 damages, being the full value of the whole of the brick earth dug by the defendant. Chambre, J., considered that the plaintiff's beneficial interest was no more than the difference between the value of the earth taken by the defendant, and the price that the plaintiff must have paid for it if he had taken it himself, and that all the remaining interest was in reversion. But the court held otherwise. Mansfield, C. J., said, "The consequence of this taking by a stranger, and of this action against a stranger, is as between the lessee and the lessors, it must be taken to have been dug by the lessee; if this and what himself had dug did not together exceed the half-acre per annum, there

* *Ante*, 165, *et seq.* In the case of Lewis *v.* Campbell, 8 Taunton, 715, the effect of a covenant for quiet enjoyment in a lease was considered, but not decided. The plaintiff set out an eviction, and in relation to his damages averred that he had "lost divers large sums of money, laid out in and about the *altering, improving and ornamenting of the premises.*" Under this allegation, he sought to recover for additions of coach-houses and out-buildings, and also for converting the lands into pleasure grounds. The question whether the measure of damages should be the value at the time of assignment or of eviction, was discussed, but not decided, the court being of opinion that the declaration was insufficient. See Campbell *v.* Lewis, s. c. in Error, 3 Barnwall & Ald. 392.

† Hodgkins *v.* Robson, 1 Vent. 276; Farley *v.* Craig, 6 Halst. 262; Gillespie *v.* Thomas, 15 Wend. 464; Nellis *v.* Lathrop, 22 Wend. 121; Stevenson *v.* Lambard, 2 East, 575; Cole *v.* Patterson, 25 Wend. 456; Van Rensselaer *v.* Bradley, 3 Denio, 135; Van Rensselaer *v.* Gallup, 5 Denio, 454; Van Rensselaer *v.* Jones, 2 Barb. S. C. 643.

‡ Attersoll *v.* Stevens, 1 Taunt. 182, 198.

puted by reference to the time during which the plaintiff is kept out of possession. Otto *v.* Jackson, 35 Ill. 349; McKinney *v.* Peck, 28 Ill. 174; Prickett *v.* Ritter, 16 Ill. 96.

In Pennsylvania, it is said in general terms, that the rule of damages for the breach of a contract to lease, is the same as for a breach of a contract to sell land. McClowry *v.* Croghan, 1 Grant's Cases (Penn.), 307.

is nothing to pay; but if it exceeds that quantity, the lessee must pay the stipulated rent for the surplus;" and a rule to set aside the verdict was discharged. Here the lease was treated as a sale of the earth.[1]

Of other covenants found in leases, the most frequent are covenants to repair, to rebuild,[2] and to insure.

COVENANT TO REPAIR.—As to the general rule of damages in an action on covenants of this nature, it was said by Lord Holt, in an early case, "We always inquire in these cases what it will cost to put the premises in repair, and give so much damages."* [3] But in a recent case it was suggested that the true rule would be the loss which the landlord would sustain if he sold his reversion in the market.† In Vivian *v.* Champion, Lord Holt said, speaking in the loose manner in which the subject of compensation is treated in the early decisions, "In these actions there ought to be *very good damages;* and it has always been practiced so before me, and everybody else that I ever knew." This is a strong illustration of the extreme laxity which pervades all the early cases on the subject of damages.

Upon the covenant by the lessee to repair, it has been doubted whether an action could be brought before the expiration of the term, as the tenant might put the premises in

* Vivian *v.* Champion, 2 Lord Raym. 1125. † Smith *v.* Peat, 9 Exchequer, 161.

[1] In an action for rent, against a lessee who has been evicted by title paramount, and offsets his damages by reason of the eviction to the claim for rent, it is error to instruct the jury that the fact that the lease was not assignable without the lessor's consent is immaterial in ascertaining its value, although when the lessee took the lease he intended to occupy the premises for his own use during the term. Rice *v.* Baker, 2 Allen (Mass.), 411.

[2] COVENANT TO IMPROVE.—There may also be a covenant by the lessee to put improvements on real estate, where nothing had been done before. For the breach of such a covenant, unless the lessor sustains actual loss, a recovery should be only for nominal damages. The plaintiffs leased to the defendant a lot in the Pennsylvania oil region, reserving no rent and stating no term, but the defendant covenanted in the lease to sink a well on the premises by the first of July following. There was a right of re-entry reserved to the lessors on the breach of the lessee's covenants. In an action for damages brought by the lessors for breach of the above covenant, they were held entitled to a nominal recovery only. Chamberlain *v.* Parker, 45 N. Y. 569.

[3] See Nixon *v.* Denham, 1 Jebb & Symes, 416. So in an action of covenant for non-repair of premises held by the defendant under a lease which has several years to run, the proper measure of damages is not the amount required to put the premises into repair, but the amount of injury to the reversion. Doe *v.* Rowland, 9 C. and P. 734. Where, on the other hand, the lessors of a hotel, by the terms of the lease, were bound to keep it in good repair, the tenant was held to have his option to make the repairs and recover the expense of them from the landlord, or to omit to make them himself and seek his recompense by an action for damages, and having adopted the latter course he was held entitled to recover, or to recoup against the landlord's claim in his action for the rent (brought under the Code of Procedure), the fair value of the use of a portion of the premises which had remained unoccupied from the want of proper repairs during the time they were so unoccupied. Myers *v.* Burns, 33 Barb. (N. Y.) 401; aff'd, 35 N. Y. 272.

repair at any time before his occupation terminated; and in such a case in New York it was insisted on this ground that the plaintiff, the landlord, could recover only nominal
[196] damages.* But it seems well settled, both in England and this country, that on the covenant to repair, the suit may be brought before the end of the term, and that of course actual damages are recoverable.†[1]

In the same State,‡ where in the lease of a ferry the lessee covenanted to maintain and keep it in good order, and instead of so doing diverted travelers from the usual landing to another landing owned by himself, by means whereof the tavern stand belonging to the plaintiff, the lessor, situated on the first landing, was so injured in its business as to become tenantless; it was held in an action by the landlord for breach of covenant, that he might assign and was entitled to recover as damages the loss of rent of the tavern stand. But in a subsequent decision,‖ it was intimated that the breach of covenant in this case was regarded as fraudulent.

[197] In an action on an agreement to keep the premises of every description in good and sufficient repair at the tenant's expense, it was held that the defendant might show, and the jury might consider, the state of repairs at the commencement of the demise, in order to compute the damages for which the defendant was liable.¶

In a suit brought in the English Court of Exchequer, on a covenant to repair, it appeared that the premises which had been destroyed by fire, were, at the time of the defendant's taking them, old and in bad repair; that the cost of reinstating them would be £1,635, but when so reinstated they would be more valuable by £600 than they were at the time of the fire. It was held that the defendant, being unable to make good the damages to the premises without putting them in a better state, was liable to pay as much only as would put the premises in

* Schieffelin *v.* Carpenter, 15 Wend. 400.
† Luxmore *v.* Robson, 1 B. & Ald. 584.
‡ Dewint *v.* Wiltse, 9 Wend. 325.
‖ Blanchard *v.* Ely, 21 Wend. 342.
¶ Burdett *v.* Withers, 2 Nev. & Per. 122.

[1] The defendant, an under-lessee who had covenanted with the plaintiff, his lessor, to keep, and at the expiration or other sooner determination of the term, to deliver up the premises in repair, allowed them to fall out of repair,—while in this condition the superior landlord, having ejected the plaintiff and defendant for non-payment of rent, the plaintiff was held entitled to substantial damages for the non-repair of the premises. Davies *v.* Underwood, 2 H. & N. 570. Where land had been demised under a lease for 900 years, including covenants to pay rent and to keep the premises in good repair, the payments of rent fell into arrear, and the premises out of repair. Upon a suit in equity, it was held that the petitioners were entitled to substantial damages for breaches of the covenant to repair, and not merely to such a sum as would, if kept at interest until the end of the term of 900 years, then suffice to put the premises in repair. M'Namara *v.* Vincent, 2 Irish Eq. 481.

the same state of repair as when he took them; and £600 were deducted from the total cost of repairs. This, it may be observed, is in analogy to the deduction of the rule of one-third *new for old*, which we shall have occasion to notice when treating of Marine Insurance.*[1]

In an action,† brought by lessee against lessor, on a lease containing a covenant "to repair, and keep in good and tenantable repair, all the external parts of the demised premises," it was proved that the corporation of Exeter, where the property was, had taken down the adjoining building; that this had weakened the wall of the plaintiff's house, and that he was obliged to remove. After repeated fruitless requests to the defendant to repair, the plaintiff gave him notice that he should go on to rebuild at his (the defendant's) expense. While the work was going on the plaintiff removed to other premises, where he made some alteration to enable him to carry on this business, and restored things to their original state when his own building was completed, and claimed for all this in damages; but the Court of Queen's Bench said, "We are of opinion that the defendant was not bound to find the plaintiff another residence whilst the repairs went on, any more than he would have been bound to do so had the premises been consumed by fire;" and, therefore, the items for rent and taxes of the house temporarily taken by the plaintiff, [198] and those for alterations and restorations of it were deducted; intimating, however, that if any evidence had been offered as to the length of time during which the plaintiff was obliged to be in another house, by reason of the defendant's delay in not acting on the notice given him by the plaintiff to repair, it might have been considered. And the actual cost of repairing and replacing the fixtures of the demised premises, of the surveyor's charge for superintendence, and for injury to the plate-glass and plastering, were allowed, the two last on the ground that if the defendant had taken proper steps to support

* Yates *v.* Dunster, 24. Eng. Law Journal R. 226.

† Green *v.* Eales, 2 Q. B. R. 225.

[1] See a minute discussion as to the elements properly entering into the computation of damages, in an action of breach of covenant to repair, in Middlekauff *v.* Smith, 1 Md. 343. Fisher *v.* Goebel, 40 Missouri, 475, was an action for the breach of a covenant by a lessor to build a wall. The rule laid down by Holmes, J., on a full consideration of the authorities, was that only the actual damages resulting from the defendant's default in relation to the wall "to be measured by what it would cost to rebuild the wall, together with any loss that may have been sustained as the direct and immediate consequence of the insufficiency of the wall and the breach of the covenant, could be recovered."

the wall whilst the carpenters were taking down the adjacent building, the injury would have been avoided.[1]

In an action brought on a covenant to keep one-half of a mill-dam in repair, it was held in Massachusetts that the plaintiff was entitled to recover only one-half of the actual expense incurred in repairing the dam; and that he was not entitled to damages for any loss of profits in business, in consequence of the neglect of the defendant reasonably to aid in making the repairs.* [2] In a case of trespass we have seen that such damages have been allowed;† and this distinction indicates the disposition, of which we find other proofs, to treat the wrong-doer, even where exemplary damages are not claimed, with more severity than the party who fails to perform a contract. ‡ [3]

* Thompson *v.* Shattuck, 2 Met. 615.

† White *v.* Moseley, 8 Pick. 356; *ante*, 80.

‡ In Tennessee, in covenant for breach of warranty of title to real estate, a verdict and judgment against the vendee of a tract of land in an action of ejectment, instituted by him against a third person in possession, with notice to the vendor to appear and prosecute, is no evidence of a better outstanding title; the court saying, "Where the vendee has

[1] Where by the terms of the lease of a quarry, the defendants were bound to repair a drain on the premises, and the plaintiff notified them that it was out of repair, it was held that if they neglected to repair it, and the plaintiff should do so, the measure of his damages would be the cost of the repairs; but the defendants having been notified to make the repairs, agreed from time to time to do so, and finally did so, but not until two months after they ought. In consequence, the plaintiff was unable to work his quarry, and the court held that he was entitled to recover the actual damages thereby sustained. Keyes *v.* Western Vt. Slate Co. 34 Vt. 81. So in an action against a landlord for breach of covenant to repair, although the ordinary measure of damages is the amount it would have cost the tenant to make the repairs, where the landlord has made them in a negligent and insufficient way, the tenant should be compensated for the actual damage resulting. Walker *v.* Swayzee, 3 Abbott's Pr. R. 136.

[2] But where one had rented the plaintiff his flouring mill for three years, and agreed to put in operation in it certain additional machinery, which was defectively done, but the defects could have been repaired at an expense of $120, but were not repaired, and in consequence of them the plaintiff lost the use of the mill, the true measure of damages was held by the Supreme Court of Illinois to be the value of the use of the additional machinery. The court distinguish the case from that of Blanchard *v.* Ely (21 Wend. 342, *ante*, 71, 196), on the ground that there the defendants had accepted the boat before she was entirely finished, and had gone on at their own expense and made the necessary alterations. Had the plaintiff in the present case repaired the machinery, which he was not bound to do, he could probably have recovered only the expense thus incurred. Green *v.* Mann, 11 Ill. 613; see also Phelan *v.* Andrews, 52 Ill. 486; Strawn *v.* Cogswell, 28 Ill. 457. A lease which was not assignable without the landlord's assent, contained a covenant that the sub-cellar of the premises should be "free from percolation of water through the walls." The difference in the yearly value of the lease was not a proper measure of damages for a violation of this covenant. Benkard *v.* Babcock, 17 Abb. (N. Y.) 421. See as to the rule of damages for alleged breach of covenant in the conveyance of a lumber-mill privilege, and also as to the proper award of the amount of damage in such a case. Torrance *v.* Conger, 46 N. Y. 340, 346.

A railroad corporation, in consideration of an amicable settlement of his damages by the owner of lands taken for their road, agreed with him to fence the land taken; and, failing to do so within a reasonable time, were sued by him for breach of the agreement. It was held, that a subsequent erection of the fences by them, without the plaintiff's consent or approbation, did not affect his right to recover, and that the measure of his damages was the sum which it would fairly cost to erect the fences according to the agreement. Lawton *v.* The Fitchburg Railroad Co. 8 Cush. (Mass.) R. 230. But compare The Chicago and Rock Island Railroad Co. *v.* Ward, 16 Ill. 522, where the net value of a growing crop, lost through breach of agreement to fence, was taken into consideration in awarding damages.

[3] But see *ante*, 114, note.

Connected with this branch of our subject, in England, is the subject of repairs which incumbents of ecclesiastical property are there required to put upon it, and which, if not made, may form the subject of an action by the incoming incumbent against the representative of the outgoing one. The duty of the incumbent is stated in the old books to be *pro reparatione aut necessariâ re-edificatione* of the premises;* and this has been, in the modern cases, declared to mean that the occupant of the premises must keep them in good and substantial repair, rebuild when necessary, but without regard to ornament;† and on this footing the damages in case of dilapidation are to be computed.[1]

COVENANT TO REBUILD.—In an action on a covenant ‡ to rebuild contained in a lease, the defendants were assignees, and the plaintiff's wife tenant for life. The plaintiff contended that as tenant for life, she was entitled to recover general damages—in other words, the whole amount of damages sustained by the breach, and was not to be restricted to a compensation measured by the extent of her particular estate. But Gibbs, C. J., at Nisi

been sued, he may notify the vendor to appear and defend the suit, and provision is made by law for making him defendant; but there is no principle by which he can be substituted as a plaintiff in the action of ejectment; and we, therefore, can think of no reason for notifying him in such a case to appear." Ferrell *v.* Alder, 8 Humphreys, 44.

* Salkard *v.* Beckwith, 1 Lester, 116; Jenkins *v.* Betham, 15 C. B. 168, 182.

† Wise *v.* Metcalfe, 10 B. & C. 299; Jenkins *v.* Betham, 15 C. B. 168.

‡ Evelyn and wife *v.* Raddish and others, 1 Holt, 543.

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[1] LESSEE'S COVENANT NOT TO ASSIGN.—In assessing the damages for breach of a covenant not to assign a lease, or part with demised premises without the lessor's written consent, it should be considered in how much worse a position the plaintiff will be both in respect to past and to future breaches, than he would have been in if he had retained the defendant's liability. So far as money can do it, he should be put in the position he would have been in if the covenant had not been broken. Williams *v.* Earle, 9 B. & S. 740 (1868).

COVENANT TO RENEW.—Another covenant sometimes found in leases is that to renew, for the breach of which the natural measure of damages is "the value of the thing which the plaintiff lost by the non-renewal of the lease." Robinson *v.* Harman, 1 Exch. 850, cited *ante*, 184. When the covenant is broken by the lessor's exacting an increased rent in a new lease, the measure is the difference between what the lessee was to have paid for the rent for the term, and what he was compelled to pay. Tracy *v.* Albany Exch. Co. 7 N. Y. 472. And in an action for breach of this covenant against the personal representatives of a lessor holding under the College of Dublin, where the covenantor had been evicted by title paramount, the jury, in determining the value of the lease, were allowed to consider the evidence of a witness as to such value, founded on the risk, on one side, that the College might not renew, and the chance on the other that they would. In the same case, although the plaintiffs gave no evidence of any eviction from the possession of the lands in question by the lessor or any person under him, the refusal of the judge to direct the jury to find nominal damages only, was sustained. Strong *v.* Kean, 13 Irish Law Rep. 93. But in Pennsylvania, the same rule has been applied to the breach of this contract as to that of warranty in a deed. And where one bought of a tenant an unexpired lease, on the agreement of the landlord to renew it at the expiration of the term, and they both refused to so renew, and the landlord died before the end of the term, it was held that the measure of damages in a suit against the landlord's administrator, was the price paid and interest, and not the value of the contract. McClowry *v.* Croghan, 31 Penn. St. 22.

Prius, held otherwise, and that the tenant, in tail or in fee, might have an action on the covenant, and recover for the injury done to his reversionary interest. *

In New York † it is held that where it is covenanted between the lessor and the lessee, that at the expiration of the term, the buildings and improvements on the demised premises are to be valued by persons to be chosen by the parties, which valuation the lessor is to pay the lessee; if, on the expiration of the term, the lessor refuses to agree on the appraisers, and the lessee appoints them, and has the buildings appraised, the valuation thus made, being *ex parte*, is not conclusive as to the amount of damages, but that they are to be ascertained by the jury.

COVENANT TO INSURE.—In England, it has been held by Lord Ellenborough, at Nisi Prius, that where a lease contains a covenant to repair the premises, and also to insure them for a specific amount against fire, the sum fixed in the latter covenant does not regulate the damages under the former. ‡ [1]

* This case was reconsidered in 7 Taunt. 410, but on another point.

† Holiday *v.* Marshall, 7 J. R. 211.

‡ Digby *v.* Atkinson, 4 Campb. 275.

[1] Independently of an express covenant, the tenant is bound to deliver complete possession to his landlord at the end of the term. Harding *v.* Crethorn, 1 Esp. 57; Henderson *v.* Squire, L. R. 4 Q. B. 170. And where the landlord was kept out of possession by an under-tenant holding over, it was held he could recover from his tenant as damages what the rent would have amounted to for the time he was deprived of possession, and the costs of ejecting the under-tenant. *Ib.*

CHAPTER VII.

THE MEASURE OF DAMAGES IN ACTIONS ON CONTRACTS.

General Rules of Compensation in Personal Actions founded on Breach of Contract, without Penalty or Liquidated Damages.—Damages limited to the Results of the Breach of Contract.—Motives of the Defendant not inquired into.—Exceptions.—The Contract controls the Measure of Damages.—Exceptions.—Tender, how far equivalent to Performance in reference to Damages.—Compensation in Cases of Partial or Imperfect Performance of Contract.—Rule of Damages on Continuing Agreements.—Agreements to do various Acts.—*Quantum meruit.*—Forms of Action employed.—Account obsolete.

ACTIONS RELATING TO PERSONAL PROPERTY.—Having thus considered the rules which govern compensation in cases relating to real estate growing out of actions regarding its possession, its occupation, enjoyment, and contracts for its transfer, we now proceed to consider the great class of cases relating to personal property, including, of course, personal services.

These actions generally grow out of negotiable paper, policies of insurance, the sale and warranty of chattels, contracts of agency, suretyship, or other express executory agreements sealed or unsealed, as well as those implied contracts which the law engrafts upon a legal liability. These subjects will be considered separately; but before doing so, it will be well to bear in mind the general principles upon which the English and American law proceed in cases *ex contractu.*

COMMON LAW PRINCIPLES IN CASES OF CONTRACT.—"Damages* are recoverable in every personal action which lies at the common law."† The language of the civil law is, *Loco facti imprœstabilis succedit damnum et interesse.* We have already considered the subject of nominal damages, and seen how [200] far the courts go for the mere purpose of declaring a right. We are now to examine those cases of contract where substantial relief is demanded; and the two cardinal principles

* Sayer on Damages, ch. 1, p. 6.

† *Ante,* 45, *et seq.* So in Tennessee, where there has been a breach of contract without actual loss, the plaintiff is at all events entitled to a judgment for nominal damages and costs. Seat *v.* Moreland, 7 Humphreys, 575.

which will be found to pervade and regulate this branch of our subject, are, *First*, that the plaintiff must show himself to have sustained damage, or, in other words, that actual compensation will only be given for actual loss; and, *Secondly*, that the contract itself furnishes the measure of damages. These two rules are closely interwoven with each other, and it is impossible to consider them altogether separately. The first rule is one of great importance. It excludes a large class of cases in which relief is often sought before an injury has occurred; and we shall have frequent occasion to refer to it. So a surety cannot sue his principal till he has paid the debt; nor a covenantee for quiet possession his grantor, till he has been evicted; nor a covenantee against incumbrances, till he has paid the incumbrance; nor a principal his agent, till he has paid the loss sustained by the latter's misconduct.* This rule is, however, not without exception, as we shall hereafter see. The second rule, that the contract itself furnishes the measure of damages, is of equal importance. We have already adverted to it generally, but we have now to consider it more fully, and at the same time to notice such exceptions to it as may be found to exist.

Vague Discretion of Jury Formerly.—We have already had occasion to observe the vague discretion that in the early books is attributed to the jury in the matter of damages.† Thus in a case already referred to, as late as the reign of James I., where the plaintiff sued the defendant on a covenant that if certain land conveyed to him by the defendant fell short of a specified measurement, he, the defendant, would pay a fixed sum for every deficient acre, and alleged that the number of acres wanting would have amounted to the sum of £700, and the jury gave but £400 damages,—it was held, that this was well found; and it was said, "If *all* the land was wanting, *still the jury are chancellors*, and can give such damages as the case requires in equity."‡

* Legare *v.* Fraser, 3 Strobhart, 337.

† *Ante*, 22.

‡ Sir Baptist Hixt's Case, 3 Roll. Abr. 703; Trial, pl. 9. In Kentucky, in an action of covenant on an agreement to pay for property, judgment was obtained. Suit was brought on that judgment, and the jury were told that *they were bound to* give interest on the judgment. The original agreement contained no stipulation for interest. The Court of Appeals said: "It is true, according to the ancient course of the common law, although the value of the things covenanted to be performed usually regulated the amount of damages, the jury in an action altogether in damages did in some instances exceed that measure; but they did not so because the law subjected the covenantor to the payment of interest, but in the exercise of a sound discretion with which they were invested, regulated by what under the peculiar circumstances of the case, they might think just." And for the reason that the charge controlled the discretion of the jury, the judgment was reversed. Guthrie *v.* Wickliff, 4 Bibb, 541; s. p. Cogswell's Heirs *v.* Lyons, 3 J. J. Marsh. 38.

So, even as late as the middle of the last century, in an [201] action for escape against the sheriff, Lord C. J. Wilmot said, "In actions on the case, the damages are totally uncertain and at large."* So, a standard text-writer† uses this language: "In all actions which sound in damages, the jury seem to have a discretionary power of giving what damages they think proper: for though in contracts the very sum specified and agreed on is *usually* given, yet if there are any circumstances of hardship, fraud, or deceit, though not sufficient to invalidate the contract, the jury may consider them, and proportion and mitigate the damages accordingly; as in the case upon a policy of insurance, which was a cheat, for an old vessel was painted, and goods of no value put in the vessel, and about £1,500 insured on it, and then the ship was voluntarily sunk." There can be no stronger proof of the revolution that has been effected in this branch of our law, than is furnished by this citation. Here, even on promissory notes, the jury are said to have power to give a sum less than that expressed in them; and a contract which now the law would pronounce utterly void, is declared to be a matter for the mere discretion of the jury.

COMPENSATION IS NOW USUALLY A QUESTION OF LAW.—It is, in truth, but slowly and at comparatively a recent period that the jury has relinquished its control over actions even of contract, and that any approach has been made to a fixed and legal measure of damages. But, by degrees, the salutary principle has been recognized, and it is now well settled, that in all actions of contract, subject to the exception already noticed, and in all cases of tort where no evil motive is charged, the amount of compensation is to be regulated by the direc- [202] tion of the court, and the jury cannot substitute their vague and arbitrary discretion for the rules which the law lays down.[1]

* Ravenscroft *v.* Eyles, 2 Wils. 295. † Bacon Ab. Tit. Damages, D.

[1] In an action on promissory notes given as a part consideration for an agreement to convey land, where the defendant, under a plea of set-off, set up the plaintiff's refusal to give him possession of the land, it was held not a mere omission but a misdirection for the court to instruct the jury that if they found "from the evidence, that the plaintiff violated his part of the agreement by refusing to allow possession, they might assess such damages as the evidence would warrant." Gilmore *v.* Hunt, 66 Penn. St. 321.

In actions for breach of contract, no damages can be, in general, recovered, which are incapable of being specifically stated and appreciated with certainty, and which depend merely on the feelings or inclination of the jury to give. Hamlin *v.* The Great Northern Railway Co. 1 H. & N. Exch. 408. Compare Bradley *v.* Denton, 3 Wis. 557. The general rule is, *compensation.* Robinson *v.* Varnell, 16 Tex. 382. See *ante*, 39, head page 36, note 1.

The measure of damages for the violation of a simple contract, where vindictive damages

It is, in fact, indispensable that it should be so: the measure of damages is the gist of the remedy; the remedy is no part of the facts of the cause, while, on the other hand, it so completely controls the rights of the parties, that, if any absolute discretion be given to the jury over the amount of compensation, the power of the court over questions of law would be most emphatically a barren sceptre. The measure of damages in all cases, then, where no complaint is made of evil motive, is a pure question of law; in all cases of contract, the sole object of the court is to ascertain the agreement of the parties, and that agreement as a general rule, controls the measure of remuneration.[1] "In contracts," said the Supreme Court of Massachusetts,* "where the precise sum is fixed and agreed on by the parties, as in many actions of assumpsit and of covenant, the jury are confined to that sum." "In no case," says the Constitutional Court of South Carolina, "where the action is for money had and received, goods sold and delivered, or for work and labor performed, which, from the nature of the contract itself furnishes the standard of assessment, are the jury allowed to give more than the amount received, with interest, or the value of the articles delivered or the services rendered."†[2] So in Ohio, where land had been sold at a given price, and the securities turning out valueless, the original owner of the land brought suit, and it was contended for the defendant that he had a right to show the value of the land; but the Supreme Court said, "The law permits parties in their agreements to fix their own terms, conditions, and prices, and the court did not err in holding the amount estimated by themselves, with the interest thereon, to be the rule of damages."‡[3] "It is urged," says the Supreme Court of Pennsylvania, "that the standard furnished by the contract may be resorted to as *a* measure of damages,

* Leland *v.* Stone, 10 Mass. 459.

† Farrand *v.* Bouchell, Harper's R. 83, and *post*, 204.

‡ Taft *v.* Wildman, 15 Ohio, 123.

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are not authorized, is the amount necessary to put the party injured in as good a condition when the contract was broken, as if he had not made the contract. Jones *v.* Van Patten, 3 Ind. 107. See also, Meade *v.* Rutledge, 11 Tex. 44; Baldwin *v.* Bennett, 4 Cal. 392; Cunningham *v.* Dorsey, 6 *Ibid.* 19.

[1] Prickett *v.* Badger, I. C. B. (N. S.) 296.

[2] To create a liability beyond the rule here stated, there must be something in the terms of the contract, read in the light of surrounding circumstances, which shows an intention on the part of the vendor to assume a wider responsibility than is assumed by the vendor in ordinary contracts for the sale and delivery of merchandise. Clark *v.* Moore, 3 Mich. 55; Cuddley *v.* Major, 12 Mich. 368.

[3] In an action for the price of chains delivered to the defendant under a contract, evidence of the market price of the chains delivered, and of other qualities of chains, is not admissible to show that the chains delivered were inferior in material and workmanship to the requirement of the contract. Swett *v.* Shumway, 102 Mass. 365.

but not as *the* measure. If it be not the *exclusive* measure, it must be disregarded altogether. If it be but one of many standards, then there is no standard at all, or as good as none. The jury are without a rule when they have a choice between different rules."* "There are certain established rules," says the Court of Exchequer in England, "according to which the jury ought to find. And here there is a clear rule, that the amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken."†[1]

"It is desirable," says the Supreme Court of Massa- [203] chusetts, "to have as definite and precise rules on the subject of damages as practicable."‡ "A proper administration of justice requires that the rules established by law for the assessment of damages should be adhered to," says the Supreme Court of Louisiana.‖ It has been repeatedly said, that courts will not attempt to modify the contracts of the parties. Their only duty is to expound and to enforce them.

CONTRACTS TO BE PAID IN PROPERTY OR SERVICES.—In connection with this subject, it may be noticed that where the contract is one by which the plaintiff is to receive, not money, but the transfer of certain property or services, then the value of the original consideration is not to be inquired into, but the value of the property or services is the measure of damages,[2] because this is the remuneration fixed by the agreement.[3] So,

* M'Dowell *v.* Oyer, 21 Penn. 417.
† Alder *v.* Keighley, 15 Mees. & W. 117.
‡ Batchelder *v.* Sturgis, 3 Cush. 201.
‖ Arrowsmith *v.* Gordon, 3 La. Ann. R. 105.

[1] The following cases illustrate the principle that the contract furnishes the measure of damages: Lecroy *v.* Wiggins, 31 Ala. 13; Herbert *v.* Stanford, 12 Ind. 503; Evans *v.* Chicago and R. I. R. R. Co. 26 Ill. 189; Springdale Cemetery Association *v.* Smith, 24 Ill. 480; McClellan *v.* Snyder, 18 Ill. 58; Coffee *v.* Meigs, 9 Cal. 363; Atlantic and La Grange R. R. Co. *v.* Hodnett, 29 Geo. (Martin) 461; Addams *v.* Tutton, 39 Penn. 447; Commonwealth Ins. Co. *v.* Sennett, 37 Penn. 205; Brigham *v.* Hawley, 17 Ill. 38. See Powell on Ev. 213.

[2] So for breach of an agreement to take care of a hedge, till it should be sufficiently grown to answer for a fence, the measure of damages was held to be the value of the labor and services, thus undertaken, and not to include the additional value the hedge would acquire by its natural growth. Gantz *v.* Clark, 31 Iowa, 254. See Goss *v.* Dysant, 31 Tex. 186. But where in this class of contracts, the rule sometimes applied in certain other contracts of sale, and in trover and trespass (*post*, 260, 261, 481 *n*, 535), of measuring the damages by the highest value up to the time of trial, of the property which should have been delivered, the rule must be confined as in such cases within reasonable limits. And where one was entitled to compensation for storing wheat to five bushels for every one hundred stored, he was not allowed to wait several years and fix the measure of his damages by demanding the wheat due him at a time when it happened to bear an enormous price. Miller *v.* Cassady, 25 Iowa, 327.

[3] BARTER CONTRACTS.—In part consideration for the rescission of a prior contract, one Sims had agreed to deliver to one Cox at once eighty bales of cotton, and within a certain time thereafter, twenty bales more of middling quality, averaging four hundred

as we have seen,* where land is the mode of payment, the value of the land is the compensation. So, where the plaintiff had forborne a debt, in consideration that the defendant would build a house and give a lease of it, the value of the lease was the standard.† "If," said Parke, B., "the consideration is to be paid in money, it must be paid; if, by the delivery of a thing of ascertained value, that value is the measure of damages." So, where a wagon was transferred in consideration that the defendant would break up certain land, the value of the labor, and not of the wagon, was held to be the measure of damages.‡ So again, if the rent of mills is to be paid in repairs, the measure of damages is the value of the repairs agreed to be made, and the plaintiff cannot recover on a *quantum meruit*.[1] In other words, when there is an an express agreement proved, the plaintiff cannot resort to an implied one.‖[2]

Motives of Contracting Parties Disregarded.—We have now to consider the exceptions which have been engrafted upon this general rule, that the contract as a matter of law fixes the damages.[3] And the first that presents itself, is that growing out of the question whether the motives of the defaulting party are in any case to be taken into consideration.
[204] It has been already said ¶ that our law makes a broad

* *Supra*, 193.
† Strutt *v.* Farlar, 16 Mees. & W. 249.
‡ Ellison *v.* Dove, 8 Blackf. 571.
‖ Baldwin *v.* Lessner, 8 Cobb's Georgia, 71.
¶ *Ante*, 28, 35, 36, 187, 188.

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pounds to the bale, and guaranteed to Cox that the twenty bales would be worth to him 16½ cents per pound. He refused, however, to deliver the twenty bales, but tendered to Cox their value estimated at 16½ cents per pound, which Cox declined to receive. It was held by the Supreme Court of Georgia in reversal of the judgment below, that by the fair construction of the contract, the delivery in addition to the eighty bales before delivered of twenty bales of the stipulated weight worth 16½ cents a pound, would have satisfied the contract, and that the measure of the plaintiff's damages was the value of the twenty bales estimated *at that price*. Had cotton declined instead of advancing, the measure would have remained the same. Sims, plaintiff in error, *v.* Cox, 40 Ga. 76. See *ante*, 193, *n.* 1.

[1] So for breach of contract to teach a slave a trade, the measure of damages is the additional value he would have gained from the trade. Bell *v.* Walker, 5 Jones (Law), N. C. 43. (This law, though sound, is happily obsolete.)

[2] Where one agreed with a surviving partner that he would pay the firm's debts if the partner would apply the firm's property to his debts, it was held in an action brought on this agreement by the surviving partner that the measure of damages was the amount the other should have paid. Weddle *v.* Stone, 12 Ind. 625.

The measure of damages in an action by the father to recover the earnings of his minor son, is not what the son's labor would have been worth to the father, but what the son, had he been of age to contract, would have been entitled to from the employer. Weeks *v.* Holmes, 12 Cush. (Mass.) 215.

[3] In an action for breach of contract, the contract price is the measure of damages, unless the defendant shows by evidence, that the damage actually sustained is less than the price agreed upon. Pond *v.* Wyman, 15 Mo. 175. See also Baldwin *v.* Bennett, 4 Cal. 392. By claiming the benefit of a special contract, and making it the *gravamen* of his action, the plaintiff is precluded from recovering damages for delay, etc., and the contract is to regulate the amount to be recovered. Bush *v.* Chapman, 2 Iowa (Greene), 549.

distinction on the subject of compensation between actions of contract and actions of tort, and while it permits the jury in the latter instance to take into consideration the intention of the offending party, to review all the circumstances of the case, and to make their verdict conduce to the purposes of punishment as well as compensation, that on the other hand in actions of contract the motive or *animus* of the defendant is entirely disregarded, and the damages are strictly limited to the direct pecuniary loss resulting from the breach of the agreement in question.

This rule has been hitherto stated without argument, as the clear and irresistible inference from the structure of our forms of action, and the rules of evidence applied to them; but as suggestions to the contrary have been in a few instances made, and as some exceptions undoubtedly exist, it is proper here more particularly to assign the reasons upon which I suppose the general rule to rest.

"There are instances," says Mr. Chitty in his very valuable work on Contracts,* "in which the defendant may be regarded in the light of a wrong-doer in breaking his contract; and in such case a greater latitude is allowed the jury in assessing the damages;" and he refers to a case,† of an action of debt on

* Page, 684.

† Lord Sondes *v.* Fletcher, 5 B. & Ald. 835. There may be some other English cases which give color to the doctrine as laid down by Mr. Chitty; but I find none where the point has been discussed or decided, with the exception of those subsequently referred to in the text. It may well be that in cases where evidence of fraud has incidentally appeared, and so blended with the other testimony showing the breach of contract that it could not be excluded, it has been allowed to influence the damages, without the point being in any way discussed.

But in South Carolina the question has been discussed at large, and the ground distinctly taken, that even in cases of assumpsit, damages will be given on the ground of fraud. The high authority of the courts of that State demand for their decisions a somewhat extended notice. An action of assumpsit was brought there, to recover damages upon the sale of cotton, alleged to be fraudulently and falsely packed by having the cotton in the centre of the bales wet. It was sent to Liverpool and sold as sound cotton, at the then current price. After the sale the fraud was discovered, and the cotton returned, and resold as damaged, at a considerable loss. The defendants contended that if liable at all, the plaintiffs could only recover the price paid at Charleston, with interest. The presiding judge, however, instructed the jury that they might give a verdict for the whole amount of damages that the plaintiffs had sustained, which was the difference between the two sales in Liverpool, with interest. The jury having found a verdict according to the direction of the court, on motion for a new trial, the court, by Mr. Justice Nott, said, "Assumpsit is *nomen generalissimum*, under which a great variety of special cases are embraced. The damages to be recovered must always depend on the nature of the action and the circumstances of the case. In an action for money had and received, the actual amount of money received (with interest in some cases) should be the measure of damages; in an action for goods, or any specified chattel sold and delivered, the value of the thing sold; and so on in all other cases which furnish a standard by which the jury can be governed. But in cases of fraud and other cases merely *sounding in damages*, the jury may give a verdict to the whole amount of the injury sustained or *imaginary* damages."

After commenting on the case of an action for a breach of promise of marriage, and other English cases, the court proceeded:—

"I apprehend, that after all these cases, it can no longer be considered, as has been somewhat confidently asserted in this case, that even *vindictive damages* may not be given

[205] bond given to resign a living, where the defendant refused to perform the condition of his agreement, but without any circumstances of aggravation, and the court, [206] on a motion for a new trial, said that the defendant being a *wrong-doer*, the jury were not bound to fix their verdict at the precise value of the living to him; and on the further ground that the plaintiff had offered to waive all damages if the defendant would resign the living, they refused a new trial.[3]

in an action of assumpsit; and surely it will not be denied that the plaintiff may recover the amount of the loss *which he has actually sustained.*"[1] It will be noticed that two judges dissented.

And in a subsequent case of covenant on a bill of sale of a negro, warranting his soundness (the breach assigned being the unsoundness of the negro), the judge charged that the only measure of recovery was the amount of consideration mentioned in the deed, and interest. A motion was made for a new trial, and the court, referring to the previous case, said, "This, it will be recollected, is an action of covenant, an action *sounding altogether in damages*, and the measure, of recovery is to the extent of the injury which the party sustains by the infraction of the covenant, whether it be partial or total, and must necessarily depend on the particular circumstances of the case, although the consideration paid might, in most cases, constitute the best evidence of the injury which a party sustained; yet in actions *sounding altogether in damages*, it seems to me to follow of necessity that the measure of recovery must depend on the particular circumstances of the case;" and a new trial was granted.[2]

Again, in another case, an action being brought by a mechanic for work and labor, etc., in the erection of a house for the defendant, the jury having allowed an arbitrary sum of double the amount of interest due, the verdict was set aside, the court saying, "There is no doubt that damages at the discretion of the jury may sometimes be given in an action of assumpsit, as where the action is founded in fraud or deceit, or when a party fails to perform a contract, by which the other party sustains a special damage, or where it is so badly performed as to frustrate the expectations of the party for whose benefit it was intended. . . . . But in no case where the action is for money had and received, goods sold and delivered, or for work and labor performed, which, from the nature of the contract itself, furnishes the standard of assessment, are the jury allowed to give more than the amount received, with interest on the value of the articles delivered or the services rendered. Ferrand *v.* Bouchele, Harper's Reports, 83, *anno* 1823.

The English authorities referred to in the first of these cases are Nurse *v.* Barnes, T. Raymond, 77 (*ante*, 86; Stuart *v.* Wilkins, Douglass, 18; and Williamson *v.* Allison, 2 East, 446; neither of which seems to me, with deference, to bear upon the question, nor am I able to understand what the court means by the phrase "*sounding in damages.*" All actions at law, except on contracts for a sum certain, may be said to sound in damages. But what appears more fatal than the absence of express authority, is the general system of our jurisprudence, and the fact that if this rule of damages applies to one form of the action of assumpsit, it must equally apply to all; that if it be sound, no reason whatever can be assigned why vindictive damages should not be given for the malicious or fraudulent refusal to pay a promissory note; and to carry it to this extent would, I think, virtually revolutionize not only our rules both of pleading and of evidence, but introduce most serious innovations in the general rules which regulate the rights of parties. Whether such a revolution be or be not desirable, is, as I have already said, another and a very different question.

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[1] Rose & Rodgers *v.* Beattie, Nott & M'Cord, 538, 1820.

[2] Garrett *v.* Stuart, 1 M'Cord, 514, *anno* 1821.

[3] The case of Hawkins *v.* Coulthurst, 5 B. & S. 543, cited elsewhere, was an action to recover from the assured the amount of a policy of insurance on his life on which he was to pay the premiums, and which he had assigned to trustees for his creditors by a deed containing a covenant that he would not do anything to avoid the policy, which covenant he broke by going beyond the limits of Europe without a license from the directors, contrary to a provision in the policy which was thereby avoided. The plaintiff's counsel, relying on the doctrine of Mr. Chitty, cited in the text, insisted that the damages were to be assessed on the

This, which is the only English authority cited for the position, is very far from supporting the doctrine of Mr. Chitty's text; and it must in all cases require very clear and stringent authority to warrant so great a disturbance of the settled principles of pleading and evidence. It is to be borne in mind, that the rules of damages are all intended to conform to those other fundamental rules which determine the issue to be tried and

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highest principle, and that the plaintiffs were entitled to recover the full amount of the policy. But the court held that its value only could be recovered, making allowance for the premiums which the defendant had covenanted to pay.

But upon principle, why should there be a distinction between allowing exemplary damages in the case of a wilful breach of a contract and that of a wilful wrong? In the latter case, as in the former, the line of compensation is overstepped, and a wholly new standard introduced, and if damages are to be allowed in civil actions between individuals from social or governmental considerations, the expediency of the rule in the one case is the same as in the other.

In principle, perhaps, some progress has been made towards applying the rule to dishonest breaches of contract. Thus, as seen elsewhere, it has been frequently held, both in England and in this country, that the damages for breaches of contract for the conveyance of real estate are enhanced in case of fraud (see *ante*, head p. 206, *n.* 4, *post*, 209). Hopkins *v.* Grazebrook, 6 Barn. & Cres. 31; Sweem *v.* Steele, 5 Iowa, 352; McNair *v.* Compton, 35 Penn. 23. So in New York, the allowance of the rent of a tavern stand as damages for the breach of a contract to repair a ferry (Dewintz *v.* Wiltse, 9 Wend. 325) was explained on this ground by the Supreme Court of New York. Blanchard *v.* Ely, 21 Wend. 342, 350 (see pp. 87, 96). So in Pennsylvania, in an action of contract for the sale of specific stock which was broken in good faith by the vendor, the stock having been sold by his agent without his knowledge to another party, the plaintiff was held entitled to nominal damages only, the court placing the decision on the vendor's good faith. Wilson *v.* Whitaker, 49 Penn. Stat. 114 (*ante*, 55). And it is familiar law that fraud, in vitiating as it does every contract, makes a sum of money, which by the contract is to fall due at a future time, recoverable immediately by the party defrauded, without rebate for the interest, to that extent punishing the author of the fraud. So where a deed was fraudulently obtained through an agreement to give satisfactory security for the unpaid balance of the purchase money—half in one year and half in two years—an action for its recovery was held immediately maintainable, in which the rule of damages was the sum to have been received. Ascutney Bank *v.* McK. Ormsby, 28 Vt. 721.

Again, a very nice distinction is sought to be maintained between circumstances showing malice or wantonness in the breach which go in aggravation of the injury itself, and the same or similar circumstances which do not have that result. See 2 Greenl. Ev. 37, 253, 254, 256, 266, 272. Thus in the case of Coppin *v.* Braithwaite (8 Jur. 875), which was an action for breach of a contract to carry the plaintiff from London to Sheerness, by putting him ashore at an intermediate port, Mr. Baron Parke allowed in aggravation of the damages evidence showing that this had been done in a rude and abusive manner, saying that it made a most material difference whether the contract were broken because of the inconvenience of carrying it out, or whether the plaintiff were turned out under circumstances of aggravation. But the distinction, if it exist, is very refined. If the *material* injury inflicted is not increased by the mode of the breach, there can be no standard for any enhancement in the rate of compensation on that account. And if the injury be, in a legal sense, thus increased in one case, it is not easy to see why it should not be so in all cases where the breach is wanton, and therefore additionally offensive. We think the distinction is but a further evidence of a disposition to return to a uniform rule on this subject, applying to contracts wilfully broken, as well as torts wilfully inflicted.

The rule in the text, however, as a *rule*, is still substantially unshaken wherever forms of action prevail. These interpose an insuperable difficulty—we think the only one—to harmonizing the rule upon this subject. When all the circumstances of one transaction and all elements of the same claim can be considered and disposed of in one suit, in which both legal and equitable relief can be had, there will remain no valid objection to allowing exemplary damages for a malicious breach of contract which does not apply to a wilful tort. See Jones *v.* Steamship Cortes, 17 Cal. 487 (cited 208, note 1), where exemplary damages were allowed in an action for breach of contract under the new system of pleading (also, 184, note).

the testimony on which it is to be decided. Pleading prescribes the form of action, and declares the precise issue. Evidence points out the testimony to be given in support and discharge of the demand, while the damages are awarded in conformity to those rules which govern the proceedings in the cause down to the time of trial.

Distinct Forms of Action in Contract.—As to the pleadings, it is the constant and sedulous object of the Anglo-American law, to draw a distinct line between actions of contract and those of tort, *ex contractu* and *ex delicto;* and the rigor with which this distinction is maintained in regard to joinder of counts, causes of action, and election of actions, is familiar learning. No form of action has yet been devised for the fraudulent breach of an agreement.*

But what becomes of this distinction, if in an action of contract damages are to be awarded on the ground of the fraud, malice, or other ill conduct of the defendant? Every action of contract may become one of tort, and the barrier between these classes of actions is at once and completely broken down.

[207] Rules of Evidence Preclude Consideration of motive in Common Law Actions.—Again, as to the rules of evidence, while it is perfectly true that in actions of tort every attendant circumstance of aggravation can be given in evidence, on the other hand, nothing is better settled than that in actions of contract the parties are limited to the mere evidence of the breach of contract. But if damages are to be awarded on account of the oppressive, malicious, or fraudulent conduct of the defendant, it is manifest that this rule cannot be maintained; if one party gives evidence of such a character, it is plain that the other must have the right to rebut the testimony, and in this way the form of the action, the issue *ex contractu*, and the rules of testimony, would be completely lost sight of. If, at the trial, the evidence of a breach of contract were complete, certainly an offer to show that the defendant's act was dictated by a malicious, fraudulent, or oppressive spirit, would not be allowed; and it is very clearly inadmissible to consider as in

* As far as the rules of pleading are concerned, the only color for this theory is derived from the rule that on a warranty of chattels either case or assumpsit will lie, and that if the former be brought and fraud laid, the *scienter* need not be charged, nor if charged need it be proved. Stuart *v.* Wilkins, Doug. 17; Williamson *v.* Allison, 2 East, 446. But this is very wide of the doctrine, that in actions of contract damages can be given for acts of a tortious nature.

evidence for the purpose of regulating the damages, testimony incidentally introduced, which could not be directly given. And what limit is to be assigned to the operation of this rule? If it holds good in regard to one contract, it should be true as to all. It will be noticed hereafter, that with the exception of the State of South Carolina, it has been applied only to contracts in regard to real property; but if sound as to an action of covenant with regard to real estate, it must be equally so as to an action of assumpsit on a promissory note. And if the motives of the defendant are to be inquired into, what sort of an examination is to be instituted? Is fraud alone to be repressed, or are malice and oppression to be equally sought out and punished, as in ordinary cases of tort?

Fraud in Conveyance of Land.—In one of the earlier cases in which it was intimated that, in cases of fraud in the conveyance of land, the rule of damages would be carried beyond the measure in an ordinary case of breach of covenant, a different form of action was clearly pointed out. "If any imposition," said the Supreme Court of New York, "is practiced by the grantor, by the fraudulent suppression of truth or suggestion of falsehood in relation to his title, the grantee may have an action on the case in the nature of a writ of deceit; and *in such action* he would recover to the full extent of his loss."*[1]

"It is agreed on all hands," said Savage, C. J.,† in a suit [208] brought on the covenant against incumbrances, "that if fraud can be shown, or concealment which would be evidence of it, that would constitute a good ground of action, in which the purchaser would recover all his damages; and the learned reporter, in his marginal note, assumes this to be an *action on the case.*

The action on the case for fraud in the sale of land is recognized by the highest authorities in our law, and by repeated decisions; and its existence furnishes another reason why the

* Pitcher *v.* Livingston, 4 J. R. 1, 12.

† Dimmick *v.* Lockwood, 10 Wend. 149, 155.

[1] In a case in South Carolina, the defendant had sold and conveyed to the plaintiff for a sum certain one hundred and twenty acres of land, to fifty-four acres only of which he had a title. Of the other acres, fifty-six belonged to the State, from which the plaintiff, subsequent to the defendant's conveyance, obtained a grant of them. The remaining ten were covered by an old grant. In an action of deceit by the vendee, it was held by the Supreme Court of the State, applying the rule of compensation for actual loss, that the measure of damages was the *pro rata* proportion of the consideration belonging to the ten acres covered by the adverse title, and the expense of obtaining the grant of the fifty-six acres. Parker *v.* Walker, 12 Rich. L. (S. C.) R. 138.

remedy in the action on the contract should not be pushed beyond its legitimate limits.*

General Conclusion.—On the whole, therefore, notwithstanding the cases cited in the notes, and the authority of the tribunals by which they are decided, I conclude that so long as our present forms of action, rules of pleading and evidence, exist, their clear and irresistible result is, that the damages in actions of contract are to be limited to the consequence of the breach of contract alone, and that no regard is to be had to the motives which induce the violation of the agreement.†[1]

* Har. & But. Notes to Co. Lit. 384 *a*; Com. Dig. Action on the Case for Deceit, A. 8; Culver *v.* Avery, 7 Wend. 380; Sandford *v.* Handy, 23 Wend. 260; Van Eps *v.* Harrison, 5 Hill, 63. I am far from desiring to express any opinion in favor of the doctrine of the text; on the contrary, if the plaintiff in an Anglo-Saxon court of justice shall ever be permitted to state his complaint according to the actual facts, and not be compelled to use an unmeaning formula, I can see no reason, greatly as legal relief would be thus extended, why exemplary damages should not be given for a fraudulent or malicious breach of contract, as well as for any other wilful wrong. Damages are given by the civil law in many cases of this kind. So they are in Louisiana, the jurisprudence of which State is very much fashioned on the great Roman original. But it does not appear to me that as yet the principle has been engrafted in any regular or practical way on the common law, unless in the exceptions subsequently stated in the text. In this work, my only object is to expound the rules of law as they appear to me to exist.

An able article in the London Law Magazine and Quarterly Review, for May, 1855, arrives at the same conclusion. The learned writer says: "In assessing damages in an action or contract, can the intention, *animus*, or motive of the party charged be inquired into? Clearly this cannot be done; the inquiry suggested would be wholly irrelevant to the issue joined;"—and in regard to the subject of vindictive damages, the article says, "In actions of tort the jury are permitted to take into consideration the *animus* of the offending party, and to assess the damages upon a general survey of all the circumstances adduced, the verdict thus being sometimes made to operate not merely as compensatory, but to some extent by way of punishment."

† In Louisiana, where the subject of damages is controlled by the Code, it has been said, "That in case of breach of contract, whether by the negligence or fraud of a party, no other sum can be allowed as damages than that which fully indemnifies the creditor." Ryder *v.* Thayer, 3 La. Ann. R. 149.

Louisiana is the only State, I believe, in the Union where an effort has been made to reduce the subject of damages to statutory limits. I annex here the provisions of their Code on the subject. It will be seen that, in

[1] The case of Jones *v.* Steamship Cortes, 17 Cal. 487, was an action brought in the Supreme Court of California for damages for the wrongful breach of a contract to transport a female passenger, one of the plaintiffs, from San Francisco to San Juan del Sur, in Nicaragua. The plaintiffs proved that on the arrival of the steamer at San Juan she was not permitted to land, but was taken to Panama against her will, and there landed in an unhealthy country; and after a detention in a destitute condition for ten days, there being no direct communication between San Juan and Panama, was compelled to return to New York in order to start afresh for Nicaragua. The court held that the whole case should go to the jury; that the plaintiffs, under the California Code of Procedure, which permitted all matters forming part of one transaction to be united in the same suit, could recover not only the pecuniary loss directly resulting from the breach of the contract, but also exemplary damages for any deceit practiced by the owners and agents of the steamer, including damages for her distress of mind. After quoting the language of the text and the first paragraph of the author's note preceding note *, p. 208, the court proceeds as follows: "In the present case, it is not important to inquire which of these opinions in relation to the rule at common law is correct. The injuries complained of were of such a character that redress may undoubtedly be obtained in some form, and under our practice there is no reason why the plaintiffs should be compelled to resort to different actions for the relief to which the law entitles them. We have but one form of action, and nothing more is required than a statement in ordinary language of the facts relied upon for a recovery. The statute makes no distinction in matters of form between actions of contract

VENDOR OF REAL ESTATE REFUSING TO CONVEY.—To this general rule, however, there undoubtedly exists an important exception, which has been introduced from [209]

all cases except contracts for the payment of money, where the creditor can recover interest only, a distinction is recognized between the breach of contracts arising from incapacity and that caused by bad faith or evil design.

Art. 1928. Where the object of the contract is anything but the payment of money, the damages due to the creditor for its breach are the amount of the loss he has sustained, and the profit of which he has been deprived, under the following exceptions and modifications:—

1. When the debtor has been guilty of no fraud or bad faith, he is liable only for such damages as were contemplated, or may reasonably be supposed to have entered into the contemplation of the parties, at the time of the contract. By bad faith in this and the next rule is not meant the mere breach of faith in not complying with the contract, but a designed breach of it from some motive of interest or ill-will.

2. When the inexecution of the contract has proceeded from fraud or bad faith, the debtor shall not only be liable to such damages as were or might have been foreseen at the time of making the contract, but also to such as are the immediate and direct consequence of the breach of that contract; but even when there is fraud, the damages cannot exceed this.

3. Although the general rule is that damages are the amount of the loss the creditor has sustained, or of the gain of which he has been deprived, yet there are cases in which damages may be assessed without calculating altogether on the pecuniary loss, or the privation of pecuniary gain to the party. Where the contract has for its object the gratification of some intellectual enjoyment, whether in religion, morality, or taste, or some convenience, or other legal gratification, although these are not appreciated in money by the parties, yet damages are due for their breach; a contract for a religious or charitable foundation, a promise of marriage, or an engagement for a work of some of the fine arts, are objects and examples of this rule. In the assessment of damages under this rule, as well as in cases of offences, quasi offences, and quasi contracts, much discretion must be left to the judge or jury, while in other cases they have none, but are bound to give such damages under the above rules as will fully indemnify the creditor, whenever the contract has been broken by the fault, negligence, fraud, or bad faith of the debtor.

4. If the creditor be guilty of any bad faith which retards or prevents the execution of the contract, or if, at the time of making it, he knew of any facts that must prevent or delay its performance, and concealed them from the debtor, he is not entitled to damages.

5. Where the parties, by their contract, have determined the sum that shall be paid as damages for its breach, the creditor must recover that sum, but is not entitled to more. But when the contract is not executed in part, the damages agreed on by the parties may be reduced to the loss really suffered, and the gain of which the party has been deprived; unless there has been an express agreement that the sum fixed by the contract shall be paid, even on a partial breach of the agreement. And see Arrowsmith *v.* Gordon, 3 La. Ann. R. 105; Porter *v.* Barrow, *Ibid.* 140.

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and those of tort, and relief is administered without reference to the technical and artificial rules of the common law upon this subject.

"Different causes of action may be united in the same complaint, and the only restrictions upon the pleader in this respect are those imposed by the statute. Our system of pleading is formed upon the model of the civil law, and one of its principal objects is to discourage protracted and vexatious litigation. It is the duty of the courts to assist as far as possible in the accomplishment of this object, and it should not be frittered away by the application of rules which have no legitimate connection with the system. The provisions for avoiding a multiplicity of suits are to be liberally and beneficially construed, and we see no reason why all matters arising from and constituting part of the same transaction should not be litigated and determined in the same action. Causes of complaint differing in their nature, and having no connection with each other, cannot be united; but the object of this rule is to prevent the confusion and embarrassment which would necessarily result from the union of diverse and incongruous matters, and it has no application to a case embracing a variety of circumstances so connected as to constitute but one transaction. The statute provides that a claim for injuries to the person shall not be joined with a claim for injuries to character.

"In a case in New York involving the construction of a similar provision in the code of that State, it was held that a demurrer to the complaint, the facts stated being sufficient to sustain an action either for assault and battery or for slander, was not well taken. The court said: 'The complaint in fact contains but a single cause of action; the allegations relate to a single transaction; the complaint purports to give the history of one occurrence and no

the civil law, in regard to damages recoverable against a vendor of real estate who fails to perform and convey the title. In these cases the line has been repeatedly drawn between parties acting in good faith, and failing to perform because they could not make a title, and parties whose conduct is tainted with fraud or bad faith. In the former case, the plaintiff can only recover whatever money has been paid by him, with interest and expenses.[1] In the latter, he is entitled to damages [210] resulting from the loss of his bargain.*[2] This exception cannot, I think, be justified or explained on principle, but it is well settled in practice.[3]

Breach of Promise.—To the general rule another exception also exists, that of breach of promise of marriage. In this action, though in form *ex contractu*, yet it being impossible from the nature of the case to fix any rule or measure of damages, the jury are allowed to take into their consideration all the circumstances; and, provided their conduct is not marked by prejudice, passion, or corruption, they are permitted to exercise an absolute discretion over the amount of compensation. "The damages in this action," says the Supreme Court of New York,†

* Flureau *v.* Thornhill, 2 W. Bl. 1078; Hopkins *v.* Grazebrook, 6 B. & Cres. 31; Robinson *v.* Harman, 1 Exch. 850; Bitner *v.* Brough, 11 Penn. R. 127, and *ante*, 69, 184.

† Southard *v.* Rexford, 6 Cowen, 254.

more. This history embraces what was done and what was said on the occasion; each constitutes a part of the *res gestæ;* what is alleged to have been done would, if established upon the trial, sustain an action for personal injury; what is alleged to have been said would, if established upon the trial, sustain an action for injury to the reputation. The whole together, constituting as it does but a single transaction, makes but a single cause of action. The plaintiff brings his action upon the whole case to recover damages for the compound injuries he has sustained. . . . When it comes to trial, all that was said and all that was done become the proper subjects of investigation, and a single verdict adjusts the rights of the parties.' Brewer *v.* Temple, 15 How. Pr. 286. In Robinson *v.* Plint, 16 How. Pr. 240, a cause of action in tort was united with a cause of action on contract, and it appearing that these causes of action arose out of the same matter, it was held that they were properly united.

"The Code contains a special provision upon this subject, but we think that the effect of our statute is the same, and that the construction would not be altered by the incorporation of a similar provision.

"Having adopted a system which rejects all distinctions in matters of form, it would be folly to subject it to the operation of rules founded upon distinctions of this nature. Every action under our practice may be properly termed an action on the case, and it would seem that any ground of relief which can be regarded as a part of the case may with propriety be included in the action."

[1] Where it was made the duty of a town by statute to make good to a purchaser of land at a tax sale all damages by reason of the collector's neglect, in an action on the case by the purchaser against the town to recover damages for such neglect, the measure was held to be, not the value of the land, but the amount paid and interest. Saulters *v.* The Town of Victory, 35 Vt. 351.

The language of the text is cited and followed by Mr. Baron Martin in delivering the opinion of the Court of Queen's Bench in the case of Bain *v.* Fothergill, L. R. 6 Exch. 59, 60, and is also referred to with approbation by the present Lord Chief Justice of England in that of Engel *v.* Fitch, L. R. 3 Q. B. 314, 327.

[2] See *ante*, 184 *n.*

[3] See Sweem *v.* Steele, 5 Iowa, 352; cited *ante*, 186; Lawrence *v.* Chase, 54 Me. 196.

"rest in the sound discretion of the jury, under the circumstances of each particular case." * And this exception is perhaps one of the strongest proofs of the general rule.

COMPENSATION FOR ACTUAL LOSS THE CONTROLLING PRINCIPLE.—But when it is said that the contract furnishes the measure of damages, it is not thereby meant that the party ready to perform his contract will be able to recover of the party in default the entire price named in the agreement. On the contrary, it has been held in many cases, that in actions for breach of contract, the measure of damages is not the price stipulated to be paid on full performance, but the actual injury sustained in consequence of the defendant's default.[1] For the rule that the contract furnishes the measure of damages, is subject to the other rule already stated, that compensation is only to be given for actual loss.[2]

So on a contract to transport horses in a canal-boat for a given sum of money, the plaintiffs averred a readiness and offer to perform on their part, and a neglect and refusal on the part of the defendants to furnish the freight, and claimed to recover the entire sum specified in the agreement. But the Supreme Court of New York held that they were only entitled to recover what they had actually lost by the defendants' non-performance, saying, "Suppose the plaintiffs had the next hour been furnished with freight entirely adequate to the voyage at the same sum, they then would have been entitled to the damage [211] arising from detention for that time, but no more. A tender and offer to perform is equivalent to performance, but merely for the purpose of sustaining an action; it is not performance, though in one respect it resembles it consequentially. It is *quasi performance*, but it does not regulate the amount of damages. †

So, also, in Kentucky it has been held, that a plaintiff contracting to do work for a stipulated price, and who is ready to

* Torre *v.* Summers, 2 Nott & M'C. 267; Coryell *v.* Colbaugh, Coxe, 77; Stout *v.* Parll, Coxe, 79; Greene *v.* Spencer, 3 Mo. 225; Hill *v.* Maupin, 3 Mo. 323.

† Shannon *v.* Comstock, 21 Wend. 457. It is difficult to reconcile this reasoning with that which allows the vendor, in cases of contract for the sale of land, to recover the full price.

[1] Jones *v.* Van Patten, 3 Ind. 107. As has been already observed (*supra*, 93, 94), it is not only the moral but the legal duty of a party who seeks redress for another's wrong to use due diligence in preventing loss thereby. This principle applies to a breach of contract, and a party is not entitled to compensation for injurious consequences from such breach, so far as he had the information, time, and opportunity necessary to prevent them. See The Cincinnati and Chicago Air Line R. R. Co. *v.* Rodgers, 24 Ind. 103.

[2] Robinson *v.* Varnell, 16 Texas, 382.

perform his agreement, but is prevented by the other party, cannot recover the price named in the contract for the whole work, but only the actual damages sustained by him. And as "the amount of compensation which the plaintiffs had recovered exceeded the value of the work they had done, and as, moreover, they did not attempt to prove any special loss or damage, they were held not entitled to recover anything." *[1]

So, also, in New York, where the defendant agreed with the plaintiff, a boarding-house keeper, for rooms and board for a year at a stipulated price, and quitted them within the time, it was held that if the plaintiff was entitled to recover at all, the measure of damages would not be the price stipulated to be paid, but only such damages as had resulted from the defendant's breach of contract. And Bronson, J., said, "If the plaintiff could recover, she was not entitled as a matter of course to the stipulated price for the use of the rooms to the end of the year, but only to such damages as had directly and necessarily resulted from the breach of the contract. She could not refuse the rooms to other lodgers, leaving them idle, and then recover against the defendant as for use and occupation. Although a party be chargeable with a breach of contract, the other party has no right to conduct in such a manner as to make the damages unnecessarily burdensome."[2] But the plaintiff was held not entitled to anything, on the ground of the contract being within the statute of frauds. †

So, again, in the same State, where the plaintiff was [212] employed by the defendant to do certain work; after he began to do it, the order was countermanded by the defendant; but the plaintiff went on to complete the job, and insisted that he was entitled to recover for doing the whole and for the materials furnished, and so the Common Pleas held. But on error, the judgment was reversed; the court saying, "That in all such cases the just claims of the party employed are satisfied when he is fully compensated for his part performance and indemnified for his loss in respect to the part left un-

* Chamberlain *v.* McCallister, 6 Dana's Ky. Reports, 352. See also, Caldwell *v.* Reed, Littell's Select Cases, 366.

† Wilson *v.* Martin, 1 Denio, 602. See to same point, Spencer *v.* Halstead, 1 Denio, 606.

[1] The same rule applies where the consideration is paid by the employer in advance. The mechanic is not entitled in such case to retain the full price, even if the work is stopped by the default of his employer, but so much only as will compensate his actual damage. Hood *v.* Raines, 19 Texas, 400.

[2] In such a case it appears the burden is on the defendant to prove the plaintiff had an opportunity of renting the rooms. See Greene *v.* Waggoner, 2 Hilt. 297.

finished; and to persist in accumulating a larger demand is not consistent with good faith towards his employer.*[1]

So, again, where a party was employed as the superintendent of a railroad for a certain time at a specified compensation, and was dismissed without cause. He was held *prima facie* entitled to recover for the whole time; but that the defendants might show in diminution of damages that after the plaintiff had been dismissed he had engaged in other business.†[2]

Unconscionable Agreements.—There is a class of decisions which may at first sight appear to be opposed to the general rule, that the contract furnishes the measure of damages. In an early case, brought on an assumpsit to pay for a horse a barley-corn a nail, doubling it every nail, with an averment that there were thirty-two nails in the shoes of the horse, which, being so doubled every nail, came to five hundred quarters of barley,—the judge, who tried the cause, directed the jury to disregard the contract, and to give the value of the horse in damages, which was £8, and so they did.‡ The prin- [213] ciple of this decision is, that if the agreement be unconscionable, the court will render such damages as may appear

* Clark *v.* Marsiglia, 1 Denio, 317; and see Durkee *v.* Mott, 8 Barb. 423.

† Costigan *v.* Mohawk & H. R. R. 2 Denio, 610; and see also, Hecksher *v.* McCrea, 24 Wend. 304; and in Arkansas, compare also Walworth *v.* Pool, 4 English, 394.

‡ James *v.* Morgan, 1 Levinz, 111. In another case, a somewhat similar contract came up on demurrer. The plaintiff declared, on an agreement, that the defendant, in consideration of 2*s.* 6*d.* in hand paid, and of £4 17*s.* 6*d.* to be paid on performance, agreed to deliver two grains of rye corn, on Monday, the 29th, of March, and four grains on the next Monday, and so doubling *quolibet alio die Lunæ* for one year. The defendant demurred, saying, "that the agreement appeared, upon the face of it, to be impossible, the rye to be delivered amounting to such a quantity as all the rye in the world was not so much; and being impossible was void, and the defendant not bound to perform it." But after argument the court thought otherwise, Powell, J., saying, "That though the contract was a foolish one, it would hold in law, and the defendant ought to pay something for his folly;" whereupon, the reporter adds, "The counsel for the defendant perceiving the opinion of the court to be against his client, offered the plaintiff his half crown and his costs, which was accepted of; and so no judgment was given in the case."

A question arose on the meaning of the contract,—the defendant insisting that *quolibet alio die Lunæ* meant *every* Monday, but Lord Holt said it must be construed "*every other Monday.*" This made a material difference in the possibility of executing the contract; for if the quantity were doubled thirty times, it would have reached 125 quarters; if fifty-two, it would have amounted to 524,288,000 quarters. Thornborow *v.* Whiteacre, 2 Lord Raym. 1164.

And the principle of James *v.* Morgan was approved of by Lord Chancellor Hardwicke, in Earl of Chesterfield *v.* Jansen, 1 Wils. 286, 295.

[1] Approved by the Supreme Court of Michigan in Hosmer *v.* Wilson, 7 Mich. 294.

[2] Wolf *v.* Studebaker, 65 Penn. 459; King *v.* Steiren, 44 Penn. 99; Hoyt *v.* Wildfire, 3 Johns. 518; Ward *v.* Ames, 9 Johns. 138; Emerson *v.* Howland, 1 Mason, 51. See Hendrickson *v.* Anderson, 5 Jones (Law), N. C. 246; McDaniel *v.* Parks, 19 Ark. 671; and Bagley *v.* Smith, 10 N. Y. 489; also *post*, 351. A servant wrongfully dismissed should seek other employment so as to lessen the damages. Emmens *v.* Elderton, 13 C. B. 495. But evidence that he obtained other employment is only admissible in mitigation of damages. It is not a defence. Armfield *v.* Nash, 31 Miss. 361. And where the servant obtains employment, the presumption is he gets the best wages he can, unless it be proved he accepted less than he might have had. Hunt *v.* Crane, 33 Miss. (4 George) 669.

reasonable, without being bound by the terms of the contract.[1] So in Massachusetts, where a note had been given to stay execution payable in oats at 20 cents per bushel, when in fact they were worth 37 cents, it was held that the jury might disregard the contract on the ground that it was unconscionable, and fix the value of the oats at 20 cents.* So a standard text writer tells us that, "on an action brought on a promise of £1,000 if the plaintiff should find the defendant's owl, the court declared, though the promise was proved, that the jury might mitigate the damages.† But in truth the assertion of the right to sever the contract, to declare a part of it unconscionable and oppressive, and to decree performance of the remainder, is the exercise of an equitable power of a high order, the incautious exercise of which might lead to very dangerous results. And the decisions just cited would, I think, be more properly brought within the rule which governs cases of fraud and oppression. If the contract is on its face so extortionate and unjust as to bear evident marks of deceit, then, instead of wasting time in trying to reduce the relief to the standard of strict justice, the whole agreement should be pronounced void.

MERE INADEQUACY OF CONSIDERATION DOES NOT DEFEAT CONTRACT.—In connection with this branch of the subject, it is to be observed that mere inadequacy of consideration is no objection to a contract. Some consideration is requisite, but the sufficiency of the consideration cannot be inquired into. So in an early case,‡ where the defendant agreed, if the plaintiff would show him a certain lease, that he, the defendant, would pay the part due on it by a third party, it was objected that there was no consideration. "But it was adjudged for the plaintiff; for when

* Cutler *v.* How, 8 Mass. 257; Cutler *v.* Johnson, 8 Mass. 266; and Baxter *v.* Wales, 12 Mass. 365; Leland *v.* Stone, 10 Mass. 459.

And Lord Mansfield used analogous language in regard to the action for money had and received. "Shall a man," said his Lordship, "in an action for money had and received, which is an equitable action, and founded on conscience, recover an unconscionable, exorbitant demand? Most clearly he shall not." Jestons *v.* Brooke, 2 Cowp. 793; and Floyer *v.* Edwards, 1 Cowp. 112.

† Bacon Abr. Damages D.

‡ Sturlyn *v.* Albany, Cro. Eliz. 67.

[1] The defendants being engaged in a flour commission business, hired from the plaintiff for one night a canvas cover, fifty feet in length by twenty-five feet wide, to be spread over flour on board a canal boat lying at a wharf in the city of New York. The price to be paid for the use of the canvas was the "customary charge," which for twenty-four hours or less was proved to be one dollar. Through some oversight the cover was not returned until the lapse of about five weeks. The action was brought for the use of the canvas during the whole period last mentioned. The plaintiff insisted upon a recovery of one dollar for each day of the detention. Held, that defendants were not liable to be charged at the contract rate per day for every day during which the canvas was detained. The recovery should be limited to the value of the use for the entire period of the detention. Russell *v.* Roberts, 3 E. D. Smith's (N. Y.) C. P. R. 318.

a thing is to be done by the plaintiff, be it never so small, this is sufficient consideration to ground an action." So it has been contended that a guarantor of negotiable paper receiving a trifling percentage for his guaranty, could not be held liable for the whole face of the paper; but on the same ground he was held liable;* and the rule has been repeatedly declared, that the value of the services or the amount of the consideration is of no importance, where a stipulated sum is agreed to be paid for the performance of a specific service.† It is only where fraud, mistake, illegality, or oppression intervenes, that the consideration can, in this respect, be inquired into.

By American Rule Contract Price Recoverable.—The rule that the contract furnishes the measure of damages, is also subject to further remark. As a general principle, it is the actual loss alone for which the common law seeks to give compensation; but in regard to contracts for the sale of land we have already seen,‡ and in regard to contracts for [214] the sale of chattels we shall hereafter see, that in this country, if the vendor tenders complete performance on his part, he is at liberty to recover, not merely what he loses by the non-performance of the vendee, but the entire contract price; while in England, on the other hand, the vendor of land is limited to compensation for such actual injury as may have resulted from the breach of the agreement. The American rule attributes to the common-law courts the exercise of the equitable power of compelling specific performance, as to the vendor, while at the same time the tribunal is incapable of enforcing either a transfer or a conveyance. ‖

Action for Rent.—Another apparent exception to the general rule has been made in the action of assumpsit for rent. So in England, in a suit for use and occupation, where an agreement of hiring had been made at £450, with a right of sporting, and of occupation of the glebe, it was shown that the plaintiff, the landlord, had no power to grant the privilege of sporting,

* Oakley *v.* Boorman, 21 Wend. 588.

† Trustees of Hamilton College *v.* Stewart, 1 Comstock, 581.

‡ *Supra*, 190.

‖ In this, as in many other cases, we shall perceive in this country a gradual inclination to attribute chancery powers to the courts of law, and to approach the system of equitable relief. It may be questioned whether this mode of altering our system is judicious. I entertain no doubt whatever, that it is most desirable to mould and blend together the two jurisdictions of law and chancery, so as to enable one tribunal to have complete cognizance of the entire cause and all its incidents. But as long as the jurisdictions are kept distinct, I am not inclined to believe that the administration of justice will be benefited by any confusion of their remedies.

and that he also failed in procuring the glebe for the defendant's occupation. On this state of facts it was held by the English Common Pleas, "That an eviction of part of the premises being shown, the jury was to ascertain, *independently of any agreement*, what the defendant ought to pay." * I should be inclined, however, to doubt the accuracy of this language; the jury are, it is true, not to be absolutely bound by the agreement: but they cannot, I should suppose, act independently of it. The proper course would be to assume the agreed rent as the fair value of the entire premises, and on that basis to make a proper deduction for the portion which the tenant had not enjoyed; and this seems to be in analogy with the class of cases which we shall next consider.

PART PERFORMANCE.—Wherever a contract is indivis-
[215] ible, but one action can be brought for damages resulting from its non-performance; † but it often becomes a question, how far a contract is to be treated as entire. And a modification of the general rule which makes the agreement control the amount of damages, is also to be found in that class of cases where the contract is on its face an entire one, and having been performed only in part, compensation is sought for what has been actually done.[1] Such are cases of agreements to work for a specified time for a given sum, where the party employed quits his employment without the consent of the other, and before the period fixed; agreements to deliver a certain quantity of goods, and delivery of only a part; agreements to do work, as building for instance, according to certain specifications, where the work is done but the specifications are departed from; whether in these cases the party failing to perform his agreement strictly has any redress whatever, and to

* Tomlinson *v.* Day, 2 Brod. & Bing. 680. † Campbell *v.* Gates, 10 Penn. State R. 483.

[1] Where work is to be done within a certain time, the employee, by allowing it to go on after the time has expired, waives his right to rescind on that account, and can only claim such damages from the employer as he may have sustained by the delay. Sinclair *v.* Tallmadge, 35 Barb. 602. But other objections are not thereby waived. Nibbe *v.* Brauhn, 24 Ill. 268.

Where work is completed, though not within the agreed time, there may be a recovery in *indebitatus assumpsit* for its value. The special contract will furnish a rule to measure the damages. So far as performance is defective in *time*, it admits of compensation.

Where there was delay in completing a steamboat within the time, the measure of damages was not what it would cost the party to hire another boat for the time, but what would be the *ordinary* hire of such a boat; and in case of defective work, what would be the cost of repairs and the ordinary hire of a boat during the time necessary to make them. Brown *v.* Foster, 51 Penn. St. 165.

When a party is bound by contract to perform a certain work, the agreement will be presumed to contemplate, unless the contrary is expressed, that if any part is to be omitted, there shall be a *pro rata* deduction. Holmes *v.* Stummell, 17 Ill. 455.

what extent, is a very delicate and much-vexed question,[1] which perhaps more properly belongs to the subject of the right of action than that of the measure of damages. The better and sounder rule would seem to be, that unless there is a waiver of the privileged performance, or an acceptance of the partial performance, there can be no recovery.* [2] In cases [216]

* It may not be improper, by way of elucidating the text, to take notice of some of the leading cases. The general principle established by the earlier decisions is, that where the contract is entire, as where A agrees to do a certain thing for which B is to make a certain compensation, the doing of the thing by A is a condition precedent, and he has no remedy until he has fully performed his part.

It has been held in some cases that where the party employing another puts an end to the contract without just cause, the party employed has a right to exact the entire amount of his wages. This, however, is subject to the right to recoup what the plaintiff could reasonably have earned during the time covered by the remainder of the contract. But we are now speaking of the relief claimed where the party employed has not performed his agreement.

So in England, where a master had given a mate a note, promising to pay him thirty guineas, "*provided he proceeded, continued, and did his duty as mate*," *etc., on a certain voyage to Liverpool*, and the mate died during the voy-

[1] On a failure to perform a contract let out by the county to the lowest bidder, who took it at much less than a fair compensation, the county again advertised and relet it. On a suit against the first bidder and his sureties, it was held, that the measure of damages was not the difference between the prices at which the contract was let, but the actual damage to the county by reason of the failure to perform the first contract. Chambers *v.* Fort Bend County, 14 Texas, 34.

In an action for the breach of a contract for work and labor to be done upon a farm, evidence of damage occurring to the plaintiff's crops in consequence of the defendant's leaving his service, is inadmissible. The legal measure of damages, in such cases, is the difference between the wages agreed to be paid to the defendant, and the price the plaintiff was obliged to pay for labor to supply his place. Peters *v.* Whitney, 23 Barb. (N. Y.) 24.

In an action to recover damages for the defective execution of a contract to construct and put up machinery in a flouring mill, in a well-finished and workmanlike manner, and of sufficient size and strength to correspond with the cylinders, the proper measure of damages is the difference between the value of the machinery actually put up, and that agreed to be constructed. In such an action the plaintiff is entitled to recover, in case the jury find that the machinery was not properly constructed, such sum as will be sufficient to put the same in the condition contemplated by the contract; also such sum as the mill would have earned during the time it was necessarily delayed in consequence of the breakage or defects in the machinery, taking the fair ordinary earnings of the mill, after deducting from the gross earnings the expense of running the same, as the net profits. So in case the contract is not performed in *a reasonable time*, the jury are to ascertain how long performance was unreasonably delayed, and then if they find the plaintiff was in a condition to work his mill, by having grain to grind, and is prevented from grinding the same by such unreasonable delay, the plaintiff is entitled to damages to the gross amount of the earnings of the mill, after deducting the expenses of the same. Davis *v.* Talcott, 14 Barb. (N. Y.) 611. This case was reversed in the Court of Appeals on a ground not touching the point in question. 12 N. Y. 184. To like effect is Singer *v.* Farnsworth, 2 Ind. 597.

See also, upon this subject, Waters *v.* Towers, 8 Exch. 401; Hughes *v.* Cannon, 1 Sneed, 622.

[2] And *e converso*, where there is such acceptance of partial performance in lieu of complete performance of an entire contract by one party to it, the other being ready to complete it on his part, the entire consideration may be recovered. Ellis *v.* Willard, 9 N. Y. 529.

Where through the plaintiff's illness, or otherwise through the act of God or of the law, a contract is not completed, a recovery can be had for what is done under it to an amount measured by the value of the service, but limited by the terms of the contract. Wolfe *v.* Howes, 20 N. Y. 197; Jones *v.* Judd, 4 N. Y. 411; Doster *v.* Brown, 25 Geo. 24; Fuller *v.* Brown, 11 Met. 440.

But in the case of an entire executory contract, which the plaintiff without legal excuse has failed to fulfil on his part, he can recover nothing. The courts, as a general rule, have refused in such case to modify the contract of the parties, or substitute another by sanctioning a recovery to any extent. Dermott *v.* Jones, 2 Wallace, 1. See Slater *v.* Emerson, 19 How. (U. S.) 224. Such is the doctrine of New York, maintaining with healthful vigor the necessity of substantially adhering to and fulfilling a fairly made contract, under penalty of the loss of all

of this kind where the plaintiff is held entitled to recover anything, the agreement of the parties, not having been com-

age, it was held in a suit brought by his administratrix, that nothing could be recovered, either on the contract or on a *quantum meruit*. Cutter's Adm'x *v.* Powell, 6 T. R. 320. So if a builder undertakes a work of specific dimensions and materials, and deviates from the specifications, he cannot recover, neither upon the contract nor upon a *quantum valebant*, for the work, labor, and materials. Ellis *v.* Hamlin, 3 Taunt. 52. So, where A

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compensation for what may have been done under it, however discouraging the circumstances attending its execution may prove, unless complete performance be voluntarily waived, or become impracticable. Pullman *v.* Corning, 9 N. Y. 93; Neville *v.* Frost, 2 E. D. S. (N. Y. C. P.) 62. See Chase *v.* Hogan's Executors, Superior Court of N. Y. May, 1867.

In the case of Smith *v.* Brady, 17 N. Y. 173, the subject is fully discussed, and the principle applied to the case of a contract by a builder to erect a building (for which he is to be paid on its completion) on another's land, according to certain specifications, between which and the building as erected, there is a substantial disagreement. In such a case the enforced occupation of the building by the owner is not a waiver of the condition precedent, and although the owner of the land necessarily becomes the owner also of the structure thus attached to his freehold, and cannot be obliged to tear it down, he is nevertheless under no obligation to pay for it.

See also Bryant *v.* Stillwell, 24 Penn. 314. The main question in these cases is that discussed and decided in Smith *v.* Brady, *i. e.*, whether, under the circumstances of the particular case, there has been a voluntary acceptance by the defendant of the plaintiff's incomplete performance. Where such voluntary acceptance is shown, the *pro ratâ* recovery may be had subject to such deduction for damage to the defendant as the plaintiff's failure may have occasioned. Bee Printing Co. *v.* Hichborn, 4 Allen (Mass.), 63. If the acceptance was involuntary, or was compelled only by the necessity of the case, or the defendant's wish to retain property of his own to which the plaintiff's work was an incident or a necessary adjunct, there is no right of recovery.

But in some of the States a laxer doctrine prevails. In Vermont the right of recovery seems to turn, not on the the plaintiff's voluntary acceptance, but on the benefit supposed to be conferred by the work done. In the case of Kelly *et al. v.* The Town of Bradford, 33 Vt. 35, Aldis, J., delivering the opinion of the Supreme Court of that State, says: "The doctrine is firmly established in this State, that where a contract has been substantially though not strictly performed—where the party failing to perform according to the terms of his contract has not been guilty of a voluntary abandonment or wilful departure from the contract, has acted in good faith, intending to perform it according to its stipulations, but has failed in strict compliance with its provisions, and where from the nature of the contract and of the labor performed the parties cannot rescind, and stand in *statu quo*, but one of them must derive some benefit from the labor or money of the other,—in such case the party failing to perform his contract strictly, may recover of the other as upon a *quantum meruit* for such a sum only as the contract as performed has been of real and actual benefit to the other party, estimating such benefit by reference to the contract price of the whole work."

And the rule by which compensation is to be made for the partial performance of the contract, is thus declared:

"The party failing to perform must first deduct from the contract price—

"1st. Such sum as will enable the other party to get the contract completed according to its terms; or where that is impossible or unreasonable, such a sum as will fully compensate him for the imperfection in the work and insufficiency of the materials, so that he shall in this respect be made as good, pecuniarily, as if the contract had been strictly performed.

"2d. Whatever additional damages his breach of the contract may have occasioned to the other."

The cases of Dyer *v.* Jones, 8 Vt. 205; Gilman *v.* Hall, 11 Vt. 510; Brackett *v.* Morse, 23 Vt. 554; Morrison *v.* Cummings, 26 Vt. 486; Hubbard *v.* Belden, 27 Vt. 645; Barker *v.* The Troy & Rutland R. R. Co. 27 Vt. 780; Kettle *v.* Harvey, 21 Vt. 301, and Swift *v.* Harriman, 30 Vt. 607, firmly maintain in that State the same *quasi* equitable doctrine in actions at law, holding that where the stipulations are not in the nature of conditions precedent, a party who but partly fulfils his contract may recover for what has been done under it to the extent that such partial performance has benefited the other. So in the same State, where one agrees to work for another a certain time, he can maintain the action for his compensation without making up time he has reasonably lost during the period, and the time so lost will be deducted. McDonald *v.* Montague, 30 Vt. (1 Shaw) 357. And see Patnote *v.* Saunders, 41 Vt. 66. Such, also, would seem to be the rule in Indiana; *vide* McKinney *v.* Springer, 3 Ind. 59, by which the prior cases of Swift *v.* Williams, 2 Carter, 365, and Hoagland *v.* Moore, 2 Blackf. 167, are overruled as to the point in question.

pletely performed, cannot be conclusive as to the remuneration. Other evidence must be resorted to, and other consid-

undertook for a specific sum of money to *repair and make perfect* a given article then in a damaged state, and did repair it in part, but did not make it perfect, it was held that he could not, in an action of assumpsit, recover for the value of the work done, or the materials found. Sinclair *v.* Bowles, 9 B. & Cres. 92. So, where a servant hired for a year refused to obey his orders, and was dismissed, and brought suit for the time he had actually been employed, it was held by Lord Ellenborough at Nisi Prius, he could not recover. Spain *v.* Arnott, 2 Stark. 256. So on an agreement to deliver one hundred bags of hops by a certain day, and part delivery being made and refused, suit was brought, the plaintiff was non-suited; the court, however, using language somewhat ambiguous, saying that "the contract was entire and could not be split, and that the plaintiff had no right to sue until the whole quantity was delivered, or until the time for delivering the whole had arrived." Waddington *v.* Oliver, 5 Bos. & Pull. 61; and the same decision was made upon a contract for the sale of one hundred sacks of flour. Walker *v.* Dixon, 2 Stark. 281.

So where the defendant had agreed with plaintiff to supply him with one hundred and fifty tons of cast-iron girders, as per drawings to be provided by the plaintiff, and drawings for a few tons' weight only were sent within the necessary time, it was held by the Court of Common Pleas, that the contract was not divisible, and that as drawings for the whole of the girders had not been sent, the plaintiff could not recover for the non-delivery of those for which drawings had been sent. Kingdom *v.* Cox, 5 M. Gr. & S. 522.

The same principle has been recognized in the United States. So, where A agreed to work for B ten and a half months, and spin yarn at three cents per run, and afterwards left the service of B before the expiration of the time, and brought an action against him for spinning eight hundred and forty-five runs at three cents per run, it was held that the contract was entire and must be performed as a condition precedent before he could bring an action against B for the price of the labor. M'Millan *v.* Vanderlip, 12 J. R. 165. The same principle was recognized in regard to a contract for hiring for a year. Thorpe *v.* White, 13 J. R. 53; and the general doctrine, that where a special agreement subsists in full force, the plaintiff cannot recover under the money counts, was laid down in regard to an agreement to deliver whiskey, in Raymond *v.* Bearnard, 12 J. R. 274. See also, Champlin *v.* Rowley, 18 Wend. 187. "The principle has been repeatedly recognized by the courts of this State (New York), that where a party enters into a special contract which is entire, for the sale and delivery of property at a specified price, a full performance on his part is a condition precedent to his right of action against the vendee for the price of any part of the property delivered under the contract." M'Knight *v.* Dunlop, 4 Barb. S. C. R. 36; affirmed 5 N. Y. 537. In Ohio, also, these decisions have been followed; and where the plaintiff agreed to deliver a whole crop of corn, payment to be made on a day certain after the delivery, he cannot recover for a part. Witherow *v.* Witherow, 16 Ohio, 238.

So, again, where the plaintiff had agreed to clear and fence certain land for a specified sum within a given period, and after doing some of the work abandoned it, it was held that he could not maintain an action for the labor actually performed. Jennings *v.* Camp, 13 J. R. 94;[1] and the same principle was held in relation to an agreement to take charge of a certain brick-yard, and make a certain quantity of bricks for a given sum. Clark *v.* Smith, 14 J. R. 326. So also on an agreement to deliver pork. Tuttle *v.* Mayo, 7 J. R. 132.

So, also, where the plaintiff agreed with the defendant to work for him for a year at ten dollars per month, and worked ten and a half months, and then left the defendant's employment on a Saturday, declaring he would work no longer. On Monday he returned and offered to work, but the defendant said he would employ him no more. Upon this he sued the defendant for work and labor, and it was held he could not recover anything. Lantry *v.* Parks, 8 Cow. 63; S. P. Monell *v.* Burns, 4 Denio, 121. And again, in Massachusetts, where one Mansfield had agreed with Holbrook to erect and finish a barn by a certain time for a specified sum, and left the work unfinished, it was held that Mansfield could maintain no action, either on the contract or on a *quantum meruit*, against Holbrook. Faxon *v.* Mansfield, 2 Mass. 147.

So, where the plaintiff agreed to work for the defendant for eight months, for $104, or $13 per month, and quitted the service before the expiration of the time, it was held, in an action for work and labor, that he could not recover. Reab *v.* Moor, 19 J. R. 337.[2]

So in Pennsylvania, a person cannot recover

[1] The same principle was laid down in Allen *v.* Curles, 6 Ohio, 505.

[2] See to the same purport, Henson *v.* Hampton, 32 Miss. 408; Posey *v.* Garth, 7 Mo. 94; Dickson *v.* Caldwell, 17 Mo. 575; Hutchinson *v.* Wetmore, 2 Cal. 310; Schnerr *v.* Lemp, 19 Mo. 40. But in Vermont it has been held, in accordance with the rule in that State, already

erations affect the result. Still, the contract to a certain
[217] extent furnishes the measure of remuneration.[1] And the rule seems to be the same, whether the agreement

for part performance of an entire contract, where he has failed in full performance on his part. Martin *v.* Schoenberger, 8 Watts & Serg. 367.

So in Massachusetts, where the plaintiff agreed to work for the defendant for a year for $120, but before the expiration of the term left his service, without the defendant's fault and against his consent, it was held that he could recover nothing, either on the contract or upon a *quantum meruit*. Stark *v.* Parker, 2 Pick. 267. And the same point was ruled in Moses *v.* Stevens, 2 Pick. 232. So, too, Thayer *v.* Wadsworth, 19 Pick. 349; Olmsted *v.* Beale, 19 Pick. 528; Davis *v.* Maxwell, 12 Met. 286. See *contra* in New York, as to infants, Whitmarsh *v.* Hall, 3 Denio, 375, because they cannot contract.

In a recent case it was said, "If the plaintiff agreed to labor for the defendants for one year, and left their service at the end of six months, she could not maintain an action for the services actually rendered." Rice *v.* Dwight Manuf. Co. 2 Cushing, 80.

So in Vermont, "The contract being entire and executory, although the plaintiff has performed a part of it, yet having failed to perform the remainder, without any sufficient excuse and without the consent of the defendants, he cannot recover either upon the special or general counts. Jones *v.* Marsh, 22 Verm. 144; and s. p. Kettle *v.* Harvey *et al.* 21 Verm. 301; and Mullen *v.* Gilkinson, 19 Verm. 503. But illness, which incapacitates the plaintiff from performing his contract, lets him in to recover on a *quantum meruit*. Seaver *v.* Morse, 20 Verm. 620.[2]

In a recent case in the State of New York, where the plaintiff had agreed to deliver a specified quantity of hay at a given price, and only delivered part, and brought a suit for the value of that part, the learned Chancellor Walworth, however, held this language:—

"The principle insisted upon is, that it is

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noticed (*ante*, 216, note 1), that when an infant makes a contract with an adult to serve for a given time, and leaves before he has performed the whole of the service, he is entitled to recover what his services are reasonably worth, taking into consideration the injury to the other. Hoxie *v.* Lincoln, 25 Vt. 206; and see Thomas *v.* Dike, 11 *Ibid.* 273. So it is held in Tennessee, that if he is discharged, although for sufficient cause, he may, notwithstanding, recover upon a *quantum meruit* the value of the services rendered his employer. Jones *v.* Jones, 2 Swan (Tenn.), 605. See, also, Rodemer *v.* Hazlehurst, 9 Gill (Md.), 288. And a minor who has agreed to work for a certain time, and not to leave without giving notice a certain time beforehand, but does not complete the agreed term, and does not give the notice, is not liable to have the damages thereby occasioned deducted from the amount he would otherwise recover, the minor not being bound by his contract. Derocher *v.* Continental Mills, 58 Maine, 217.

[1] It is long and well settled, that where a special agreement has been executed, and nothing remains to be done except the payment of the money due by the defendant, a general *indebitatus assumpsit* may be maintained, but in such cases the special agreement will furnish the measure of damages. Dermott *v.* Jones, 2 Wallace, 1; Bank of Columbia *v.* Paterson, 7 Cranch, 299; Perkins *v.* Hart, 11 Wheat. 237; Miles *v.* Moodie, 3 S. & R. 211; Williams *v.* Sherman, 7 Wend. 109. See Chamberlin *v.* Scott, 33 Vt. 80, *infra*, 222, note. The measure of damages in an action on the common counts for work accepted, but not done according to the contract, should be the value of the work, with the right in the defendant to recoup damages for the non-performance. Dermott *v.* Jones, 23 How. (U. S.) 220. In an action for negligence in building a cellar under a house by contract, the rule of damages is the amount in money which the value of the cellar and building falls short of what it would have been if the work had been done according to the contract. This difference includes both the cost of supplying such deficiencies as could be supplied without expense disproportioned to the value of the building, and also in the case of such as could not be so supplied, the further or independent diminution in value thereby caused. Moulton *v.* McOwen, 103 Mass. 587.

[2] Wolfe Ex'r *v.* Howes, 20 N. Y. 197; Fahy *v.* North, 19 Barb. 341; Hubbard *v.* Belden, 27 Vt. 645; and see Patrick *v.* Putnam, *Ibid.* 759. And where an agent was employed to superintend the construction of an engineering work under a contract by which he was to receive as compensation a third of the profits besides a salary, but died after the greater part of the work had been done, and it was afterwards finished at a large profit, it was held in an action brought by his executors, that they were entitled to recover the *pro ratâ* proportion of the salary and of the profits under the contract, which last were measured by taking one-third of such a proportion of the whole profits earned and received by the defendant, as the cost of the work done at the time of the testator's death bore to that of the completed undertaking. Clark Ex'r *v.* Gilbert, 26 N. Y. 279.

has been departed from with or without mutual consent.[1] [218] So in a case in Massachusetts, where the plaintiff was

unconscientious and inequitable for a party who has been actually benefited by the part performance of a contract, above or beyond the damages he has sustained by the non-performance of the residue of the agreement, to retain this excess of benefit without making the other party a compensation therefor; and that this excess of benefit, arising from the part performance of the other party, forms a new consideration, upon which the law implies a promise to pay for the same, and which excess of benefit, therefore, may be recovered in the equitable action of assumpsit. But if the nature of the part performance is such that the other party can reject the benefit received therefrom, as by offering to return specific articles received in part performance, but not actually converted or used, he is at liberty to do so, and to reserve his remedy for the non-performance of the contract. Courts of equity sometimes act upon a similar principle, in relieving a party against a penalty or forfeiture arising from misfortune, or the neglect of a party to perform his agreement; and perhaps in some cases it has been done where the forfeiture was incurred wilfully and intentionally, without any pretence of excuse arising from mistake or inability to perform. With the exception of this last class of cases, if courts of justice were at liberty to make new laws instead of administering those which are already in existence, and upon which the contract of the parties litigant is supposed to be founded, or if this were a new question, upon which a court in this State was now to pass for the first time, in settling a principle upon the flexibility of the common law as applied to new cases, I see no reasonable objection to the transferring these principles of the court of chancery to the courts of common law, in cases of mere personal contract not founded upon agreements relative to the sale or transfer of an interest in real estate. But I consider this question as settled in this State by a uniform course of decisions, for the last twenty-five years, during which time the laws have undergone a most thorough revision by the legislature, without any attempt to change the law in this respect, as settled by the Supreme Court. I think it belongs, therefore, to the legislature, and not to this court, to make a change in the law in this respect, if such a change is deemed to be expedient and useful to the community. The only possible objection I can perceive to such a change, is that it may be a strong temptation to negligence in the performance of personal contracts, as the known practice of the court of chancery unquestionably is, with respect to agreements for the sale or purchase of real property." And it was held that the plaintiff could not recover. Champlin *v.* Rowley, 18 Wend. 187.

And this case has been affirmed in New York, where the suit was brought by a party contracting to deliver lumber by a day specified, but who delivered only part of it. Paige *v.* Ott, 5 Denio, 406.

In Louisiana this subject is regulated by the provisions of the Code Act, 2720, 2721. Angelloz *v.* Rivollet, 2 La. Ann. R. 652.

On the other hand, in England and in this country, there is a class of cases which it is difficult, if not impossible, to reconcile with those just cited.

It is laid down as a general position in Buller's Nisi Prius, 139, that if a man declare upon a special contract, and upon a *quantum meruit*, and prove the work done but not according to the contract, he may recover on the *quantum meruit;* for otherwise he would not be able to recover at all. And this general principle was recognized as law in Cooke *v.* Munstone, 4 Bos. & Pul. 351, 355.

So it was held in England, that where there is an entire contract for the delivery of goods, and some of the goods have been delivered, and the vendee *does not return them*, upon the failure of the vendor to perform his part of the contract, the latter may bring an action for the value of the goods. Shipton *v.* Casson, 5 Barn. & Cres. 378.

So, again, where the plaintiff had agreed to deliver to the defendant 250 bushels of wheat, and in fact only delivered 130, and brought suit for the quantity delivered, the King's Bench held he was entitled to recover; Lord Tenterden, C. J., saying, "If the rule contended for were to prevail, it would follow that if there had been a contract for 250 bushels of wheat and 249 had been delivered to and retained by the defendant, the vendor could never recover for the 249, because he had not delivered the whole." And Parke, J. said, "Where there is an entire contract to deliver a large quantity of goods consisting of distinct parcels, within a specified time, and the seller delivers part, he cannot, before the expiration of that time, bring an action to recover the price of that part delivered; because the purchaser may, if the vendor fail to complete his contract, return the part delivered. *But if he retain* the part delivered after the seller has failed in performing his contract, the latter may recover the value of the goods which he has so delivered." Oxendale *v.* Wetherell, 9 Barn. & Cres. 386. But this decision is not law in New York.

In Champlin *v.* Rowley, 18 Wend. 187, above cited, Mr. Chancellor Walworth said,

[1] Smith *v.* Foster, 36 Vt. 705.

allowed to recover on a *quantum meruit* for building a [219] house, the agreement not having been strictly adhered

"This decision, carried to the extent it was in that case, cannot be considered as good law anywhere, for it is not founded upon any equitable principle, and is contrary not only to justice, but to common sense. The only way I can account for it is upon the supposition that the facts of the case are not properly stated in the report, or that the injustice of requiring the party who was not in fault to be at the expense of returning to the other party bulky articles of this description, or even of seeking him for the purpose of making an offer to return them, to protect himself from an action, was not presented to the consideration of the court."

So also, in this country, it has been said that where there is an honest intention to pursue the contract, and a substantive execution of it, but some comparatively slight deviations as to some particulars provided for, if the partial performance of the contract is of any value or benefit to the other party, he who does the work may recover on a *quantum meruit*. So it was held in Massachusetts, on a building contract, Hayward *v.* Leonard, 7 Pick. 181; and the same point was again decided on a similar contract, in Smith *v.* First Cong. Meeting House in Lowell, 8 Pick. 178. See the latter case commented on in Pullman *v.* Corning, 14 Barb. S. C. R. 174 (affirmed 9 N. Y. 93), and disapproved.

See, in the same State, a case where a plaintiff who had undertaken to build a bridge, but had departed from the contract, and built it so unskilfully that it was carried away, and it was held that he could not recover on the contract because he had not pursued it, nor on the *quantum meruit*, because the defendants *had received no benefit from his labors*. Taft *v.* Inhabitants of Montague, 14 Mass. 282. In the same State, see Moulton *v.* Trask, 9 Met. 577.

It is also settled in New York, by repeated decisions, that if there be a special agreement to do a piece of work, and the work be done, but not pursuant to such agreement, either in point of time or any other respect, the party can recover what the work is reasonably worth on the common counts.[1] So on an agreement to deliver bore and lay log water-pipes. Linningdale *v.* Livingston, 10 J. R. 36. So on a contract to construct a mill within a given time for a given sum. Jewell *v.* Schroeppel, 4 Cowen, 564. And on a contract to ship cotton. Peltier *v.* Sewall, 12 Wendell, 386. And so in Iowa, Davies *v.* Fish, 1 Greene (Iowa), 407; Dubois *v.* Delaware & H. C. Co. 4 Wend. 290. In Vermont, see Myrick *v.* Slason, 19 Verm. 121.

And there is a very numerous class of analogous cases, which we shall have occasion to notice when we come to the subject of *Recoupment*, where, on the imperfect performance of an agreement, the defendant is allowed to recoup his loss in damages, thus recognizing the general principle, that the precise performance of the agreement is not necessary to entitle the plaintiff to recover.

The subject presents, indeed, one of the most vexed questions in the law; and though it regards, as I have said, perhaps more strictly the cause of action, or the right of the parties, than the measure of relief, it may not be improper to notice the mode in which the difficulty has been solved by the very learned and able Supreme Court of New Hampshire.

In an action for work and labor, it appeared that the plaintiff had agreed to work for the defendant one year for a given sum, and that before the expiration of the time agreed on, he had quitted his service without the defendant's consent, and on this he was held entitled to recover for the time he was employed. Parker, C. J., after commenting on the extreme disagreement and want of harmony among the cases, and calling particular attention to those where a recovery had been allowed on partial performance of agreements to build, proceeded to say,—Britton *v.* Turner, 6 N. H. R. 495,—

"The cases for building, etc., are not to be distinguished, in principle, from the present, unless it be in the circumstance that where the party has contracted to furnish materials, and do certain labor, as to build a house in a specified manner, if it is not done according to the contract, the party for whom it is built may refuse to receive it, elect to take no benefit from what has been performed, and therefore if he does receive, he shall be bound to pay the value; whereas in a contract for labor merely, from day to day, the party is continually receiving the benefit of the contract, under an expectation that it will be fulfilled, and cannot, upon the breach of it, have an election to refuse to receive what has been done, and thus discharge himself from payment.

"But we think this difference in the nature of the contracts does not justify the application of a different rule in relation to them.

"The party who contracts for labor

[1] But to sustain such a recovery there must be a waiver of strict performance or an acceptance of the work done, or the equivalent of one of these. Pullman *v.* Corning, 9 N. Y. 93.

to, and the jury were told at the trial to consider [220] what *the house was worth* to the defendant, and give

merely, for a certain period, does so with the full knowledge, that he must, from the nature of the case, be accepting part performance from day to day, if the other party commences the performance, and with knowledge also that the other may eventually fail of completing the entire term. . . . . It is said that in those cases where the plaintiff has been permitted to recover, there was an acceptance of what had been done. The answer is, that where the contract is to labor from day to day, for a certain period, the party for whom the labor is done, in truth stipulates to receive it from day to day, as it is performed; and although the other may not eventually do all he has contracted to do, there has been necessarily an acceptance of what has been done in pursuance of the contract, and the party must have understood when he made the contract, that there was to be such acceptance. . . . . We have no hesitation in holding that the same rule should be applied to both classes of cases, especially as the operation of the rule will be to make the party who has failed to fulfil his contract, liable to such amount of damages as the other party has sustained, instead of subjecting him to an entire loss for a partial failure, and thus making the amount received in many cases wholly disproportioned to the injury. . . . . We hold, then, where a party undertakes to pay upon a special contract for the performance of labor, or the furnishing of materials, he is not to be charged upon such special agreement until the money is earned according to the terms of it; and where the parties have made an express contract, the law will not imply and raise a contract different from that which the parties have entered into, except upon some further transaction between the parties.

"In case of a failure to perform such special contract, by the default of the party contracting to do the service, if the money is not due by the terms of the special agreement, he is not entitled to recover for his labor, or for the materials furnished, unless the other party receives what has been done or furnished, and upon the whole case derives a benefit from it.

"But if, where a contract is made of such a character, a party actually receives labor, or materials, and thereby derives a benefit and advantage, over and above the damage which has resulted from the breach of the contract by the other party, the labor actually done, and the value received, furnish a new consideration, and the law thereupon raises a promise to pay to the extent of the reasonable worth of such excess. This may be considered as making a new case, one not within the original agreement, and the party is entitled to recover on his new case for the work done, not as agreed, yet accepted by the defendant.

"If, on such failure to perform the whole, the nature of the contract be such that the employer can reject what has been done, and refuse to receive any benefit from the part performance, he is entitled so to do, and in such case is not liable to be charged, unless he has before assented to and accepted of what has been done, however much the other party may have done towards the performance. He has, in such case, received nothing, and having contracted to receive nothing but the entire matter contracted for, he is not bound to pay; because his express promise was only to pay on receiving the whole, and, having actually received nothing, the law cannot and ought not to raise an implied promise to pay.

"But where the party receives value, takes and uses the materials, or has advantage from the labor, he is liable to pay the reasonable worth of what he has received. And the rule is the same, whether it was received and accepted by the assent of the party prior to the breach, under a contract by which, from its nature, he was to receive labor, from time to time, until the completion of the whole contract; or whether it was received and accepted by an assent subsequent to the performance of all which was in fact done. If he received it under such circumstances as precluded him from rejecting it afterwards, that does not alter the case; it has still been received by his assent. . . . The amount, however, for which the employer ought to be charged, where the laborer abandons his contract, is only the reasonable worth, or the amount of advantage he receives upon the whole transaction; and, in estimating the value of the labor, the contract price for the service cannot be exceeded.

"If a person makes a contract fairly, he is entitled to have it fully performed; and if this is not done, he is entitled to damages. He may maintain a suit to recover the amount of damage sustained by the non-performance.

"The benefit and advantage which the party takes by the labor, therefore, is the amount of value which he receives, if any, after deducting the amount of damage; and if he elects to put this in defence, he is entitled so to do; and the implied promise which the law will raise, in such case, is to pay such amount of the stipulated price for the whole labor as remains after deducting what it would cost to procure a completion of the residue of the service, and also any damage which has been sustained by reason of the non-fulfilment of the contract.

"If in such case it be found that the damages are equal to or greater than the amount

that sum in damages,—on a motion for a new trial,
[221] this was held wrong, the court saying, "The house might have been worth the whole stipulated price, notwithstanding the departures from the contract. They should have been instructed to deduct so much from the contract price as the house was worth less on account of these departures." And a new trial was granted.* [3]

of the labor performed, so that the employer, having a right to the full performance of the contract, has not upon the whole case received a beneficial service, the plaintiff cannot recover. . . . There may be instances, however, where the damage occasioned is much greater than the value of the labor performed; and if the party elects to permit himself to be charged for the value of the labor, without interposing the damages in defence, he is entitled to do so, and may have an action to recover his damages for the non-performance, whatever they may be.

"And he may commence such action at any time after the contract is broken, notwithstanding no suit has been instituted against him; but if he elects to have the damages considered in the action against him, he must be understood as conceding that they are not to be extended beyond the amount of what he has received, and he cannot afterwards sustain an action for further damages." [1]

In Illinois, a different conclusion has been arrived at. In an action for work and labor, it appeared that the plaintiff had agreed to work for the defendant on his farm for eight months for ninety dollars; but that he left the defendant's employment, without his consent or fault, at the end of four months. It was held that the plaintiff could not recover on a *quantum meruit* for the time during which he had actually bestowed his labor. And the court said, "It is no objection to say that the defendant has received the benefit of his labor, this being a case where, from its nature, the defendant could not separate the products of his labor from the general concerns of his farm, and ought not, therefore, to be responsible to any extent whatever for not doing that which was impossible." Eldridge *v.* Rowe, 2 Gilman, 91.[2]

The subject has been recently considered in New York. It was there held, in a case where the plaintiff contracted with the defendants to build a stone building in a good and workmanlike manner at a specified sum, and the house was built in so unskilful a manner that the walls cracked, and could not be made good and safe walls without taking down and rebuilding two-fifths of them,—that the plaintiff could not recover any compensation for his work. Pullman *v.* Corning, 9 N. Y. 93.

* Hayward *v.* Leonard, 7 Pick. 181.

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[1] See, to a similar effect, Lowe *v.* Sinklear, 27 Mo. (6 Jones) 308.

[2] But compare Downey *v.* Burke, 23 Mo. 228.

[3] Other authorities to the same purport are Bishop *v.* Price, 24 Wisc. 480; Horn *v.* Batchelder, 41 N. H. 86; Laton *v.* King, 19 N. H. 280; Wadleigh *v.* Town of Sutton, 6 N. H. 15; Corwin *v.* Wallace, 17 Iowa, 374; Tait *v.* Sherman, 10 Iowa, 60; Crookshank *v.* Mallory, 2 Iowa (Greene), 257; White *v.* Oliver, 36 Me. 92; Hillyard *v.* Crabtree, 11 Tex. 264; Davidson *v.* Edgar, 5 *Ibid.* 492; Merrow *v.* Hunton, 25 Vt. 9; Morrison *v.* Cummings, 26 *Ibid.* 486; Davis *v.* Barrington, 10 Fost. (N. H.) 517. See, also, Vandeusen *v.* Blum, 18 Pick. 229; Hayden *v.* Madison, 7 Greenl. 76. The amount recovered in such case cannot exceed the price which would have been allowed under the contract for the same amount of work or quantity of materials, had the contract been fulfilled. The mode of ascertaining the real benefit received from the part performance of work, in such case, is to estimate the whole work at the price fixed by the contract, and to deduct from that the amount requisite to complete the part of the work left unfinished. If any loss is occasioned by the unfinished part costing more in proportion than the whole was undertaken for, the loss must be borne by the party who originally contracted to do the whole. The amount to be allowed may in some cases be less than the proportion which the work done would bear to the cost of the whole, but cannot exceed it. M'Kinney v. Springer, 3 Ind. R. 59. If in such a case the plaintiff is put to the same expense in time and money as if he had fully performed, the contract price of the whole work is the measure of damages. Wood *v.* Schettler, 23 Wisc. 501. See Epperly *v.* Bailey, *Ibid.* 72; Manville *v.* M'Coy, *Ibid.* 148; Heaston *v.* Colgrove, *Ibid.* 265. Compare, also, Bristol *v.* Tracy, 21 Barb. (N. Y.) 236; Kidd *v.* Belden, 19 *Ibid.* 276; The Isaac Newton, 1 Abbott's Adm. R. 11. But the party in default must not gain by his default, nor the other lose by it. Parties often agree to give excessive prices to have an entire contract literally performed, when a partial performance would never have been contracted for. And though the contract price, as far as practicable and equitable, furnishes the measure of dam-

DEVIATION BY CONSENT.—So, also, where work is done under a special agreement at estimated prices, and there is a deviation from the original plan, by the *consent of the parties*, the contract is made the rule of payment, as far as it can be traced, and for the extra labor the party is entitled to his *quantum meruit*.[1] It has been thus decided, both in England * and in New York. Where performance of a special contract was prevented by the defendant, and suit brought on [222] the general counts, the court said, "The defendant may give the contract in evidence with a view to lessen the quantum of damages. So far as the work was done under the special contract, the prices specified in it are, as a general rule, to be taken as the best evidence of the value of the work.[2] Where it does not appear that the work was rendered more expensive to the plaintiff than was contemplated when the contract was made, or than it otherwise would have been, in consequence of the improper interference of the defendant, or of his neglect or omission to perform what by the contract he was bound to do, the contract prices should be held conclusive between the parties. But if the defendant neglect to furnish the materials which he was to find in due time, so that the plaintiff is obliged to do his work at a less favorable season, and at an additional expense, such expense ought to be taken into consideration and added to the contract price." †[3]

* Robson *v.* Godfrey, 1 Holt N. P. C. 236. † Koon *v.* Greenman, 7 Wend. 123.

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ages on such a *quantum meruit*, and the defaulting party can in no case recover more, yet he can have his *quantum meruit* only, and is not entitled to the contract price for what is worth less. See Allen *v.* M'Kibben, 5 Mich. 449. But in Michigan, in an action for work and labor, where the defendant had broken his contract, it was recently held that the other party could recover the reasonable value of the work beyond the consideration paid. Kearney *v.* Doyle, 22 Mich. 294. And see Western *v.* Sharp, 14 B. Monr. (Ky.) 177.

See Hollinshead *v.* Mactier, 13 Wend. 276, where the parties entirely departed from the specifications of the contract.

[1] See Merrill *v.* The Ithaca and Owego R. R. Co. 16 Wend. 586. So in Missouri. Marsh *v.* Richards, 29 Mo. 99. And see Barcus *v.* Hannibal, Ralls Co. and Paris Plank R. Co. 26 Mo. 102.

And where the contractor is in default, so that he cannot sue upon his contract, but the other party has stood by and seen him prosecute the work without objection, and been benefited by his labor and materials, the contractor is entitled to compensation, to the extent of such benefit. But the profits which he might have made if he had complied with his engagement, cannot be included in his damages. Carland *v.* New Orleans, 13 La. Ann. 43. The law in such case implies a promise on the other's part to pay what the labor was reasonably worth, of which the special contract will furnish the evidence. Jewell *v.* Schroeppel, 4 Cow. 564.

As to the mode of estimating the amount recoverable in various cases on a *quantum meruit*, see Edington *v.* Pickle, 1 Sneed (Tenn.), 122; Stockbridge *v.* Crooker, 34 Me. 349; Cole *v.* Clark, 3 Wisc. 323.

[2] See McClelland *v.* Snider, 18 Ill. 58; Western *v.* Sharp, 14 B. Monr. (Ky.), 188; Brigham *v.* Hawley, 17 Ill. 38.

[3] In an action of assumpsit to recover for machines partly constructed under a contract between the plaintiff and defendant, but left unfinished, owing to the defendant's neglect to furnish necessary castings, and therefore not delivered, the measure of damages was not the

EXTRA WORK.—There may be cases where the work embraced in the contract is performed under circumstances less advantageous than were expected at the time of the estimate, and where the additional expense thus incurred should be added to the contract price. So, in a case where the plaintiff entered into a written contract with the defendants to construct a section of a canal, to receive nine cents per cubic foot for excavation, forty cents per cubic yard for rock, and eleven cents for embankment; and the defendants had so far rescinded the contract as to enable the plaintiff to recover in the form of a *quantum meruit*, the plaintiff was held at liberty to recover for excavating *hard pan* (that not being mentioned nor included in the contract), at the rate which it was worth; and to prove the value of his labor in this respect, wholly irrespective of the contract. The contract contained a provision that the judgment of the defendant's engineer should, in case of a difference between the parties, be conclusive; but this was held not to apply to the hard pan.* [1]

And where the plaintiffs, contractors on a railroad, were stopped by the defendants, and it was impracticable to ascertain what sum would be due at the prices stipulated in the contract, because when the work was stopped a large
[223] portion of it was in such an unfinished state as to be incapable of measurement, the plaintiffs were held entitled

* Dubois *v.* Delaware and Hudson Canal Co. 4 Wend. 285; s. c. 12 Wend. 334; and s. c. in error, 15 Wend. 87. In Alabama, see Aikin *v.* Bloodgood, 12 Ala. (N. S.) 221.

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value of the labor and material on these machines, but the plaintiff's damages for being prevented from completing them and receiving the agreed price—taking into account whatever the unfinished machines left on his hands were worth to him. Allen *v.* Thrall, 36 Vt. 711. See Kugler *v.* Wiseman, 20 Ohio, 361.

[1] It is the duty of a contractor who has undertaken a piece of work, such as the erection of a house for a specified price, but without specification as to the manner or style of the work, when he proposes to do any part of it in a more costly style than would be justified by the agreed price, to inform the employer of the difference in cost. The employer has *prima facie* a right to suppose, unless apprised of the contrary, that every proposition as to different parts of the work is made under the contract for the whole, and is intended merely to present him with a choice of modes within that contract. To get rid of this inference, the contractor must show, either that he notified his employer that his proposition was a departure from the original design and contract, and would be attended with increased cost, or that its character necessarily gave him this information. As to costly work done in his absence, and in a manner not previously approved by him, it is not enough to show that on his return, he was pleased with its appearance, and did not order it to be removed.

The rule sanctioning payments for alterations and additions not originally contemplated, as far as the work can be traced under the contract, must be so applied as not to violate the above principles. Nor, it seems, should extra work, either in quantity or quality, unless done under an express agreement or on a statement of the price, be charged for at a greater rate in reference to the measure and value price of such work than the contract bears to the measure and value price of the work contracted to be done. See Jones *v.* Woodbury, 11 B. Monroe, 167.

to recover as on a *quantum meruit*, without reference to the rate of compensation specified in the contract.* [1]

WORK STOPPED BY THE OTHER PARTY.—So, also, if the contract is rescinded, one party stopping the work while the other is ready to proceed. In this case he is at liberty to prove the value of his services; but the contract is, nevertheless, not to be altogether disregarded.[2] So, where the plaintiff had agreed with the defendants to make a section of an aqueduct, to be paid one dollar per cubic yard for rock excavation, the defendants stopped the work when about half of it was done. The plaintiff proved that he had lost on the part of the work which he had executed (that being the most expensive), estimating it at the contract price of one dollar per yard, the sum of $46,800, and that he would have made a profit on that portion of the contract which remained to be executed when the work was suspended, equal to the amount of his loss on the work

* Derby *v.* Johnson, 21 Verm. R. 17.

[1] And where there is a special contract for labor, and an entire sum to be paid for it, and the plaintiff has performed a part according to its terms, and has been prevented from performing the whole by the defendant, he may sue either on the contract to recover damages for the breach of it, or in general assumpsit to recover for the value of what he has done. If he sue on the contract, he must set it forth specially, and then his damages for what he has done under it must be regulated by the contract price, and he will recover such a proportion of the whole of that price as the work he has done bears to the whole work. And in such a suit he may recover whatever other damages he may have sustained by the defendant's breach; as, for instance, if the contract were a profitable one, the profit he would have made by being allowed to complete it, and the damages he may have incurred in providing labor and means to perform the residue.

If he choose to waive the contract and sue in general assumpsit for work and labor, then his measure of damages will be a reasonable compensation for the work actually performed. He is not then limited to a recovery of his *pro ratâ* share of the agreed price. Chamberlin *v.* Scott, 33 Vt. 80; M'Cullough *v.* Baker, 47 Mo. 401. These views express, we think, the prevalent rule. But see Doolittle *v.* M'Cullough, 12 Ohio St. 360 (*infra*).

[2] So where one who has contracted to perform or construct a work is wrongfully prevented by the employer from completing it, the measure of damages is the difference between the price agreed to be paid for the work, and what it would have cost the plaintiff to complete it. Myers *v.* The York & Cumberland R. R. Co. 2 Curtis' C. C. R. 28; Durkee *v.* Mott, 8 Barb. (N. Y.) 423. Differently stated, the rule in such a case is recompense to the plaintiff for the part performance, and indemnity for his loss in respect to the part unexecuted. Friedlander *v.* Pugh, 43 Miss. 111. In an action for such a breach of contract, evidence by the defendant to show that the fulfilment of the contract would have cost the plaintiff more than he was to receive from the defendant, is proper. Durkee *v.* Mott, 8 Barb. (N. Y.) 423.

But where the defendants wilfully embarrass and delay the plaintiffs, so that the contract which would have been profitable on the original estimates has, in consequence of such conduct, become the reverse, the original principles and mode of estimate may, at the plaintiff's election, be departed from, and he may recover under a *quantum meruit*. Merrill *v.* Ithaca & Owego R. R. Co. 16 Wend. 586.

So in executory contracts, a party exercising the power he possesses of stopping the other's performance by an explicit order, subjects himself to such damages as will compensate the other for being stopped at that point. In the case of a refusal to accept goods contracted for, the measure of damages would be the difference between the price stipulated for the goods not delivered and what it would cost to furnish and deliver them. Danforth *v.* Walker, 37 Vt. 239.

done; and it was held that he was entitled to recover that sum, $46,800.*[1]

PROPERTY DELIVERABLE AT A FUTURE DAY.—It is proper here to notice generally, in regard to executory contracts for the delivery of property at a future day, that if the article does not come up to the agreement, the vendee may return it and sue for damages; differing in this respect from such sales with warranty, when if the warranty is broken the party cannot return the article, but is left to his action on the agreement.† We shall have occasion to notice this again when we come to speak of warranty of personal property.

CONTRACT FOR SERVICE.—In Georgia, it has been held in an action brought by the overseer of a plantation engaged for a limited time, and dismissed without cause, that his remedy was threefold: that he might either bring an action at once for any special injury sustained by reason of the breach of the contract;

* Clark *v.* The Mayor, &c. 3 Barb. S. C. R. 288. This case was reversed on appeal, 4 Comstock, 338, on the ground that where the contractor elects to consider the contract as rescinded, and sues for work and labor generally, he cannot recover profits, and the rule of damages is the actual value of what has been done.

† Freeman *v.* Clute, 3 Barb. S. C. R. 424.

[1] In this case Mr. Justice Pratt, in delivering the opinion of the Court of Appeals, after saying that "when parties deviate from the terms of a special contract, the contract price will, so far as applicable, be the rule of damages," lays down the rule since adopted by the Supreme Court of Vermont (Chamberlin *v.* Scott, *supra*), and adds, "But when the contract is terminated by one party against the consent of the other, the latter will not be confined to the contract price, but may bring his action for a breach of the contract, and recover as damages all that he may lose by way of profits in not being allowed to fulfil the contract; or he may waive the contract and bring his action on the common counts for work and labor generally, and recover what the work done is actually worth."

The Supreme Court of Ohio, in discussing this decision, dissent from these views and declare it as a rule in all cases that "the express contract furnishes the measure of damages to the extent of the evidence it affords, and to the same extent as in cases where the contract continues in force but remains neglected and unperformed by the defendant," and that this rule remains the same, notwithstanding the contract was terminated by the defendant against the plaintiff's consent. Doolittle *v.* McCullough, 12 Ohio State, 360.

Where one sues to recover for his damages in manufacturing an article (as a steam engine), which has been countermanded, the measure of his damages is not simply the value of his labor; the materials may have been increased in value by his labor, in which case a proportionate deduction from his claim should be made; or they may have been diminished in value, in which case his damage is to that extent enhanced. The jury are to determine the enhancement or diminution, and assess the damages accordingly. Hosmer *v.* Wilson, 7 Mich. 294; Dillon *v.* Anderson, 43 N. Y. 231.

Where the defendants agreed at a fixed price to convey six vessel loads of lumber from Saginaw to Chicago—one in August, two in September, two in October, and one in November, and carried five only—one in August, one in September, one in October, and two in November—and freight rose in October and largely in November, and there was no evidence of any agreement of the parties to apply the extra cargo to the default in September or October, it was held that the defendants had a right to have the extra cargo carried in November, and which had been accepted by the plaintiffs, stand as a substituted performance for the cargo they had failed to carry in October, and that the plaintiffs would be entitled to such damages only as they had sustained by the defendants' failure to carry one of the September cargoes. Lord *v.* Strong, 6 Mich. 61.

or, secondly, that he might wait till the end of the period for which he was engaged, and recover his whole wages; [224] or, thirdly, that he might treat the contract as rescinded, and recover as on a *quantum meruit*, for the time and labor actually expended.*[1]

ARBITRATION.—In regard to contractors for works, another question sometimes presents itself, of great importance to the amount of recovery; and it is settled, that where the parties agree that the estimate of any third party shall be conclusive on the question of remuneration, the courts will so treat it. If, indeed, by fraud or collusion, the arbitrator selected refuses to make an estimate, then the plaintiff may resort to other testimony. But he cannot do this so long as the defendant observes and insists on the contract.†

PROSPECTIVE DAMAGES.—A question of interest and importance is sometimes presented, in regard to prospective damages, or damages which accrue after the suit is brought. We have already had occasion to take notice of this matter.‡

CONTINUING AGREEMENT.—The same point arises in regard to continuing agreements, or agreements to do specified acts at certain successive periods. In these cases, it has been doubted whether the damage should be assessed as at the time of the first breach, or whether the whole period of the contract is to be gone through, and an estimate made of the damages sustained, with reference to each period fixed for performance. This, again, depends, to a certain extent, on another question, whether the contract will admit of more than one action being brought on it, or whether the first recovery is conclusive of the plaintiff's rights. It is an ancient rule of our law that one action only can be maintained for the breach of an entire contract; and a judgment obtained by the plaintiff in one suit may be pleaded in bar of any second proceeding; ‖ but the difficulty is, to determine in what cases the contract is entire.[2] The question was first

* Rogers *v.* Parham, 8 Cobb. Ga. R. 198.

† Hotham *v.* East India Co. 1 T. R. 638; Easton *v.* Penn. & Ohio Canal Co. 13 Ohio, 79; and Randel *v.* Ches. & Del. Canal Co. 1 Har. 233; Canal Trustees *v.* Lynch, 5 Gilman (Ill.), 521; Merrill *v.* Gore, 29 Maine R. 346.

‡ *Ante*, 104.

‖ Badger *v.* Titcomb, 15 Pick. 409; Bendernagle *v.* Cocks, 19 Wend. 207; Rudder *v.* Price, 1 H. Bl. 547.

[1] See as to the rule of damages in contracts for service, *post*, 351, *et seq.* and notes, *Ib.*

[2] If a plaintiff recover compensation for part of a cause of action, it satisfies the whole. Town of Marlborough *v.* Sisson, 31 Conn. 332; Baker Ex'r *v.* Baker, 4 Dutch. (N. J.) 13; Veghte *v.* Hoagland, 5 Dutch. (N. J.) 125. But a recovery of nominal damages for the infringement of a right will not bar a suit for actual damages sustained after the bringing

presented on contracts to pay debts by instalments. Debt was then the only form of action to recover a sum certain; and it was held that on a bond or other contract to pay divers sums on divers days, no action of debt would lie until all the days [225] were past.* So stood the law until the reign of Elizabeth, when the decision in Slade's case introduced the action of assumpsit into general practice.† The rule was then modified as regards the action of assumpsit, and in cases of money payable by instalments, the plaintiff was allowed to proceed upon the first default; but it was still held that the judgment was a full satisfaction, and the plaintiff therefore recovered damages for all the prospective breaches.‡ This latter rule in regard to assumpsit was further modified by a decision made in the reign of Charles II, when, in an action on an award to pay several sums at several times, the court held that an action might be brought for each sum when due, and that the plaintiff should recover damages accordingly, and have a new action as the other sums became due, *toties quoties.*‖ The rule in debt, however, appears unaltered.¶ So stands the matter in regard to agreements for the payment of money at specific future periods. In New York the rule which enforces the indivisibility of entire demands has been applied to open accounts for goods sold; and it has been held that the whole of such an account must be recovered, if at all, in one suit.** But in Massachusetts the doctrine of this case has been denied.††

AGREEMENTS TO DO VARIOUS ACTS.—The question becomes more complicated when we approach the consideration of agreements to do specific acts at various prospective periods. In a case in New York, where the defendant had covenanted with the

* Fitzh. Nat. B. 131; Taylor *v.* Foster, Cro. Eliz. 807; Milles *v.* Milles, Cro. Car. 241.

† 4 Coke's Rep. 94.

‡ Beckwith *v.* Nott, Cro. Jac. 504.

‖ Cooke *v.* Whorwood, 2 Saund. 337.

¶ Rudder *v.* Price, 1 H. Bl. 547.

** Guernsey *v.* Carver, 8 Wend. 492; Bendernagle *v.* Cocks, 19 Wend. 207; Clark *v.* Jones, 1 Denio, 516.

†† Badger *v.* Titcomb, 15 Pick. 409.

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of the first suit. Successive suits for actual damages may be brought from time to time as the damages are sustained, and in each suit the party may recover such damages as he has sustained before its commencement not barred by a previous recovery. McConnel *v.* Kibbe, 33 Ill. 175.

If one contracts to serve another for one year at a stipulated sum, payable monthly, and is discharged without any fault on his part before the expiration of the year, he may treat the contract as still subsisting, and sue in assumpsit for wages due according to its terms; or he may consider it rescinded, and sue for unliquidated damages for its breach. If he sues on the contract, he can only recover the wages due by its terms before the institution of the suit; if for damages for breach of contract, he is entitled to recover the actual damage sustained up to the trial; but the sum specified in the contract is not of itself necessarily the exact measure of such actual damage. Fowler *v.* Armour, 24 Ala. 194; but compare Goodman *v.* Pocock, 15 Q. B. 576; and see *post*, 351, notes.

plaintiff to keep a certain gate in repair, and to use common care in shutting it when passing and repassing, it was held that if the gate was left unrepaired or open, the defendant would be responsible in an action on the covenant, and that the true measures of damages would be the amount of the plaintiff's loss by the breach proved; that for every second breach a fresh action would lie; that a refusal to rebuild the gate did not amount to a total and final breach of the covenant, nor could the damages recovered in a suit brought for one breach be presumed to have been given as a compensation for [226] the non-performance of the covenant through all future time, so as to bar further suits.*

But it has been held by the same court, that all the breaches which have actually taken place, must be embraced in the first suit; and that even if they are not, a second suit will not lie for them.† [1] In a recent case in New York, a bond had been given conditioned to furnish the plaintiffs their support during their natural lives; and it was held that a failure by the obligor to provide for the obligee according to the covenant, amounted to a total breach, and that full and final damages might be recovered.‡ It appears, therefore, that in debt for money payable by instalments the action will not lie till all the sums are due, but that in assumpsit an action may be brought for each sum as it becomes payable; that in agreements to do certain acts for a continuing period of time, an action may be brought for each breach, and damages for each of the breaches separately assessed, but that all the breaches actually committed must be declared for in one suit.

Fluctuations in Value during Contract.—There is still another class of cases, namely, where the contract covers a long space of time, and during that period the value of the thing in controversy has fluctuated. Thus, in a case in New York, which we have already had occasion to notice in reference to another branch of our subject,‖ the plaintiff, in 1836, agreed to furnish and deliver marble to build a city hall, at successive periods in five successive years. In 1837 the defendants refused to receive any more, and it was shown that the difference be-

* Crain *v.* Beach, 2 Barb. S. C. R. 120, and s. c. on appeal, Beach *v.* Crain, 2 Comstock, 86; and see, also, Fish *v.* Folley, 6 Hill, 54.

† Bendernagle *v.* Cocks, 19 Wend. 207; Bristowe *v.* Fairclough, 1 M. & G. 143; Pinney *v.* Barnes, 17 Conn. 420.

‡ Shaffer *v.* Lee, 8 Barb. S. C. R. 413, where the cases are collected at large.

‖ Masterton *v.* Mayor of Brooklyn, 7 Hill, 62, *ante*, 76.

[1] See Colvin *v.* Corwin, 15 Wend. 557.

tween the cost of the marble and the contract price, which was the measure of damages, had fluctuated considerably in the five years. On this state of facts the circuit judge charged, that, "In fixing damages to be allowed the plaintiffs, the jury were to take things as they were at the time the work was suspended, and not allow for any increased benefit they would have [227] received from the subsequent fall of wages or subsequent circumstances." And of this opinion was the majority of the court, on a motion for a new trial.

Nelson, C. J., who delivered the leading opinion, said:—

"It has been argued that, inasmuch as the furnishing of the marble would have run through a period of five years, of which about one year and a half only had expired at the time of the suspension, the benefits which the party might have realized from the execution of the contract, must necessarily be speculative and conjectural; the court and jury having no certain data upon which to make the estimate. If it were necessary to make the estimate upon any such basis, the argument would be decisive of the present claim. But in my judgment no such necessity exists. Where the contract, as in this case, is broken before the arrival of the time for full performance, *and the opposite party elects to consider it in that light,* the market price on the day of the breach is to govern in the assessment of damages. In other words, the damages are to be settled and ascertained according to the existing state of the market at the time the cause of action arose, and not at the time fixed for full performance. The basis upon which to estimate the damages, therefore, is just as fixed and easily ascertained in cases like the present, as in actions predicated upon a failure to perform at the day." Page 71.

And Bronson, J., said:—

"There may have been fluctuations in the prices of labor and materials, between the day of the breach and the time when the contract was to have been fully performed, and this makes the question upon which my brethren are not agreed. I concur in opinion with the chief justice, that such fluctuations in prices should not be taken into the account in ascertaining the amount of damages, but that the court and jury should be governed entirely by the state of things which existed at the time the contract was broken. This is the most plain and simple rule; and it will best preserve the analogies of the law, and will be as likely as any other to do substantial justice to both parties. Page 76.*

* Beardsley, J., however, dissented, saying, —"The plaintiffs were not bound to wait till the period had elapsed for the complete performance of the agreement, nor to make successive offers of performance, in order to recover all their damages. They might regard the contract as broken up so far as to absolve them from making further efforts to perform, and give them a right to recover full damages as for a total breach. I am not prepared to say that the plaintiffs might not have brought successive suits on this covenant, had they from time to time made repeated offers to perform on their part, which were refused by the defendants; but this the plaintiffs were not bound to do."

"There can be no serious difficulty in assessing damages according to the principles which

The decision in this case has been adhered to in New [228] York;* and it has been cited with approbation and its authority recognized in Louisiana.† [1]

In a case in Vermont, the rule was laid down as follows:— The defendants, a bridge company, had, in September, 1830, agreed with the plaintiffs to keep a bridge in repair for twelve years, on the plaintiffs' paying twenty-five dollars every year. The plaintiffs paid the annual sum till 1838, when the defendants ceased to repair; and the judge charged at the trial, that the jury "should limit their inquiries to the time when both the parties ceased in fact to act under the contract." But on motion for a new trial, the court said, "The rule of damages in this case should have been, to give the plaintiffs the difference between what they were to pay the defendants, and the probable expense of performing the contract, and thus assess the entire damages for the remaining twelve years.‡

Distinction between Indivisible and Severable Contracts. —Perhaps, on principle, a distinction should be made among agreements of this class. Where they are intrinsically indivis-

have been stated. The contract was made in 1836; and, according to the testimony, about five years would have been a reasonable time for its execution. That time has gone by. The expense of executing the contract must necessarily depend upon the prices of labor and materials. If prices fluctuated during the period in question, that may be shown by testimony. In this respect there is no need of resorting to conjecture; for all the data necessary to form a correct estimate of the entire expense of executing the contract, can now be furnished by witnesses.

"If the cause had been brought to trial before the time for completing the contract expired, it would have been impracticable to make an accurate assessment of the damages. This is no reason, however, why the injured party should not have his damages; although the difficulty in making a just assessment in such a case, has been deemed a sufficient ground for decreeing specific performance. No rule which will be absolutely certain to do justice between the parties, can be laid down for such a case. Some time must be taken arbitrarily, at which prices are to be ascertained and estimated; and the day of the breach of the contract, or of the commencement of the suit, should perhaps be adopted under such circumstances. But we need not, in the present case, express any opinion on that point. No conjectural estimate is required to ascertain what would have been the expense of a complete execution of this contract; but the state of the market, in respect to prices, is now susceptible of explicit and intelligible proof. And where that is so, it seems to me unsuitable to adopt an arbitrary period; especially as the estimate of damages must, in any event, be somewhat conjectural."

In Shaffer *v.* Lee, 8 Barb. S. C. R. 412, Mr. Justice Hand said of this case, "As I understand the opinions delivered, all the judges considered the plaintiff entitled to recover entire and final damages for the non-fulfilment."

* N. Y. & H. R. R. Co. *v.* Story, 6 Barb. S. C. R. 419.

† Seaton *v.* Second Municipality, 3 La. Ann. R. 44.

‡ Royalton *v.* R. & W. Turnpike Co. 14 Vermont, 311.

[1] So in Alabama. And where in that State, the plaintiff had agreed to let the defendants have all the pine timber on his lands, suitable for good lumber, and the defendants to saw it into lumber, sell it as soon as they could, and pay the plaintiff one-fifth of the gross proceeds of the lumber sold and collected by them, it was held that for the breach of this contract by the defendant in not sawing all the lumber, but one action lay, in which, notwithstanding the period allowed for the performance had not expired at the time of the breach, he was entitled to the damages resulting from the prospective as well as the actual failure, to be assessed on the basis of value at the time of the breach. Fail *v.* McRee, 36 Ala. (N. S.) 61.

ible, as in the case of a building contract, for instance, one refusal may properly be considered as an absolute breach; and then there are very strong reasons for adopting the decision of the Supreme Court of New York. As a general rule, it is the time of breach which fixes the liability in cases of per-
[229] sonal contract; if the periods specified in the contract have not arrived before the trial of the cause, any effort to fix the rights of the parties at those various times, must be mere matter of conjecture; and "*probable expense*," in the language of the decision just cited, is neither a precise nor a safe direction for a jury. But if the contract is, in its nature, capable of division, as, to deliver the crops of a farm for several successive years, and if the periods have arrived before suit brought, there seems no reason why several actions may not be brought for every refusal to perform, nor why the damages should not be estimated as at every period fixed for performance.*[1]

With modifications thus noticed, the rule is adhered to, that the contract furnishes the standard of relief;[2] and the other general rule is equally true, that compensation will only be given for actual loss sustained.[3] This principle we have already had occasion to consider when discussing the subject of nominal damages;† and it is one which applies to cases of tort,

* In England, it has been several times held in chancery, in regard to future agreements, that the difficulty of arriving at any true rule of damages is a good ground for a decree for specific performance. Buxton *v.* Lister, 3 Atk. 383; and Taylor *v.* Neville, cited therein; Ball *v.* Coggs, 1 Bro. Parl. Cas. 140; and Adderley *v.* Dixon, 1 Sim. & Stuart, 607. In this last case the vice-chancellor said, "The profit on the contract being to depend on future events, cannot be correctly estimated in damages, where the calculation must proceed upon conjecture. Damages might be no complete remedy, being to be calculated merely by conjecture." This language seems to imply that, at law, the whole period of the contract would be inquired into, on the principle of the Vermont decision.

† *Ante*, ch. ii.

[1] An agreement was made that the plaintiff should enter into the defendants' employment for the sale of wines on commission; the agreement to continue in force five years, and the defendants guarantying the plaintiff £600 per annum as a minimum revenue from the business during its continuation. Held that the plaintiff might sue in any year during the continuance of the agreement for breaches in any former year; but that if, before its expiration, there was an entire dismissal from the service, he should include in one action the whole *gravamen* he would suffer by such a breach of contract. Clossman *v.* Lacoste, 28 Eng. L. & E. 140.

[2] The cases where consequential damages are allowed (*ante*, ch. iii.) also furnish exceptions to this general rule. But if the contract does not itself furnish the measure, there must, to recover more than nominal damages, be evidence that an actual substantial loss has been sustained. Adams Express Co. *v.* Egbert, 36 Penn. 360.

[3] In the case of a mixed contract, partly continuing and partly executed, where a railroad company had engaged to *construct and keep in repair* certain "cowpits" on the plaintiff's land, and constructed them defectively, but the plaintiff did not remake or repair them himself, the court set aside a judgment for the amount it would have cost the plaintiff to construct and repair them, and held him entitled to recover only the damage, if any, resulting from the defect. The Indiana Central Railway Co. *v.* Moore, 23 Ind. 14.

as well as of contract. So, no action will lie for a conspiracy unless the plaintiff sustains injury from the transaction.*

ACTUAL LOSS THE BASIS OF COMPENSATION. This rule is a wise one—one that should be kept carefully and constantly in view. There are many cases where the preventive power of courts of justice may be exercised most beneficially, and in those cases, future events must be taken into consideration; but when the plaintiff applies for pecuniary redress, nothing can as a general rule be more reasonable than to require him to show that he actually sustained injury.[1] There would be neither wisdom nor justice in compelling a defendant to pay the plaintiff money as compensation for a loss which he has not incurred, and may never sustain. These remarks, of course, do not apply where a liability has attached that may fairly be regarded as inevitable, and sure to be responded to by the party charged.

EXCEPTIONS.—But to this rule there are exceptions to be noticed; and the principal one grows out of the question how far the plaintiff can recover for loss which he is legally liable to sustain. A mere probability of future loss is an insufficient basis of a claim for legal relief. But the case may be different where the plaintiff is fixed with a legal liability to loss which, whenever consummated, the defendant will be bound to make good. The question here is, Can suit be brought, or a recovery had, before the injury is actually consummated?

POLICIES OF INSURANCE.—Some exceptions of this kind to the general rule, which requires proof of actual loss, have been made in actions on policies of insurance. Thus it has been held, that a party insured can recover his contributory share of general average from the underwriter, although he has not paid it, and his interest in the voyage, cargo, freight, or vessel is only liable to pay it.† So a party in possession [230] of a house, under a contract of purchase, can recover the whole sum insured against fire, although he has paid but a

* Cotterell *v.* Jones, 11 C. B. 713; Hutchins *v.* Hutchins, 7 Hill, 104.

† Phillips on Insurance.

[1] In the case of Burt *v.* Dewey, 40 N. Y. 283, the plaintiff had bought a horse of the defendant, which the defendant proved to have had no title to, it having been stolen before coming into his possession. Before the action was brought, a judgment had been recovered against the plaintiff for the value of the horse, but it did not appear that the judgment had been paid, or that the defendant had had notice of the action. It was held by the Court of Appeals, reversing the judgment of the Supreme Court, that the plaintiff, not having paid the judgment against him, had no right of action, and had been properly non-suited at the trial.

small part of the purchase money, and is only liable to pay the balance.* So the re-assured has been held at liberty to sue and recover from the re-assurer the full amount insured, although the re-assured had not repaid it, and from his insolvency could not by possibility do so.†[1] So the importer has been allowed to recover from the underwriter the value of his goods destroyed by fire, including duties, though the duties had not been paid.‡

Other Cases.—So too, as we have already seen,‖ the defaulting party to an agreement to convey land has been, in England, made to pay the attorneys' and brokers' bills for which the plaintiff had merely become liable. So in Louisiana, the sureties in a sequestration bond have been adjudged to pay the counsel fees for which the plaintiff in the original suit was only liable.¶

Other analogous decisions have been made, which we shall have occasion to consider when we come to the subject of principal and surety;** but it appears to me, that the principle that actual loss should be sustained, cannot be much further relaxed without effacing the line which separates equitable from legal relief. As a general rule, the latter awards damages for injury actually done; anticipation and prevention belong to equity.

Quantum Meruit.—We have thus far spoken of express contracts made by the parties; we have still to speak of the agreements which, in the absence of any express stipulation, the law implies from a given state of facts. For property transferred or services rendered by one to another, the law implies a promise to pay what the thing or the property is worth.[2]

* The Ætna Fire Ins. Co. *v.* Tyler, 16 Wend. 385.

† Hone *et al. v.* The Mutual Safety Insurance Co. 1 Sandford's Sup. Ct. Rep. 137.

‡ Wolfe *v.* Howard Ins. Co. 1 Sandford's Sup. Ct. Rep. 124.

‖ *Ante*, 106.

¶ Jones *v.* Doles, 3 La. Ann. R. 588.

** Vide *post*. But the rule being settled that the plaintiff can only recover for actual loss, nice questions often present themselves as to the nature of the evidence requisite to establish his loss,—whether the proof must be definite and absolute, so as to amount to mathematical certainty, or whether the tribunal should be satisfied with an approximative conviction. This subject we shall examine when we come to treat of evidence. In the mean time, I shall refer the reader to the sagacious observations of Mr. Justice Story, in Rogers *v.* Mechanics' Insurance Co. 1 Story, 609.

[1] So the assured can recover the full amount of a policy of insurance "on all passage money" for a certain voyage, though all the passengers were lost with the vessel, and the company may not in fact be called on to refund all the passage money which was paid in advance. Ogden *v.* N. Y. Mutual Ins. Co. 8 Bosw. 248.

[2] So where one has incurred necessary expense or sustained damages in protecting another's property which is accidentally beyond the owner's control, and it is afterwards reclaimed by the owner, the law implies a promise to pay the expense or compensate for the damage. Sheldon *v.* Sherman, 42 Barb. (N. Y.) 368. The same principles apply in the cases which sometimes occur where the law implies an obligation on the part of one party to a contract,

The party then recovers, to use technical language, on a [231] *quantum meruit* or a *quantum valebat;* and the measure of damages becomes a question of evidence as to the value of the property or services. Nor can this rule be varied, except by express agreement. Thus, if a father, whose infant daughter was employed by a manufacturing company, forbade them to employ her any longer, and gave them notice that if they did so he should demand a given sum for her time and labor, it was held in an action of assumpsit against the company, that the notice was unavailing to fix the measure of compensation, and that he could only recover what her services were reasonably worth.* [1]

FORMS OF ACTION.—The common law remedies for the violation of contracts are furnished by the actions of assumpsit, debt, and covenant, according to the form of the agreement, whether sealed or unsealed, and to the character of the demand, whether for sums certain, or for an undetermined amount. A line of division more satisfactory, however, than that resulting from the forms of action may be derived from the character of the agreement itself, as to the liquidation of the damages. There is a large class of cases where the parties, either by direct language or by the use of the technical form of the bond and penalty, undertake to fix the amount of remuneration, or at least to determine a limit which it shall not exceed. This class of contracts we shall consider after we have examined those where the damages are entirely at large, the parties not having fixed the compensation for a breach, and where the burden of this duty is thrown entirely upon the court. While adhering, however, as far as possible to this division, founded on the nature of the contract, it is impossible altogether to disregard

* Adams *v.* Woonsocket Co. 11 Met. 327.

corresponding with that expressed on the part of the other. So where the plaintiff and defendant entered into a written contract, by which the former agreed for a certain sum to be paid him by the latter to do the carpenter's work on a school-house to be built, and furnish and use the necessary materials, and that he would "commence said work and proceed therewith without delay and in such a manner as not to delay the contractor for the mason work," it was held that this covenant implied a correlative obligation on the part of the defendant to have his building in readiness for the plaintiff to perform the condition; and that the plaintiff having sustained damages from the defendant's delay in having the building ready for him to do the work, could maintain an action to recover the amount of his damages, in which was included his increased expense from the delay. Allamon *v.* The Mayor of Albany, 43 Barb. (N. Y.) 33. So an agreement to receive as part of the purchase money of land the purchaser's services in cutting and taking away wood, implies a covenant to allow him to go on the land, for the breach of which an action lies, and entitles him in the absence of proof of special damages to recover nominal damages. French *v.* Bent, 43 N. H. 448.

[1] So, in an action for work and labor, the rule of damages is the value of the service rendered, and not an oral agreement as to wages, ruled out under the statute of frauds. Emery *v.* Smith, 46 N. H. 151.

the character of the proceeding in which the question is presented; for, as has been already noticed, and as we shall have frequent occasion to see, the same claim may be presented in very different forms, and the measure of relief will vary with the action made use of.

ACCOUNT.—Of the action of account it would be superfluous to take any extensive notice here. "It is laid down in divers cases," says Mr. Sayer, "that no damages are recoverable [232] in it." * But on this point there is much conflict in the old books; and inasmuch as the proceeding in its original shape has become almost if not entirely obsolete, it is believed it is not necessary, in this country, to pursue the inquiry.†

ASSUMPSIT.—The great action of assumpsit, although of comparatively recent origin, is of very different importance;‡ and under this head we shall have occasion first to consider the rule of damages in relation to bills and notes, insurance, sales of chattels, principal and surety, and common carriers.

COVENANT.—The action of covenant differs materially from that of assumpsit, in its requisition of a seal to the contract; but as this variation in the form of the agreement has no influence on the measure of relief, we shall be able to consider the rules of damages in that form of action, conjointly with assumpsit, reserving for separate examination the consideration of a very limited class of cases, which are presented in that form of proceeding only. First, then, of negotiable paper.‖

* Sayer, ch. 9, 39; Bro. Dam. Pl. 136, Pl. 166; Dal. 18, Pl. 121; Rol. Abr. 571, Pl. 17.

† In New York, by the Revised Statutes, an effort was made by simplifying the practice in this action to reintroduce it, in the hope, perhaps, that it might to some extent supersede the expensive and dilatory remedy in equity; but the attempt did not succeed.

‡ The action of assumpsit was first held right in Slade's case, 44 Eliz. 4 Co. 92, *b*; previous to which the action of debt was used. "The action of assumpsit was established in Slade's case," said Sir Jas. Mansfield, C. J., in Max *v.* Roberts, 5 Bos. & Pul. 454. See, also, Lord Loughborough's opinion, in Rudder *v.* Price, 1 H. Bl. 547.

‖ An interesting and valuable work published at New Orleans, entitled *The Civil Law of Spain and Mexico*, by Gustavus Schmidt, contains a brief but useful sketch of the gradual growth of the Spanish jurisprudence, and its introduction on this continent, and the modifications it has here undergone. Among the texts in regard to damages on breach of contract, are the following:—

"Art. 437. When one of the parties, who has fulfilled his part of the contract, desires to rescind it, on account of the non-execution on the part of the other, he is entitled to indemnity for the injury he has sustained by such non-execution.

"Art. 438. The obligor in such a case is bound to pay indemnity, unless he prove that the execution of the contract was rendered impossible by some unforeseen *vis major*.

"Art. 439. The indemnity is fixed by the creditor himself, with the approbation of the judge who taxes the same."

This last provision curiously accords with the original rule of the Roman law, in which, as we have seen, the measure of damages was fixed by the plaintiff himself: *in infinitum jurare potuit*. *Ante*, 23. I confess, until I discovered this analogy, I thought there must be some misunderstanding of the civil law, and that no jurisprudence could ever have tolerated such an enormity.

CHAPTER VIII.

THE MEASURE OF DAMAGES IN ACTIONS UPON PROMISSORY NOTES AND BILLS OF EXCHANGE.

On Promissory Notes the Legal Rate of Interest fixes the Measure of Damages.—Questions: when the Currency is altered; when the Contract is made in one Country and the Suit is brought in another; when the Amount of Recovery depends on the Consideration paid or received.—Rule of Damages on Bills of Exchange.—Re-exchange fixed in the United States generally by Statute.

NEGOTIABLE PAPER.—The subject of negotiable paper is so amply discussed in the various treatises devoted to this particular branch of the law, that it will only be necessary for us in this place to take a brief view of the general principles regulating the compensation awarded for the breach of contracts of this class.

LEGAL INTEREST FIXES THE RULE.—In actions brought on promises to pay a liquidated sum of money, as on promissory notes or bills, where no question arises as to the currency or rate of exchange, the rule of damages is a fixed and arbitrary one. It is identical with the rate of legal interest.[1] The actual damages may be much greater; the non-performance of the obligation may have occasioned the greatest distress, nay, even extreme positive loss; it may have produced actual insolvency. These remote results, the law, however, does not investigate.[2]

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[1] Usury laws, which are one day, we think, to become curious monuments of past ignorance of political economy and the laws of trade, do not come within the scope of this treatise. But we may properly refer to a subject belonging to the law of usury which relates also to the rules of damages. A prohibition against lending money beyond a certain rate of interest does not prevent a purchase of securities at any price the parties may agree on. The Junction Railroad Co. v. Ashland, 12 Wall. 226. And State and municipal governments, as also railroads and other corporations, have often sold their own bonds in the market. The issue of such bonds, it is true, is usually authorized by statute; but without any express provision of law sanctioning the sale of them below par or the legal rate of discount, such sales are not a violation of the usury laws in force where they have been issued. Nor if the transaction be in good faith, does the fact that the payment of the bonds at maturity is guaranteed by the directors of the corporation individually, make it a loan, or subject to the operation of the laws against usury. See Bank of Ashland v. Jones, 16 Ohio St. 154. Nor do bonds so issued by a corporation for the completion of its works or improvements, although purporting to be a loan, and although issued for a sum largely exceeding the estimated cost of the projected work, become usurious. White Water Valley Canal Co. v. Valette, 21 How. (U. S.) 414.

[2] Lewis *v.* Lee, 15 Ind. 499.

It takes the rate of interest as the measure of damages; and so, says Pothier, "as the different damages which may result from the failure to perform this kind of obligation vary infinitely, and as it is as difficult to foresee as to excuse them, it has been found necessary to regulate them as by a species of penalty, and fix them at a precise sum." * [1]

[234] Interest by the Civil Law.—With this, the general language of the modern civil law accords. The damages resulting from the non-performance of contracts to pay money are limited to the infliction of interest. "Interest," says Domat,† "is the name applied to the compensation which the law gives to the creditor who is entitled to recover a sum of money from his debtor in default." So, too, the Roman law: *In bonæ fidei contractibus usuræ ex morâ debentur.*‡

These principles, equally recognized by our system, are embodied in the French Code by a positive provision,‖ the correctness of which is thus supported and expounded by one of the ablest commentators on that law:—

"It is certain that the non-payment of money when due may cause, and often actually causes, the creditor loss much beyond the legal interest on the sum. For want of the funds on the receipt of which his calculations are made, he may have been compelled to borrow, himself, and to submit to the exactions of the usurer. He may have been prosecuted, in a manner calculated to destroy his credit. He may have been ejected from his property; have become bankrupt; his house may have gone to ruin for want of repair. He may have lost highly advantageous bargains.

"But how are we to distribute these losses according to their real cause, and fix on those which should be imputed to the party in default? How is any equitable valuation to be made of them? Add to this that the non-payment of money is the most common of all cases which give rise to damages, and we shall perceive that the peace of society would be harassed by this infinite multitude of settlements, and the litigation that would result from them.

"The law prevents this, by declaring that the damages shall never exceed

* Traité des Oblig. part i, ch. ii, art. 3, 170. Comme les différens dommages et intérêts qui peuvent resulter du retard de l'accomplissement de cette espèce d'obligation varient à l'infini, et qu'il est aussi difficile de les prevoir que de les justifier, il a été nécessaire de les regler, comme par une espèce de forfait, à quelque chose de fixe.

† Liv. iii, tit. v, § 1.

‡ L. 32, § 2, Ff. Deusur.; propter moram. L. 17, § 3, in fine eodem.

‖ Dans les obligations qui se bornent au paiement d'une certain somme, les dommages et intérêts résultants du retard dans l'exécution ne consistent jamais que dans la condamnation aux intérêts fixés par la loi, sauf les règles particulières au commerce et au cautionnement.

Ces dommages et intérêts sont dus, sans que le créancier soit tenu de justifier d'aucune perte.

Ils ne sont dus que du jour de la demande; excepté dans les cas où la loi les fait courir de plein droit. Code C. Art. 1153.

[1] Heyman *v.* Landers, 12 Cal. 107.

legal interest from the day that payment becomes due; and this, which is a species of forfeiture, may often be advantageous to the creditor.

"Whatever may be the damage that he has suffered by the delay in receiving his funds, whether the debtor was animated by malicious or even fraudulent motives, the creditor cannot, it is true, demand any other compensation than legal interest on his demand. But on the other hand, he is not required to prove the damages that the delay may have caused. And this provision, which fixes the measure of damages for non-payment of money at [235] legal interest, is founded on a principle of equity.

"In cases of the non-performance of other contracts, the party in default, as the lessee who violates his contract of letting, or the architect who, by his negligence, causes the destruction of a house, must be fully apprised of the nature of the loss that may result from the non-performance of his duty; whereas with money it is different.

"On the contrary, the engagement to pay a sum of money has no precise relation to any particular damage; it is impossible to know what will result from its non-payment; it is impossible to see what the creditor will lose, or how much he will lose; whether he will be compelled to borrow—whether he will be driven from his house and reduced to bankruptcy—whether his business or his credit will suffer; it is impossible to predict any one event among the thousand which are possible, and which depend upon the situation of the creditor's affairs.

"Money being the common measure of all things, has not, like other things, any peculiar function. It takes the place of all other things. The loss experienced, then, by those who are not paid at maturity is as diversified as the use that they might make of the money, and as unforseen as the wants from which the injury might arise. They are, in regard to the debtors, like fortuitous cases, impossible to foresee, and which for this reason their obligation does not embrace."*

* Touillier, vol. VI, liv. 3, tit. 3, ch. iii. De l'Effet des Obligations, 230, *et seq.* Il est pourtant certain que le défaut de paiement d'une somme au terme fixé peut causer, et cause souvent, au créancier des pertes fort superieures à l' intérêt légal de son argent. Faute de la somme sur laquelle il comptait, il a pu être réduit à emprunter luï même, et à subir la loi d'un usurier avide. Il a pu se voir traduit en justice, par une action qui a porté une atteinte mortelle à son crédit, se voir exproprié faire faillite, voir périr sa maison faute de moyens pour la réparer, manquer des marchés avantageux, etc., etc.

Mais comment assigner à ces pertes leur véritable cause, et discerner celles qui doivent être imputées au débiteur en retard? Comment en faire une évaluation equitable? Ajouter à cela que le défaut de paiement d'une somme due est le plus fréquent de tous les cas qui donnent lieu à des dommages et intérêts, et l'on verra que la paix de la société serait troublée par cette multitude infinie de liquidations différentes, et par les procès qui en seraient la suite. La loi les prévient, en statuant que les dommages et intérêts ne pourront jamais consister que dans l'intérêt légal de la somme à compter du jour de la demande. C'est une espèce de forfait qui peut souvent être avantageux au créancier.

Quelque soit le dommage qu'il souffre par le défaut de rentrée de ses fonds, soit qu'il n'y ait qu'une simple négligence, soit qu'il y ait de la part du débiteur contumace affectée ou même dol, le créancier ne peut à la vérité demander d'autre indemnité que l'intérêt légal du son argent; mais aussi il n'est pas assujetti à justifier le dommage que ce retard lui a causé.

Cette disposition de la loi, qui fixe l'indemnité à l'intérêt légal des sommes dues, est encore fondée sur un principe d'équité qu'il faut développer. . . . . .

Au contraire, l'engagement de ceux qui doivent une somme d'argent n'a de rapport précis à aucun dommage particulier: on ne voit pas ce qui doit arriver faute de paiement; on ne peut prévoir ni si le créancier en souffrira ni ce qu'il en souffrira, in cas qu'il en souffre, s'il sera forcé d'emprunter, s'il sera exproprié ou réduit à une faillite, s'il éprouvera

[236] And it should be borne in mind, as Pothier also well remarks, that if on the one hand the creditor cannot recover anything beyond the legal interest, so on the other hand he is not put to any proof of damage whatever.* It is an arbitrary assessment of damages, in the nature of the *Lex Aquilia* of the Roman system. He can, it is true, recover but the legal rate of interest; but then, on the other hand, he might in fact not have been able to gain any interest whatever during the time he has been deprived of his funds.

"It is a dictate of natural justice and the law of every civilized country, that a man is bound in equity not only to perform his engagements, but also to repair all the damages that accrue naturally from their breach. Hence, every nation, whether governed by the civil or the common law, has established a certain common measure of reparation for the detention of money not paid according to contract, which is usually calculated at a certain and legal rate of interest."† [1] Such is the language of the Supreme Court of the United States; but is to be taken with much allowance. The thunders of the early church ‡ were leveled against interest and usury indiscriminately; and up to the time of Henry VIII, as we are [237] told by Lord Mansfield, ‖ "all interest on money lent was prohibited by the common law, as it is now in Roman Catholic countries."¶ This statute simply provided that none should take for any loan or commodity above the rate of ten pounds for one hundred pounds for one whole year, which rate was reduced to five per cent. by a subsequent statute, passed in the reign of Queen Anne.**

des pertes dans son crédit, dan son commerce, ou tel autre événement entre mille possibles qui dépendent de la situation des affaires du créancier.

L'argent par sa nature étant le prix commun de toutes les choses, n'a pas comme elles un usage particulier. Il tient lieu à chacun de toutes celles dont il a besoin. Les dommages qu' éprouvent ceux qui ne sont pas payés du terme, sont donc aussi diversifiés que l'usage qu'ils pourraient faire de leur argent, et aussi imprévus que les besoins d'où ces dommages peuvent naître. Ils sont, à l'égard des débiteurs, comme des cas fortuits qu'ils n'ont pu prévoir, et que par cette raison leur obligation ne renferme point.

* So says the civil code of Louisiana, "The damages due for delay in the performance of an obligation to pay money, are called interest. The creditor is entitled to these damages without proving any loss, and whatever loss he may have suffered, he can recover no more."—Art. 1929.

† Curtis *v.* Innerarity, 6 Howard, 146.

‡ See Voltaire's article, *Intérêt*, in the Dictionnaire Philosophique, where he represents a Jansenist Abbé remonstrating with a Dutch merchant against taking interest: Prenez garde; vous vous damnez; l'argent ne peut produire de l'argent—ne peut produire de l'argent; nummus nummum non parit. The hostility of the church was founded on the prohibition in the Old Testament, "Thou shall not lend upon usury to thy brother."—Deut. xxiii, 19, 20.

‖ Lowe *v.* Waller, Doug. 736, 740.

¶ See also, Robinson *v.* Bland, 2 Burr. 1077, 1086.

** 12 Anne, Stat. 2, c. xvi.

[1] As to the liability for interest in a peculiar case, see Davis *v.* Lanier, 2 Jones (N. C.) L. 307.

PROMISSORY NOTES. — I shall consider the rule of damages in regard to promissory notes and bills of exchange, separately.* In regard to the former, the measure of damages being fixed at the rate of interest, if the currency at the time and place of payment be the same as at the time and place of contract, it would seem that no question could arise; but it sometimes happens that between the date and maturity of a promissory note a change takes place in the value of the coin or currency in which it is made payable,[1] even in the same country.[2] In such a case, it seems, in England the note will

* It will be remembered, that Mr. Justice Story has given the high authority of his precept and example to a complete division of all discussions as to bills and notes, by the separate treatises which he has presented to the profession on these subjects.

[1] Other questions very various, and sometimes very perplexing, arise from the depreciation of the currency.

Upon a deposit being made in the Bank of the Commonwealth of Kentucky, the cashier gave a written certificate that there had been deposited to the credit of the plaintiffs below $7,730 81, which was subject to their order on the presentation of the certificate. The deposit was made in the notes of the bank, and both when the same were deposited and when demand of payment was made, they were passing at one-half their nominal value. When the certificate was presented to the bank, the cashier offered to pay the amount in the notes of the bank, but the holders refused to receive payment in anything but gold or silver. The language of the certificate was held to be expressive of a general, not a specific deposit, and the act of incorporation required that the bank should pay and redeem their bills in gold and silver. The transaction was considered equivalent to receiving and depositing the gold and silver, and the bank was held liable for the whole nominal amount of the deposit in coin. Bank of Kentucky *v.* Wister, 2 Peters, 318. "Contracts between a banker and his customers must be construed in the same way as contracts between other parties. When the banker specially agrees to pay in bullion or coin, he must do so, or answer in damages for its value; and so if one agrees to pay in depreciated paper, the tender of that paper is a good tender, and in default of payment, the promisee can recover only its market and not its nominal value. But when the deposit is general, and there is no special agreement proved, the title of the money deposited, whatever it may be, passes to the bank; the transaction is unaffected by the character of the money in which the deposit is made, and the bank becomes liable for the amount as a debt which can be discharged only by such money as is by law a legal tender." Thompson *v.* Riggs, 7 Wallace, 663, 678. And "where money is paid and received without specific agreement, for any distinction in computing or accounting for the same, by reason of the kind of currency in which the payment is made, it must be fixed by the number of dollars paid." Stark *v.* Coffin, 105 Mass. 328, 334; Bush *v.* Baldrey, 11 Allen, 367; Stanwood *v.* Flagg, 98 Mass. 124.

Payment in forged paper or base coin is not good. But this does not apply to a payment made to a bank in its own notes, which are received and afterwards discovered to be forged. Bank of the United States *v.* Bank of Georgia, 10 Wheat. 333.

[2] Among the most important of the legal questions, growing out of the great war in which the United States have been involved since the third edition of this work, are those relating to the value of the depreciated currency, as a means of discharge of debts. The Congress, early in the war (Act of February 25, 1862, c. xxxiii, U. S. Stat. at Large, vol. xii, 345), passed a law declaring certain treasury notes, to be issued by virtue of the law, a legal tender in payment of debts, the principle of which was again repeatedly acted on by the Congress. Acts March 3, 1863, 12 U. S. Stat. at Large, 709, and June 30, 1864, 13 Stat. at Large, 218.

Until this legislation, gold and silver coin had been the only legal tender known to the law, and had been not only understood by the profession and the public, but also assumed by high authority to be the only one sanctioned by the Constitution of the United States. See Gwin *v.* Breedlove, 2 Howard, U. S. 29. Indeed, subject to the constitutional restriction against impairing the obligation of contracts, which will be presently noticed, the rights under them and the remedies upon them had been always regarded as matters exclusively for State regulation and control.

But the unprecedented exigencies of the civil war led to the expedient, no less unprecedented in this country, though before adopted in Great Britain, of giving to the notes of the

be discharged by a due payment in any coin which by law is made of equivalent value at the time of payment.* [1]

* Story on Notes, § 390, where the opinion of the continental jurists will be found. Case of Mixed Moneys, Sir John Davis' Reports, 18; s. c. 2 Bligh R. 98; Pilkington *v.* Commissioner for Claims on France, 2 Knapp's R. 18, 19; Cockerell *v.* Barber, 16 Ves. 461, 465; Story on Con. of Laws, § 312; on Bills, § 163; Warder *v.* Arell, 2 Wash. Virg. R. 282; Searight *v.* Calbraith, 4 Dall. 325; Bartsch *v.* Atwater, 1 Conn. R. 409.

government the same legal efficacy with gold and silver coin in the discharge of debts (Act February 25, 1862; Act March 12, 1863, *supra*); and after a sharp and general controversy in the State courts, which with rare exceptions upheld the constitutionality of these laws, they were at last sustained by the highest tribunal in the land. Knox *v.* Lee; Parker *v.* Davis, 12 Wallace, 457; see also Dooley *v.* Smith, 13 Wallace, 604. These decisions, however, so far as they applied to contracts made before the passage of the acts, overruled one made shortly before by the same court, in which, by a majority of five to three, the law had been declared unconstitutional as to such contracts. Hepburn v. Griswold, 8 Wallace, 603; affirming Griswold *v.* Hepburn, 2 Duvall, 20. They were brought about, moreover, not by an alteration in the opinions of the original majority, but by a change in the members of the court. One of the justices (Mr. Justice Grier) who had concurred with the majority having resigned, and the number of judges in the court having, by an act of Congress which took effect on the first Monday of December, 1869, been increased from eight to nine, the two vacancies thus created were supplied by judges who united with the previous minority of the court in overruling, by a vote of five to four, the principle of the former decision. Under these circumstances, perhaps, the judgment of this high tribunal, though carrying paramount authority while it remains unreversed, is not to be regarded as wholly free from the liability to reconsideration.

A summary of the arguments on both sides of this important and interesting question may be permitted.

The validity of the laws was impeached on the grounds that the power to make the notes of the government a legal tender was neither directly granted by the Constitution, nor properly incident to any of the other powers that were directly granted, such as those of borrowing and coining money; that the Constitution had designated the powers of taxation, of borrowing and coining money, and of selling the property of the United States as the means of raising funds, and that as the government possessed only delegated, specified and limited powers, the grant of these means negatived the existence of any others: that in particular, the expressed power to coin money was inconsistent with that of making anything but coin a legal tender. It was denied that the government had any additional or resulting power under the Constitution growing out of the aggregate of the powers granted, and it was insisted that if the national legislature had such an undefined and dangerous power, and were the sole judge of the necessity for its exercise, the government would become practically absolute. To the Congress, which was expressly authorized to fix the standard of weights and measures, belonged also, it was said, under the Constitution (as shown by the history of national legislation on the subject), the right and the duty of establishing a standard of value, and this standard, by the common consent of nations, and by the intention of those who made the Constitution, as evidenced by the authority given to *coin* money, must be gold and silver; and the power of regulating the value of coins, notwithstanding that the Congress had repeatedly exercised it by changing the amount of alloy they contained, could not be stretched to cover the substitution for money of something else. As to contracts made before the passage of the acts, it was insisted these acts were void, as impairing the obligation of such contracts; and in enabling the debtor to satisfy his creditor's claim for a stipulated sum, by tendering what in actual value was but a part of this sum, violated the fifth amendment of the Constitution, which provides that no person shall be deprived of property without due process of law. Moreover, although the several States only, and not the United States, were in terms enjoined from impairing the obligation of contracts, yet that the power to do so was in its nature inconsistent with the principles of a free government, and could not exist in such a government otherwise than as a necessary incident to its recognized powers; and *a fortiori*, in our government of limited powers, could exist only where in exceptional circumstances, such as the power to establish a uniform system of bankruptcy, it was granted expressly or by necessary implication. Finally, it was urged that the argument derived from the last clause of the eighth section of the Constitution, which gives the Congress the power to make all laws necessary and proper for carrying into execution the expressed powers was unsound, since the legal tender quality was not necessary to give the notes of the government credit and circulation, or to enable them to serve any honest purpose, and not being necessary for such purposes, was not proper.

On the other hand, the laws were sought to be maintained, as under the circumstances

[1] See page 284 for the note.

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in which the country was placed at the time of their passage, sufficiently sanctioned, by those provisions of the Constitution, which in pursuance of the objects set forth in its preamble, of providing for the common defence and promoting the general welfare, authorize the Congress to borrow money on the credit of the United States; to coin money and regulate its value; to declare war; to raise and support armies; to provide and maintain a navy; to suppress insurrection, and to make all laws necessary and proper for carrying into execution the powers explicitly granted to the Congress, and the other powers vested by the Constitution in the government and its departments and officers. It was also insisted that the power to pass these laws existed not only without having been expressly granted or as an incident merely to any one enumerated power, but as growing out of the aggregate of the powers of the government, and as belonging to its sovereignty and its right of self-preservation. It was a vital necessity, it was said, to a government intended in some important particulars to be supreme over States and people. With a destitute treasury and the public credit exhausted, which it was insisted was the condition of the nation when the notes were issued, the necessities of the war made that issue a peculiarly appropriate if not necessary means to a legitimate end—means quite as appropriate, as "necessary and proper," as the charter of a United States bank, or the priority given to debts due the government over private debts—measures which had been decided to be constitutional. The absence from the Constitution of any express restriction upon the Congress against making anything but gold and silver a tender in payment of debts, while such a restriction was imposed on the States, was thought to indicate a recognition of this power in the national government as an element in its sovereignty. This, it was insisted, was a necessary implication, analogous to that by which the power of the Congress to suspend the writ of *habeas corpus*, although not in terms granted, was inferred from the provision that "the writ of Habeas Corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it," or to the restrictions on the power of the Congress to be found in the amendments to the Constitution, which (as in the case of the first article of the amendments restraining that body from making any laws respecting the establishment of religion or prohibiting its free exercise, or abridging the freedom of speech or of the press) are in a great measure denials of power which had not been expressly granted. In answer to the objection that the acts were an attempt to make a standard of value of something which had no intrinsic value, it was said that no such attempt was made, and that these laws merely declared that the government's promise to pay should for the time being be equivalent to the representative of value determined by the coinage acts. To the objection that they impaired the obligation of contracts, it was not only answered that the Congress was not prohibited by the Constitution from taking action which might have that effect, but it was denied that they had it. The obligation of a contract to pay money, it was argued, was merely to pay what the law should recognize as money when the payment was to be made. Such contracts, the argument continued, were necessarily made subject to the constitutional power of the government over the currency, and while contracts to deliver specific articles belong to the domain of state legislation, contracts to pay money are subject to the authority of the Congress, so far as relates to the means of payment. To the objection, again, that the legal tender acts were prohibited by the fifth constitutional amendment, it was answered that this amendment referred only to a direct appropriation of property, and not to consequential injuries, which might, as in the case of the powers to declare war, levy and collect taxes and duties, or regulate the value of money, result from the exercise of a lawful power.

On both sides of the question, the famous test of constitutionality, laid down by Marshall, C. J., in the case of M'Culloch *v.* The State of Maryland (4 Wheat. 421), was confidently appealed to. "Let the end be legitimate; let it be within the scope of the Constitution; and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." But, like other oracles, this sentence was oppositely interpreted, and, while one party seized it as a shield, the other brandished it as a weapon of destruction.

These cases furnish a striking illustration of the power of judicially defining and controlling the authority of the national government, which belongs to the Supreme Court of the United States alone, among the tribunals of the world. It is hardly possible that the determination of such questions should not be always influenced by the political bias or education of the judges, as strict or liberal interpreters of the powers of the government, and, perhaps, also by the nature and by the importance of the exigency which brings up the questions, and puts them into definite and practical shape.

By these decisions of the highest tribunal, the following cases, cited in the fourth and

suit is afterwards brought in another country to recover for a breach of the contract, a question often arises as to the manner

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fifth editions of this work, as sustaining the constitutionality of the legal tender acts, are, in effect, approved: The Metropolitan Bank and The Shoe and Leather Bank *v.* Van Dyck, superintendent, and Meyer *v.* Roosevelt, 27 N. Y. 408; Kimpton *v.* Bronson, 45 Barb. 618; Lewis *v.* The New York Cent. R. R. Co. (Supreme Court, N. Y.) 6 Am. Law Reg. (N. S.) 703; Hague *v.* Powers, 39 Barb. 427; Roosevelt *v.* Bull's Head Bank, 45 B. C. 529; Wilson *v.* Morgan, 1 Abb. Pr. R. (N. S.) 174; Reynolds *v.* Bank of Indiana (Supreme Court of Indiana), 1 Am. Law Reg. (N. S.) 669; Lick *v.* Faulkner, 25 Cal. 404; Maynard *v.* Newman, 1 Nevada, 271; Shollenberger *v.* Brinton, Mervine *v.* Sailor, Davis *v.* Burton, Kroener *v.* Colhoun, Sandford *v.* Hays, Graham *v.* Marshall, Laughlin *v.* Harvey, 52 Penn. St. 9; Wood *v.* Bullens, 6 Allen, 516; George *v.* Concord, 45 N. H. 434; Breitenbach *v.* Turner, 18 Wis. 140; Van Husan *v.* Kanouse, 13 Mich. 303; Carpenter *v.* Northfield Bank, 39 Vt. 6; Appel *v.* Woltmann, 35 Mo. 194; Verges *v.* Giboney, 38 Mo. 458. It need scarcely be added that the subsequent course of decision in the State courts accords with the ruling of the highest tribunal. See Howe *v.* Nickerson, 14 Allen, 400; Tufts *v.* Plymouth Gold Mining Co. 14 Allen, 407; Kellogg *v.* State Treasurer, 44 Vt. 356; Townsend *v.* Jennison, 44 Vt. 315.

[1] Independently of the general question of the validity of the legal tender acts, already considered, another question, which, after much conflict of opinion in the State tribunals, has been set at rest by the Supreme Court of the United States, grew out of the different kinds of currency recognized by these acts. By the terms of a mortgage, executed in 1851, the mortgagor agreed "to pay the sum of one thousand five hundred dollars in gold or silver coin, lawful money of the United States." This obligation was held by the Court of Appeals of New York to be satisfied by the tender of the amount due in legal tender notes, at their nominal value. Rhodes *v.* Bronson, Exr. 34 N. Y. 649. This judgment was, however, reversed by the Supreme Court of the United States, Bronson *v.* Rhodes, 7 Wallace, 229, in a decision based on two grounds: *first*, that by the various acts of Congress regulating the currency, a contract, payable in gold and silver coin, lawful money of the United States, was equivalent to one to deliver an equal weight of bullion of the same fineness as required by law for the coin; *second*, that as there were two kinds of money at the time the tender was made, both of which were by law a legal tender, but which were, in actual value, far from equivalent to each other, a contract stipulating for payment in the most valuable kind, namely, gold and silver, could only be satisfied by such a payment.

The same principle was subsequently applied by the same court to the case of a breach of covenant for the payment of rent, contained in a lease of certain premises, in the city of Baltimore. The lease was for ninety-nine years, renewable forever, upon an "annual rent of fifteen pounds current money of Maryland, payable in English golden guineas, weighing five pennyweights and six grains, at thirty-five shillings each, and other gold and silver, at their present weights and rates established by act of Assembly." Butler *v.* Horwitz, 7 Wallace, 258. In the opinion of the majority of the court, delivered by Chase, C. J., in this case, the rule as to the assessment of damages for the breach of such agreements, is thus declared: "When it appears to be the clear intent of a contract that payment or satisfaction shall be made in gold and silver coin, damages should be assessed and judgment entered accordingly. It follows that, in the case before us, the damages should have been assessed at the sum agreed to be due, with interest, in gold and silver coin, and judgment should have been entered in coin for that amount." Mr. J. Miller dissented. Again, when a yearly rent of a specified number of ounces, pennyweights, and grains of pure gold, in coined money, was reserved in a lease, it was held, by the same court, that judgment for the breach of the covenant should be "entered for coined dollars and parts of dollars, instead of treasury notes, equivalent in market value to the value in coined money of the stipulated weight of pure gold." Dewing *v.* Sears, 11 Wallace, 379. In the case of Trebilcock *v.* Wilson, 12 Wallace, 687, the principle of the decision in Bronson *v.* Rhodes, is applied to a promissory note, payable *in specie*; and see Chisholm *v.* Arrington, 43 Ala. 610; McGoon *v.* Shirk, 54 Ill. 408. So, also, the legal tender acts do not prevent a State from collecting its taxes in gold and silver coin. Lane County *v.* Oregon, 7 Wallace, 71. Gold coin, therefore, although it may be dealt with as a commodity, does not become merchandise, merely in consequence of the legal recognition of two kinds of currency. It is one kind of money. Kellogg *v.* Sweeney, 46 N. Y. 291. So, a judgment on a bill of exchange, payable in the United States, in gold dollars, or in an action for the conversion of gold coin, should be for the gold dollars. Chrysler *v.* Renois, 43 N. Y. 209; Phillips *v.* Speyers, 49 N. Y. 653. See, also, Independent Insurance Co. *v.* Thomas, 104 Mass. 192; Warren *v.* Franklin Ins. Co. 104 Mass. 518, 521. By the decisions in the Supreme Court of the United States, therefore, last referred to, the following earlier cases in the State courts: Thayer *v.* Hedges, 23 Ind. 141; Buchegger *v.* Schultz, 5 Am. Law Reg. (N. S.) 95; Whetstone *v.* Colley, 36 Ill. 328; Warnibold *v.* Schlichting, 16 Iowa, 243; Humphrey *v.* Clement,

in which the amount of the debt is to be ascertained, whether at the nominal or par value of the currencies of the two countries, or according to the rate of exchange at the particular time existing between them; as, for instance, a debt of £100 is contracted in England and is payable there, and afterwards a suit is brought in America for the recovery of the amount. And on this subject there is considerable diversity of opinion among the courts of this country. In New York and in Massachusetts it has been distinctly held, that the debt is to be [238] paid according to the par and not the rate of exchange, and that the creditor is not entitled to any allowance on account of the difference of exchange between the country where the suit is brought and the country where the debt was payable.* While, on the other hand, Mr. Justice Washington, on the Pennsylvania circuit, and Mr. Justice Story, on the Massachusetts

* Martin *v.* Franklin, 4 J. R. 124; Scofield *v.* Day, 20 J. R. 102; Adams *v.* Cordis, 8 Pick. 260.

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44 Ill. 299; Troutman *v.* Gowing, 16 Iowa, 415, cited in the last two editions of this work, in which it had been held that a contract for the payment of gold and silver coin could be satisfied by a payment of legal tender notes, at their nominal value, are overruled. The principle of the following decisions, on the other hand, is maintained: Kupfer *v.* The Bank of Galena, 34 Ill. 328; Dutton *v.* Paillaret, 52 Penn. St. 109; Lüling *v.* the Atlantic Mutual Ins. Co. 45 Barb. 510; although in the last cited case, which was an action by insurers in a mutual insurance company, to compel the company to pay its dividends in gold, instead of currency, because the plaintiffs had paid their premiums in gold, the judgment below was reversed, on the ground that there was no agreement that the profits should be paid in gold. 50 Barb. 520. The following series of cases in California, which arose under a State law requiring judgments to be paid in the coin or currency stipulated in the contract, the validity of which they maintained, also accord with the principle thus established by the Supreme Court of the United States: Carpentier *v.* Atherton, 25 Cal. 564; Lane *v.* Gluckawf, 28 Cal. 288; Spencer *v.* Prindle, 28 Cal. 276; McComb *v.* Reed, 28 Cal. 281; Harding *v.* Cowing, 28 Cal. 212; Reese *v.* Stearns, 29 Cal. 273; Tarpy *v.* Shepherd, 30 Cal. 180; Poett *v.* Stearns, 31 Cal. 78. The same doctrine is recognized in Nevada, where a similar law is upheld. Clark *v.* Nevada Land and Mining Company, 6 Nevada, 203. By this decision, the earlier one of Milliken *v.* Sloat, 1 Nevada, 573, is overruled. Where, however, there was no contract to pay in coin, but the defendants had wrongfully sold, to a third party, real estate which, although not held by them as the court considered in a fiduciary capacity, yet equitably belonged to the plaintiff, and which was valued at $5,200, gold, it was held by the Supreme Court of California that the specific money act did not apply. Price *v.* Reeves, 38 Cal. 457.

The law of the United States, therefore, under the existing acts of Congress, appears to be at present as follows: Where a contract provides, in terms, for the payment of gold and silver coin, the coin must be paid. If it is not paid, the damages are assessed in coin, and a breach of the contract by not paying the coin can be satisfied only by paying it *in specie*. Where gold and silver coin of the United States, however, as well as foreign coin, are bought and sold as merchandize, or are deliverable otherwise than as *money*, the measure of damages for not delivering the coin will be, we think, its market value. Where, on the other hand, a contract for the payment of money, contains no stipulation as to the kind of money in which the payment is to be made, or provides simply for its payment in lawful money, it will be satisfied by the payment of the nominal amount in legal tender notes, and which, consequently, is the measure of the damages. If, in such a case, however, gold coin is applied towards the payment of a debt, without a special contract as to the rate at which it shall be taken, it will pay no more of the debt than an equal nominal amount in legal tender currency. Bush *v.* Baldrey, 93 Mass. 367. Whether, in the case of an action of *tort*, for the conversion or negligent loss of United States coin, the judgment should be for the value of the coin in legal tender notes, or for the amount of the coin itself *in specie*, the decisions in Massachusetts and New York are at variance. Cushing *v.* Wells, Fargo & Co. 98 Mass. 550; Kellogg *v.* Sweeney, 46 N. Y. 291.

circuit, have both held that the creditor was entitled to recover at the rate of exchange.*[1]

* Smith *v.* Shaw, 2 Wash. Cir. C. Rep. 167 and 168; Grant *v.* Healey, 3 Sumner, 523. See also, Lanusse *v.* Barker, 3 Wheat. 101, 147; Woodhull *v.* Wagner, 1 Bald. R. 296 and 302; Story on Notes, § 396; Scott *v.* Bevan, 2 B. & Adol. 78; Delegal *v.* Naylor, 7 Bing. 460; Ekins *v.* E. India Co. 1 P. Wms. 395; Lee *v.* Wilcocks, 5 Serg. & Rawle, 48; Cash *v.* Kennion, 11 Vesey, 314.

[1] The former rule as to damages on a bill of exchange drawn in this country and payable in England in pounds sterling, was to estimate the pound at $4 44 (which was originally the valuation for revenue purposes, Act March 2, 1799, ch. 22, § 61, 1 Stat. at Large, 673), adding what was known as the "rate of exchange" between this country and England at the time of the trial, with interest.

By an act of Congress, however, passed July 14, 1832 (4 Stat. at Large, 583), the value of the pound sterling, in calculating the rates of duties, was fixed at $4 80, and subsequently for the purpose of payments into the United States treasury, and the appraisement of imported merchandise, it was made equal to $4 84 (Act July 7, 1842, 5 Stat. at Large, 496). And by the second section of a statute, entitled "An act to establish the custom house value of the sovereign or pound sterling of Great Britain, and to fix the par of exchange," approved March 3, 1873, it is provided as follows: That in all payments by or to the treasury, whether made here or in foreign countries, where it becomes necessary to compute the value of the sovereign or pound sterling, it shall be deemed equal to four dollars eighty-six cents and six and one-half mills, and the same rule shall be applied in appraising merchandise imported where the value is, by the invoice, in sovereigns or pounds sterling, and in the construction of contracts payable in sovereigns or pounds sterling; and this valuation shall be the par of exchange between Great Britain and the United States; and all contracts made after the first day of January, eighteen hundred and seventy-four, based on an assumed par of exchange with Great Britain of fifty-four pence to the dollar, or four dollars forty-four and four-ninths cents to the sovereign or pound sterling, shall be null and void.

At the time of the passage of this act (which, it will be observed, is much broader in its scope than its predecessors), the English sovereign, owing to the changes in the value of the precious metals, had come to be worth a little over $4 86 in gold coin. To correct the error caused in our accounts with Great Britain, by the difference between the actual value and the legal value of $4 44, about nine and a half per cent., under the name of "exchange," was added to the legal value. By the act in question, this element of confusion is eliminated from the accounts.

Where a bill is drawn in New York and returned unpaid, the damages are fixed by statute (1 R. S. N. Y. 770). The general principle is to allow the creditor what it would cost him to place the amount of the bill in the place of payment, or to allow him for re-exchange. Where the bill is drawn abroad, and made payable here, the holder is entitled to receive only the amount named in the bill, without exchange. Guiteman *v.* Davis, 45 Barb. 576, note; see Cary *v.* Courtenay, 103 Mass. 316.

And in an action here on a contract to pay money in another country (not a bill of exchange), no exchange can be recovered, although there were no tribunals in that country in which the plaintiff could sue. Lodge *v.* Spooner, 8 Gray, 166; Hussey *v.* Farlow, 91 Mass. 263.

Where a payment is to be made in the currency of a foreign country, its amount is to be computed in the currency of the United States, by ascertaining what sum the standard coin of one will produce of equal weight and fineness in the currency of the other. Bush *v.* Baldrey, 93 Mass. 367.

And it is said that in the case of a party coming from another country into the courts of the United States to enforce the payment of moneys which, if paid abroad where they were due, would be paid in a currency equal to gold when gold is at a premium here, our courts will not add to the nominal amount a sum sufficient to enable him to replace it in gold in the place where it is payable. If the debt were payable in dollars, the plaintiff, like a citizen, could recover the nominal amount of dollars and interest only. And if the debt is for so many pounds sterling, the recovery can be for that sum only converted into dollars at the rate which the pound sterling bears to the dollar, without any premium or regard to the rate of exchange between the two countries, which is owing to the want of a specie currency here. Swanson *v.* Cooke, 45 Barb. 574. This decision is based on the same reasoning with the New York cases cited in the text, and conforms to the doctrine of that State, as there stated. So in Rice *v.* Ontario Steamboat Co. 56 Barb. (N. Y.) 384, in an action against a carrier to recover the value of goods, which were delivered to him in New York, to be transported to Montreal, and which were burned while in his charge, the recovery was limited to the amount

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the property would have been worth in Montreal in dollars on the day when it was destroyed, without allowance for exchange or for depreciation of the United States currency. But if the question were an open one, the principles laid down, in the case of Swanson *v.* Cooke, might at first appear to admit of doubt, as unnecessarily substituting an artificial for a natural measure. It might seem more philosophical to hold that where a debt or demand, payable in a foreign currency, has here a recognized or ascertainable mercantile value, and is properly suable here, the measure of damages in this country is such actual value. Why should not the foreign currency, in the absence of any statutory provision to the contrary, be placed on the same ground with other commodities, or with gold and silver coin regarded as bullion, and not as money, and the measure be in the one case as in the other, the actual value? Foreign coin is no more money here than any foreign commodity, unless it is made so by statute, and the arbitrary rule does not conform to the principle of compensation.

The decision can be maintained, however, on the ground that there is no common standard between the paper dollar and the foreign coin. The relative weight, fineness, and consequent value of the national coin, in this and other countries, are susceptible of exact determination, and in the United States the value of the foreign coin is in fact ascertained by law. By an act revising and amending the laws relative to the mints, assay offices, and coinage of the United States, known as the "Coinage Act of 1873," by which all prior inconsistent legislation is repealed (17 U. S. Stat. at Large, 424), it is enacted that the gold coins of the United States shall be a one dollar piece, which, at the standard weight of twenty-five and eight-tenths grains, shall be the unit of value; a quarter eagle; a three dollar piece; a half eagle; an eagle, or ten dollar piece; and a double eagle; that the silver coins shall be a trade dollar; a half dollar, or fifty cent piece; a quarter dollar; and a dime, or ten cent piece; and that the minor coins shall be a five cent piece, a three cent piece, to be composed of copper and nickel; and a one cent piece, to be composed of copper with an alloy of five per cent. of tin and zinc. In addition to the legislation already referred to, fixing the value of the pound sterling for certain purposes, the following series of acts establish and regulate for specific and general purposes the value of the principal foreign coins as compared with our silver dollar: Acts February 9, 1793, ch. 5 (1 Stat. at Large, 300); March 2, 1799, ch. 22 (1 Stat. at Large, 680, § 74); April 10, 1806, ch. 22 (2 Stat. at Large, 374); June 25, 1834, ch. 71 (4 U. S. Stat. at Large, 681); June 28, 1834, ch. 96 (4 Stat. at Large, 700); March 3, 1843, ch. 69 (5 Stat. at Large, 607); March 3, 1843, ch. 92 (5 Stat. at Large, 625). But as the legal tender currency is without intrinsic value, no equivalent in that currency to foreign coin can be furnished. The value of the foreign debt, therefore, cannot be directly estimated in paper currency, but must necessarily be estimated in gold or silver dollars or units of value. After it is thus ascertained in dollars, the acts of Congress which make all debts payable in certain paper currency become applicable. And the foreign creditor having an ascertained claim of a certain number of dollars, is necessarily compelled like any other creditor to accept payment of the amount in notes which are made by law a legal tender for all debts.

In the case under consideration, the claim was an application to the equitable power of the court to enforce the payment of money improperly appropriated by a trustee. Whether in such a case the court, as a court of equity, might not on other and purely equitable grounds, have directed the ascertainment and payment of the actual value of the debt, including the premium, is a question which does not seem to have been considered.

So where a seaman had shipped at Saint John, New Brunswick, on board an American ship for a voyage to London and back, he was held entitled to recover in the United States double the stipulated wages, gold having been at a premium of one hundred per cent. But on appeal the judgment was modified by the Circuit Court of the United States for the first circuit, which held that the libellant could recover no more than the amount in dollars and cents specified in the contract. Trecartin *v.* Ship Rochambeau, 26 Law Rep. 564; 2 Clifford, 465.

The natural rule, however, of allowing the creditor the actual equivalent in currency of the amount of foreign money which his claim represents, is sanctioned to some extent by recent decisions. Thus where a libel for the loss of a vessel on the Canadian shore of Niagara River had been referred to a commissioner, who reported that the vessel was worth, at the time of the loss, a certain sum of dollars "in gold or Canadian currency," which were both at a premium of forty-nine per cent. over United States legal tender notes, it was held by the United States District Court for the Northern District of New York, in a decision which was affirmed on appeal, that the amount being reported at a certain sum in foreign currency, was to be estimated at the value of that sum in United States notes, and that the use of the word

sideration paid for the security, whether it be a bill or a note, or on the fact whether it was in whole or part given for the accommodation of the party who sues.[1] "In general," says Mr. Chitty, "between the original parties, or a holder who has not given full value, the defendant is at liberty to show that he drew, accepted, indorsed, or made the bill or note for the accommodation of the plaintiffs, or one of them, or of a person for whom he is a trustee, who either expressly or impliedly engaged to provide for the bill; or the defendant may show that he received no consideration, or none that was in point of law adequate, and thus may entirely defeat the action or reduce the claim."* Therefore, where the defendant accepted the bill for the accommodation of the plaintiff, except as to a part; and where the plaintiff, as indorsee, had only advanced a part of the money made payable by the bill accepted for the indorser's accommodation, neither was allowed to recover more than he had advanced.†[2] But the consideration of this subject, in truth, appertains more properly to the right of recovery than the measure of damages; and it is, moreover, so abundantly dis-

* Chitty on Bills, 9th English edition, 70. † Darnell *v.* Williams, 2 Stark. R. 166; Wiffen *v.* Roberts, 1 Esp. R. 261.

"gold" by the commissioner, did not require that any effect should be given to the report other than would have been required if the value had been stated in Canadian currency only. Councer *v.* Steam Tug Griffin, 5 Am. Law Reg. (N. S.) 45. So in an action on a note made by the defendant in Canada, payable in Canadian currency, which at and continually subsequent to the date of the note was at a premium over the United States currency, it was held by the Supreme Court of Wisconsin that the premium might be recovered, and should be calculated at the rate current at the date of the judgment, which should be for a sum that would purchase Canadian funds to the amount found due on the note. Any payment previously made on the note should be credited at the the rate of premium current at the time of such payment. Hawes *v.* Woolcock, 26 Wisc. 629; see *ante*, 193, *n.* For the measure of damages in an action against a factor for breach of his contract to deliver in a foreign country notes and evidences of debt, see Nickerson *v.* Soesman, 98 Mass. 364, *infra*, 341, *n.*

Vice versa, in Nova Scotia it has been decided by the Supreme Court of that province, that United States treasury notes were not a legal tender for rent there payable in dollars and cents of United States currency. The Nova Scotia Tel. Co. *v.* Am. Tel. Co. 4 Am. Law Reg. (N. S.) 365.

[1] In an action by the maker of a negotiable promissory note, against one who has wrongfully negotiated it, so as to render the maker liable upon it, the measure of damages is the amount of the note; and proof that the plaintiff has already paid the note is unnecessary. Decker *v.* Mathews, 2 Kern. 313; affirming s. c. 5 Sandf. 439.

[2] In an action by the indorsee against the indorser of a promissory note, the measure of damages is the amount paid by the indorsee, with interest, subject to the limitation that the recovery must not exceed the sum due on the face of the note. Schaeffer v. Hodges, 54 Ill. 337. So also where the law permits the assignment of a non-negotiable promissory note, and owing to the insolvency of the maker or other sufficient cause the assignee has failed to recover the amount from him; in an action against the assignor, the measure of the assignee's damages is the amount of the consideration paid and interest. Davis *v.* Harrison, 2 J. J. Marsh. (Ky.) 189; Whistler *v.* Bragg, 31 Mo. 124. See Braman *v.* Hess, 13 J. R. 52; Cook *v.* Clark, 4 E. D. S. (N. Y.) 213; Hutchins *v.* McCann, 7 Porter (Ala.), 94; Noble *v.* Walker, 32 Ala. 456; French *v.* Grindle, 15 Maine, 163; Hawkinson *v.* Olsen, 48 Ill. 277. So too, the assignee of a right of action on the covenants in a deed may recover of the maker of the deed the consideration paid for the assignment, not exceeding what the grantee might have recovered, if he had brought the action. Eaton *v.* Lyman, 26 Wisc. 61.

cussed in the treatises to which I have already referred, that it is only necessary here to advert to it.

It seems that where a party sells a note for a valuable consideration, there is an implied warranty that the parties whose names appear on it, are able to make a valuable [239] contract;[1] and so, where the defendant had procured a minor to indorse a note and then put it in circulation, he was held liable for its amount.*

NOTES PAYABLE IN SPECIFIC ARTICLES.—In the United States, notes are frequently given payable in specific articles; and on instruments of this form a doubt has arisen whether they should be treated as to be paid in money, or as contracts for the delivery of goods.[2] In New York, notes were given in this form: "I promise to pay seventy-nine dollars and fifty cents, on the first day of January, in salt, at fourteen shillings per barrel." The Supreme Court† held this to be a contract for the delivery of salt, and that the value of the salt was the true measure of damages; thus 45 barrels and 3-7ths of a barrel would have discharged the note, at 14 shillings a barrel; and so, if salt had been only a dollar per barrel, at the time specified for payment, or delivery, the same quantity would discharge the note; the value, then, of 45 barrels and 3-7ths of a barrel, was the rule of damages. The Court of Errors, however, held the instrument not to be a contract for the delivery of salt at all events, but intended to give the party his election to pay the sum expressed in money, or in salt; and that as the defendant had neglected to avail himself of the privilege of paying in the specific article, the payment of the principal debt and interest must give the true measure of damages; and the judgment of the Court was

* Lobdell *v.* Baker, 3 Met. 469; Thrall *v.* Newell, 19 Verm. 202.

† Gleason *v.* Pinney, 5 Cowen, 152; s. c. in Error, 5 Wend. 393, and Clark *v.* Pinney, 7 Cowen, 681.

[1] In an action to recover the damages sustained by the plaintiff by the act of the defendant in fraudulently transferring to him a promissory note, as a valid and subsisting demand, when it had been in fact previously paid and canceled, the measure of damages is, *prima facie*, the amount of the note and interest. The ability of the maker to pay the note will be presumed, until the contrary is proved. Neff *v.* Clute, 12 Barb. (N.Y.) 466.

[2] In Pennsylvania, when the contract is to pay a sum of money in specified articles, the damages on failure are the interest of the money. And where one contracted to buy land at a certain price, the payments to be made in axes, it was held that the damages on the vendee's failure was the interest on the money, not the profit which the vendor might have made on the axes. White *v.* Tompkins, 52 Penn. St. 363. So in Ohio, the measure of damages for the violation of an agreement to pay $1,500 in wool, at 20 cents per pound, is fifteen hundred dollars, and not the market value of the wool. Trowbridge *v.* Holcomb, 4 Ohio St. 38. But in Iowa, in an action on a due bill, payable in flour on a given day, the measure of damages is the value of the flour on the day when payment should have been made. Davenport *v.* Wells, 1 Iowa, 598.

reversed.* So, too, in Connecticut, on a promissory note to pay "two hundred and fifty dollars in brown cotton shirting at the rate of thirty cents a yard," the defendant offered to prove that the shirting at the time and place fixed for payment, was worth only twenty cents a yard. But the evidence was excluded; the court holding that the instrument was an acknowledgment of a debt for the sum named, with an option to pay it in a cer-
[240] tain way, which option the defendant had failed to take advantage of; and that consequently the promise was to be regarded as a naked agreement to pay the money.† And in Vermont it has been recently said, "that in that State, by an uninterrupted series of decisions, notes payable in specific articles of property, after the time of payment has elapsed, seem to stand much in the same condition as notes payable in money, except in their lack of negotiability;" and the plaintiff was held entitled to recover under the money counts.‡ But a note given in South Carolina, "to deliver to the plaintiff or order such number of barrels of new rice as will amount to the sum of two hundred dollars, value received this day, at one dollar per cwt.," was held to be clearly a contract for the delivery of rice; and the measure of damages was held to be the value of the rice at the time it was to be delivered, which exceeded considerably the value fixed by the note.‖[1] In New Hampshire, too, the doctrine is maintained in relation to notes payable in specific articles, that after the time of payment has elapsed, the obligation of the maker is not a mere duty to pay money, but a liability in damages for the non-fulfilment of his contract.¶[2] In Tennessee, it has been decided that the measure of damages for breach of a covenant to pay a given sum in a particular species of paper, as Tennessee, Alabama, or Mississippi bank notes, is the specie

* A similar contract was construed differently, and according to the views of the Supreme Court of New York, in Pennsylvania, in Edgar *v.* Bois, 11 Serg. & R. 445; and in Tennessee, McDonald *v.* Hodge, 5 Haywood's T. R. 85. In Maryland it has been held, that in an action for breach of contract to make payment in tobacco, the plaintiff shall recover the value of the tobacco on the day appointed for payment. Lyles *v.* Lyles, 6 Har. & J. 273.

† Brooks *v.* Hubbard, 3 Conn. R. 58.

‡ Perry *v.* Smith, 22 Verm. R. 301.

‖ Price *ads.* Instrobe, Harper, 111.

¶ Wilson *v.* George, 10 N. H. R. 445.

[1] The same rule obtains in Alabama. Rose *v.* Bozeman, 41 Ala. (N. S.) 678.

[2] So in Wisconsin, an instrument in the following form: "Due to J. A. Noonan $300 in Watertown R. R. Stock," was held to bind the promisor to pay so many dollars in the stock of the company as "when counted at par" would amount to $300—that is, the value of the stock, and not the nominal amount of money, furnished the measure. Noonan *v.* Isley, 17 Wis. 314. In Rhode Island, where a specified lot of cotton was to be exchanged at an agreed price for a certain note of a third person who had failed, although all the parties to the contract were, at the time of making it, ignorant of the failure, it was held that the plaintiffs, not having received the amount of the note in cotton at the stipulated price, were entitled to judgment for the value of the note in money upon that basis, with interest on that value from the day of demanding the cotton. Bicknall *v.* Waterman, 5 R. I. 43.

value of such notes, according as it would be for the interest of the covenantor to discharge the obligation;* the court saying, "Manifestly on the day the payment was to be made the covenantee might have discharged himself by the payment of one hundred dollars, in paper of either description described in the covenant; of course he might have selected the least valuable bank notes mentioned. If he failed to pay, and broke his covenant, what injury did the covenantee sustain thereby? Certainly only the value in money of the article in which payment might have been made. As the measure of damages in covenant consists in the value to the covenantee of the [241] thing required to be performed at time of the breach, the damages in this case must be the specie value of the notes in which payment might have been made, and in which it would have been most to the interest of the covenantor to have paid."[1] I confess this seems to me the most correct view of contracts of this description.[2] In Mississippi, it has been held that if a note be given for depreciated bank paper, the measure of damages in an action on the note is the value of the money at the time the note was given; the burden of the entire proof of the case, however, lying on the defendant.[3] I cannot see, however, that

* Hixon *v.* Hixon, 7 Humphreys, 33.

[1] So, in the same State, on the breach of a covenant to pay certain stocks at a specified time, or their equivalent in money, the measure of the damages was held to be what the stocks would have brought in the principal markets of the United States at the time the contract was broken, deducting the expense of the sale. Doak *v.* Ex'rs of Snapp, 1 Coldwell (Tenn.) 180. But, in the same State, it has been held, that in an action on an obligation to pay a certain sum in the bonds of a railroad company, the measure of damages is the nominal, not the market value, of the bonds. Memphis & Little Rock R. R. Co. *v.* Walker, 2 Head (Tenn.), 467.

[2] Where one agreed to pay forty dollars (a year's rent) in specific articles, at prices and in quantities specified, it was held, that if the tenant tendered the articles when due, the landlord must receive them, not at their cash value, but the stipulated price; and if he did not tender them, the landlord could not recover them, but must take the forty dollars which was held to be liquidated damages on the tenant's failure to perform. Heywood *v.* Heywood, 42 Maine, 229.

[3] See Green *v.* Sizer, 40 Miss. 530, where the doctrine is adhered to in that State, and applied to the case of a deposit with a banker, during the late civil war, of confederate treasury notes, Mississippi cotton notes, and Mississippi military treasury notes, the validity of which obligations, although issued by authority of the insurgent government, is maintained on the ground that this government existed *de facto* before the notes were issued, and that at the time of the deposit they passed from hand to hand as representatives of value. In a suit in Indiana, for non-delivery of notes under an agreement to pay $900 in cash notes on "good solvent" men, it was held that the measure of damages was not the sum named, but the value of the notes to be found by a jury. Williams *v.* Jones, 12 Ind. 561. The rule adopted, we think, was right, and not the less so that what is called "solvency" in Indiana, as it certainly often is elsewhere, should seem, in the judicial apprehension, to have been a thing of uncertain value. So, in the same State, in a suit on a note payable in "good judgments on good men," the value of the judgments is held the measure of damages. Pierce *v.* Spader, 13 Ind. 458. See, also, Parks *v.* Marshall, 10 Ind. 20. So in Alabama. Williams *v.* Sims, 22 Ala. 512. Under a written contract, by which the defendant undertook to deliver the plaintiff two notes "on" certain named persons, or, if he failed to do so, "to make satisfaction" within four weeks, it was held that the measure of damages was the value of the designated notes, and that the

this case can be defended on principle; nor as it appears to me, is it consistent to deny a party the right to speculate on the rise of a given species of paper, as he would have in regard to any article of merchandise.*[1] We shall have occasion again to advert to this subject when we come to treat of sales of chattels.

Having thus exhibited the rules in regard to promissory notes, which are the simplest form of legal obligation, we turn now to bills of exchange.

BILLS OF EXCHANGE.—If the bill be properly an inland bill, and if there be no difference between the currency or rate of exchange at the time and place where the bill is drawn and the time and place where it is payable, then the measure of damages is the same as that we have laid down in regard to notes; but in regard to foreign bills of exchange generally, the question becomes more complicated by the introduction of the element of re-exchange.

RE-EXCHANGE.—The general rule is, that the holder of a bill protested for non-payment, is entitled to the amount of the bill, re-exchange, and charges.

"Re-exchange," says Mr. Chitty,† "is the expense incurred by the bill being dishonored in a foreign country in which it was payable, and returned to the country in which it was made or indorsed, and there taken up. The amount of it depends on the course of the exchange between the countries through which the bill has been negotiated. It is not necessary for the plaintiff to show that he has paid the re-exchange; it suffices if he were liable to pay it; [242] but if the jury find that there was not at the time any course of re-exchange between the two foreign places, then no re-exchange is recoverable." ‡

* Walker *v.* Meek, 12 Sm. & M. 495.

† Bills, 666.

‡ See, also, De Tastet *v.* Baring, 11 East, 265, where the origin and principle of the right to redraw is gone into at large. Mellish *v.* Simeon, 2 H. Black. 378, 379; Pollard *v.* Herries, 3 B. & P. 335.

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burden of proof of their value was on the plaintiff, as an essential ingredient in his case. Moore *v.* Fleming, 34 Ala. (N. S.) 491. So, in Kentucky, the measure of damages for breach of an obligation to pay in cash notes, is the value of the notes, to which may be added interest from the time when they ought to have been paid. Marr's Adm'r *v.* Prather, 3 Metc. (Ky.) 196. But, in Massachusetts, for the breach of an agreement to pay for property bought at a stipulated price in notes for the amount, with interest, the measure of damages is the contract price. Worthy *v.* Jones, 11 Gray, 168.

[1] The measure of damages for the breach of a contract, payable in "confederate" currency, is the value of the "confederate" notes in lawful money at the time and place of the contract. Thorington *v.* Smith, 8 Wallace, 1; Herbert *v.* Easton, 43 Ala. (N. S.) 547. See, also, Toulman *v.* Sager, 42 Ala. (N. S.) 127; Marshall *v.* Marshall, *Ib.* 149; Kirtland *v.* Molton, 41 Ala. (N. S.) 548. So in the case of a check. Bank of Mobile *v.* Brown, 42 Ala. (N. S.) 548. If the contract, payable in such currency, matures at a future time, as a promissory note, the measure is the value of the stipulated amount at the time of maturity; and if such a note is of no value, nominal damages only can be recovered. Powe's Adm'rs *v.* Powe, 42 Ala. (N. S.) 113. In Arkansas, however, contracts payable in "a currency prohibited by law" are declared void. Leach *v.* Smith, 25 Ark. 246.

"By re-exchange," says Mr. Justice Story, "is meant the amount for which a bill can be purchased in the country where the acceptance is made, drawn on the drawer or indorser, in the country where he resides, which will give the holder of the original bill a sum nearly equal to the amount of that bill at the time when it ought to have been paid, or when he is able to draw the re-exchange bill, together with his necessary expenses and interest, for that is precisely the amount which the holder is entitled to receive, and which will indemnify him for its non-payment." *

The question of re-exchange usually arises in regard to the drawers and indorsers; for the acceptor is not, upon non-payment of the bill, ordinarily liable to the holder for anything more than the principal sum, and the expenses of the protest with interest. †[1] But if he has expressly or impliedly agreed with the drawer, or with any indorser, for a valuable consideration, to pay the bill at its maturity, and has failed to do so, and the drawer or indorser has been compelled to take up the bill, and pay damages and other expenses necessarily incurred thereby, he may, perhaps, be compellable fully to indemnify the drawer or indorser, for all the damage and expense so paid by him, on account of the breach of his contract. ‡

The subject of re-exchange is very differently treated in England and in the United States. The rate which the holder is entitled to recover, depends in the former country on the actual course of exchange, as proved at the trial; while in this country, with that leaning to a fixed rule which we shall have occasion again to notice, when speaking of the subject of insurance, the amount of re-exchange is generally regulated by positive statutory provision. ‖

To obtain a correct appreciation of this branch of our [243] law, it is necessary to consult those treatises which are specially devoted to it; and I shall therefore content myself here with a brief examination of a few of the cases which have been decided in this country, and a reference to the statutory

* Story on Bills, 400.

† Bowen *v.* Stoddard, 10 Met. 375; Newman *v.* Goza, 2 Louisiana Annual R. 642.

‡ Story on Bills, § 398; Chitty on Bills, part 2, ch. vi. 666 to 669; Woolsey *v.* Crawford, 2 Camp. 445; Napier *v.* Schneider, 12 East, 420; Bayley on Bills, ch. ix. 353; Riggs *v.* Lindsay, 7 Cranch, 500; Bowen *v.* Stoddard, 10 Met. 375; Pothier de Change, 115, 117.

It has been decided in Pennsylvania, that the acceptor is not liable for re-exchange. Watts *v.* Riddle, 8 Watts, 545.

‖ Mr. Chitty, in his Treatise on Bills, 188 and 667, suggests the expediency of a fixed rule analogous to those adopted by the States of our Union; and among certain parties connected with the trade between England and East India, the subject is regulated by a resolution of the East India Trade Committee, fixing all charges at 25 per cent. Chitty on Bills, 668.

[1] In Maine, in the absence of a statutory provision, damages for protest are not allowed in a suit on a promissory note, though brought by an indorsee against an indorser, and payable in another State. Loud *v.* Merrill, 47 Me. 351.

provisions of the various States; in making which it should be borne in mind that these statutes have no extra-territorial operation. Thus it has been held in Massachusetts, that the statute of Maine which enacts, that in an action on a bill of exchange drawn or indorsed in that State but payable out of it, and protested for non-payment, the holder shall recover three per cent. damages in addition to the contents of the bill and interest—does not entitle the holder to recover those damages in a suit against the acceptor in the courts of Massachusetts.*

The desire to establish a fixed rule in the matter of re-exchange, manifested itself in this country at an early period of our colonial history. In Pennsylvania, as far back as the year 1700, the legislature enacted, that if any person within that province should draw or indorse any bill of exchange upon any person in England, or other parts of Europe, and the same should be returned unpaid, with a legal protest, the drawer and all concerned should pay the contents of the bill, with *twenty per cent. advance for the damage* thereof, in the same specie as the bill was drawn, or current money of that province, equivalent to that which was first paid to the drawer or indorser.† So in Massachusetts, the old rule, founded on usage (since modified by statute), was to allow on all foreign bills drawn on England, and probably also upon any part of Europe, ten per cent. as damages in lieu of re-exchange.‡[1]

In New York, the original usage was to allow twenty per cent. damages, in lieu of re-exchange, on all bills drawn [244] on England or any part of Europe. In an action brought in New York, on a bill drawn by the defendant on a Liverpool house, indorsed to the plaintiff, and protested for non-payment, the plaintiff claimed twenty per cent. damages, and interest, together with two per cent. for the difference of exchange, it being two per cent. above par when the defendant was notified of the non-payment of the bill. But the claim of the indorser was refused, notwithstanding reliance was placed on a usage of the Chamber of Commerce. Spencer, J., said, "The right to recover damages on the protest of a foreign bill

* Fiske *v.* Foster, 10 Met. 597.

† See Francis *v.* Rucker *et al.* Ambler, 672, and Hendricks *v.* Franklin, 4 J. R. 119. In Rhode Island, as early as 1743, an act of similar purport was passed, fixing the damages at *ten per cent.* Brown *v.* Van Braam, 3 Dallas, 344, 346.

‡ Grimshaw *v.* Bender, 6 Mass. 157, 161, 162.

[1] In Maine, the mercantile usage is the same. Wood *v.* Watson, 53 Maine, 300. Such a rule of damages established by long usage has the force of law. It must be taken as part of the contract of indorsement, and cannot be changed by the court, whatever monetary crisis may occur. *Ibid.*

of exchange rests with us on immemorial commercial usage, sanctioned by a long course of judicial decision. . . . . It is presumed that our rule to allow twenty per cent. on the protest of a foreign bill, was originally co-extensive with the rule established in Pennsylvania, and that the same reasons induced both rules. The twenty per cent. was in lieu of damages, in case of re-exchange, and because there was no course of exchange from London to New York, and to avoid the constant fluctuation and uncertainty of exchange." After saying that the usage of the Chamber of Commerce was too recent to alter the rule of law, he closed by stating, "In my opinion the twenty per cent. is in lieu of all claim for damages in such cases; and the claim for the difference in the price of the bills cannot be supported, and therefore it must be deducted in this case." *

In a subsequent case, however, in the Court of Errors,† though the twenty per cent. was allowed, the rule in regard to the sum on which it was assessed was altered. The court decided that the holder of a bill of exchange, drawn here on England, and protested there, was entitled to recover the contents of the bill at *the rate of exchange* on England *at the time of the return* of the dishonored bill and notice given to the drawer, and that the twenty per cent. damages and interest were to be calculated on this amount, as the principal sum, and not upon the fixed par of exchange. The judgment of the Supreme Court was reversed, but no reasons were assigned.‡ [1]

* Martin *v.* Franklin, 4 J. R. 112.

† Graves *v.* Dash, 12 J. R. 17.

‡ Mr. Chancellor Kent has stated the present rules existing in many of the American States, in 3 Kent's Com. lec. xliv. 116 to 121.

The American Jurist for July, 1829, vol. ii. p. 79, contains an interesting article on the subject of Damages on Bills of Exchange. It states the difference between the system of re-exchange in force in Great Britain and France, and that of arbitrary damages adopted in the United States, and discusses various questions,—whether the European or American system is the best; whether the want of a uniform law on the subject in the different States is an evil; and if so, in what manner it should be redressed. An able report was made on the subject by Mr. Verplanck to the House of Representatives of the United States, in March, 1826, maintaining the right of Congress to control the subject, urging the importance of establishing a uniform rule, and strongly contending for the rule of actual re-exchange as opposed to that of arbitrary damages.

"In fact," says the report, "this principle is the only one which can perfectly and under all circumstances and fluctuations of exchange, secure anything like a fair compensation of the loss sustained by the holder of a dishonored bill, without the hazard of one party being sometimes but partially paid, or the other oppressed with the payment of unequal and ruinous damages. . . . . If this principle be adopted, no valid reason appears why arbitrary damages should be added. If provision be made for the substantial fulfilment of the engagement of the seller of the bill, and if he acted in good faith, the requiring any additional sum as a mulct or penalty for the failure of some other person, is useless and unjust, and as recent examples in some of our cities have proved, may be of the most dangerous consequences, and overturn the credit of many a fair trader who had made the amplest arrangements to meet all his engagements."

[1] See Denston *v.* Henderson, 13 Johns. 322. But the holder of a bill of exchange remitted to pay an antecedent debt is not entitled to recover the twenty per cent. Kenworthy *v.* Hopkins, 1 Johns. Cases, 108; Thompson *v.* Robertson, 4 Johns. 27.

[245] We have thus far considered the damages and re-exchange on bills protested for non-payment. The same general principles govern the case of bills protested for non-acceptance. "On failure of the performance of the engagement that the drawer will accept," says Mr. Chitty,* "the drawer of a bill will immediately, and before the time specified in the bill for payment, be liable to an action, not only for the principal sum, but also in certain cases for interest, re-exchange, and costs, as a consequence of the bill not being honored." This was decided as early as the year 1765,† and again by Lord Mansfield,‡ on the ground that what the drawer had undertaken has not been performed, the drawer not having given the credit which was the ground of the contract; and the same point was held in an action by the indorsee against the indorser,‖ each indorser being considered as a new drawer. It had been decided in bankruptcy to the same effect at an earlier day;¶ and the rule in this country is the same.** [1]

[246] NON-ACCEPTANCE.—In New York, the damages in cases of protest for *non-acceptance*, are by statute fixed at the same rate as for non-payment. This was the rule before the statute.††

When a bill is drawn in Alabama, payable at a place without its limits, neither interest nor damages can be recovered of the acceptor upon its dishonor without proving the law of the place of payment as to such damages and interest. But it is no ob-

* Bills, 216.

† Bull. N. Prius; Bright *v.* Purrier, 269.

‡ Milford *v.* Mayor, 1 Douglass, 54.

‖ Ballingalls *v.* Gloster, 3 East, 481.

¶ Macarty *v.* Barrow, 2 Strange, 949, of which a fuller report is given in Chilton *v.* Whiffin, 3 Wilson, 17.

** Mason and Smedes *v.* Franklin *et al.* 3 J. R. 202; and again in Weldon *v.* Buck *et al.* 4 J. R. 144.

In France the rule appears different. On the protest for non-acceptance, the obligation of the parties indebted, says Pardessus, Cours de Droit Commercial, part ii. tit. iv. ch. iv. sec. 7, vol. 2, p. 424, is either to pay, to deposit the amount, or to give security. Lorsque il (la personne poursuivie) donne une caution, jugée suffisante, ou qu'il consigne, le porteur n'a plus jusqu' à l'échéance de droits à exercer ni contre lui ni contre les autres signataires de la lettre pour exiger qu'ils donnent un semblable cautionnement, ou qu'ils remboursent, parceque l'obligation des co-debiteurs étant alternative de payer, ou de donner caution, l'un d'eux était libre de choisir le mode qui leur convenoit pour acquitter la dette de tous.

And there are traces of some similar or analogous custom in England. In Bright *v.* Purrier, the defendant offered to prove a commercial usage not to pay till protest for *payment;* and in Buller's Nisi Prius, page 266, it is said, "When the bill is returned protested, the party that draws the bill is obliged to answer the money and damages, or to *give security to answer the same beyond sea*, within double the time the first bill ran for."

†† See reviser's notes to the 22d section, 1 R. S. 771. The point was expressly decided in Weldon *et al. v.* Buck *et al.* 4 J. R. 144; and the same is the rule in England.

[1] For the defendant's failure to fulfil his agreement to accept a draft for the plaintiff's accommodation, the measure of damages is not the amount of the draft, but the inconvenience and loss which the plaintiff sustains from the defendant's offer to accept, and failure to do so. Isley *v.* Jones, 12 Gray (Mass.) 260.

jection that interest and damages for non-payment are included in the same entry of judgment, without specifying the amount of each separately.*

INTEREST.—Some points still remain to be noticed, which have a common application to bills and notes. We shall have occasion hereafter to consider the principles which govern the allowance of interest, in a separate place; it is sufficient to say here, that the general rule is, that though the law does not always imply a contract on the part of the debtor to pay interest on the sum he owes,† still, in the case of a bill or note, interest is usually recoverable from the time it becomes due; and a bill or note, payable at a certain day, carries interest from that day unless the non-payment at the appointed time was occasioned by the negligence of the holder.‡[1]

We shall have occasion hereafter to see that the En- [247] glish courts are less disposed to allow interest than those of this country; and in accordance with this disposition, it appears that there, when interest is not made payable by the bill itself, the jury are not bound to give it; but it rests in their discretion to award it,[2] if they are of opinion that the delay of payment has not been occasioned by the fault of the holder. And so in a late case they refused it where a promissory note had been overdue thirty years; and the court, on motion, would not increase the verdict by giving it.‖

A party who guarantees the due payment of a bill of exchange by the acceptor, is liable for interest upon it if it be not paid when due.¶[3]

* Dickinson *v.* Branch Bank of Mobile, 12 Ala. 54.

† Chitty on Bills, ch. vi. p. 662; De Haviland *v.* Bowerbank, 2 Camp. 50; De Bernales *v.* Fuller, 2 *Ibid.* 426; Walker *v.* Constable, 1 Bos. and Pull. 307.

‡ Robinson *v.* Bland, 2 Burr. 1077; Laing *v.* Stone, 2 Man. & Ry. 561; Bann *v.* Dalzell, Mood. & M. 228; Greenleaf *v.* Kellogg, 2 Mass. R. 568; Cooley *v.* Rose, 3 Mass. R. 221; Hastings *v.* Wiswall, 8 Mass. 455; Foden *v.* Sharp, 4 J. R. 183: Slacum *v.* Pomery, 6 Cranch, 221; Cannon *v.* Beggs, 1 M'Cord, 371.

‖ Du Belloix *v.* Lord Waterpark, 1 Dow. & Ry. 16; Bann *v.* Dalzell, Mood. & M. 228; Arnott *v.* Redfern, 3 Bing. 353; Calton *v.* Bragg, 15 East, 223; cited 3 Bing. 359; Higgins *v.* Sargent, 2 Barn. & Cres. 343; Page *v.* Newman, 9 Barn. & Cres. 378; 4 Man. & Ry. 305. See also, Chitty on Bills, ch. vi. p. 662, *et seq.*, and cases there cited, and Starkie on Evidence, tit. Bills of Exchange, Damages.

¶ Ackermann *v.* Ehrensperger, 16 M. & Wels. 99.

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[1] Interest by way of damages is recoverable on the overdue coupons of a railroad bond from the time of demand and refusal. Whitaker *v.* Hartford, Providence and Fishkill R. Co. 8 R. I. 47. See Maury *v.* Coyle, 34 Md. 235 (*post*, 491).

[2] If the jury award interest on a bill dishonored for non-acceptance, the rate of interest proper to be allowed is that which prevails at the place where the bill was drawn. Gibbs *v.* Fremont, 20 Eng. L. & E. 555; s. c. 9 Exch. 25; 17 Jur. 820.

[3] But he is not liable for *costs* of a suit against the maker. The Woodstock Bank *v.* Downer, 27 Vt. 540.

Costs of Prior Suits.—Some other decisions have been made upon the subject of the amount of recovery, which it may be proper to notice. An indorser who is sued on his indorsement, and subjected to costs, cannot recover those costs against the maker. He can only have the amount of the note and interest;* "because," says the Supreme Court of New York, "if the indorser of a note be duly fixed, he ought to pay it without being sued; and if he finds it more convenient to delay taking up the note until he is prosecuted to judgment and execution, the drawer ought not to pay for that convenience..... The mere fact of drawing the note does not imply a promise to save the payee harmless from all costs and charges that he may be subjected to as indorser. There must be a special promise to save harmless before the payee can call upon the drawer for costs accrued by the default of the payee (indorser) himself." In a suit against the indorser, the fees of protest are a proper charge.† And an indorser who has paid the note, can, it seems, recover the costs of protest against the maker.‡

On the same principle it has been held in England, [248] where an accommodation acceptor was sued by a *bonâ fide* holder, that as he ought to have paid it when demanded, he could not recover the costs against the party who had improperly indorsed it to the holder.‖ So also, the acceptor of a bill with funds who has failed to pay, is not liable for the costs of a suit against the drawer.¶ And the indorser of a bill is not liable for the costs of a suit by the holder against the acceptor, nor for commissions paid on the collection of the money.** In like manner the indorser of a regular bill who has been sued by an indorsee, is not entitled to recover from the acceptor his costs in such action.†† But a party who makes or indorses or accepts an accommodation bill or note is regarded as a surety, and can charge the party for whose benefit his signature is given with the costs of a suit for the collection of such note or bill if he be compelled to pay it. So the accommodation acceptor of a bill who is sued, can

* Simpson *v.* Griffin, 9 J. R. 131. See also, Steele *v.* Sawyer, 2 M'Cord, 459; and Richardson *v.* Presnall, 1 M'Cord, 192, to the same point as Simpson *v.* Griffin.

† Merritt *v.* Benton, 10 Wend. 117.

‡ Morgan *v.* Reintzel, 7 Cranch, 273.

‖ Bleaden *v.* Charles, 7 Bing. 246. See this case commented on in Asprey *v.* Levy, 16 M. & W. 851; Roach *v.* Thompson, 1 M. & M. 487.

¶ Barnwell *v.* Mitchell, 3 Conn. 101.

** Bangor Bank *v.* Hook, 5 Greenleaf, 174.[1]

†† Dawson *v.* Morgan, 9 B. & C. 618.

[1] Disapproved in Hargous *v.* Lahens, 3 Sandf. (N. Y.) 213.

recover his costs of the drawer.* And so it has been held between the accommodation indorser of a note and the maker.† [1]

* Jones *v.* Brooke, 4 Taunt. 464.
† Hubbly *v.* Brown, 16 J. R. 70; Baker *v.* Martin, Adm'r, 3 Barb. S. C. R. 634; and see *post*, ch. xi, Of Principal and Surety.

[1] Where one is estopped from denying his signature to a note, as where he has adopted the signature knowing it to be a forgery, the general rule will apply, and the measure of the damages will be the whole amount of the note. Casco Bank *v.* Keene, 53 Maine, 103. See this rule applied to the case of the signature of an indorser. Fall River Nat'l Bk. *v.* Buffinton, 97 Mass. 498.

CHAPTER IX.

THE MEASURE OF DAMAGES IN ACTIONS UPON POLICIES OF INSURANCE.

Marine Insurance: Partial Loss; Total Loss; General Average; The Principle of Arbitrary Remuneration.—Fire Insurance.—Life Insurance.

THE contract of insurance assumes various forms known under the general heads of Marine Insurance, Fire Insurance, and Life Insurance.[1] The subject forms a necessary part of a treatise on the law of damages; but, at the same time, as it has, like the matter of the last chapter, been fully treated of in the separate works devoted to this particular branch of jurisprudence, it would be improper here to do more than give a general outline of the subject.

MARINE INSURANCE.—Marine insurance is defined to be a "contract of indemnity in which the insurer, in consideration of the payment of a certain premium, agrees to make good to the assured all losses, not exceeding a certain amount, that may happen to the subject insured, from the risks enumerated or implied in the policy, during a certain voyage or period of time."* [2]

* Duer on Marine Insurance, vol. i. p. 58; Hamilton *v.* Mendes, 2 Burr. 198, 1210.

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[1] The right to recover upon a contract of insurance is commensurate with the loss actually sustained. Any evidence conducing to show the loss less than that claimed, is admissible. The doctrine relative to mitigation of damages has no application to such a case. Franklin Fire Insurance Co. *v.* Hamill, 6 Gill (Md.) 87.

[2] The law of Marine Insurance, which in the plan of this book is touched on but lightly, is full of nice questions as to consequential damages.

That the insurer is liable for losses only, which are directly occasioned by a peril insured against, is familiar law. But what is or not remote, must be governed by the circumstances of the particular case. Where a vessel is injured by a peril of the sea, and further injury occurs from the master's neglect to have her repaired; where in the case of an insurance on cargo, the ship is lost and the goods are saved, but are afterwards partially lost in consequence of the master's neglect to tranship them; and generally, where the master's neglect is the immediate cause by which the injury, although arising from a peril insured against, produces the damage, the insurers are not liable. See Copeland *v.* The N. E. Mar. Insurance Co. 2 Met. (Mass.) 432; Hazard *v.* Same, 1 Sumn. 218; Schieffelin *v.* N. Y. Ins. Co. 9 Johns. (N. Y.) 21; Cleveland *v.* Union Ins. Co. 8 Mass. 308. But if the loss was a remote consequence only of the negligence of the master or crew, but a direct one of a peril insured against, the underwriters are not discharged. The American Ins. Co. *v.* Bryan, 26 Wend. 563, 583. So a collision is a peril within a policy insuring against the perils of the sea, and the insured may recover the damage which was the immediate consequence of it, although the vessel was brought within the peril by the fault of the master or crew. Matthews *v.* The Howard Insurance Co. 11 N. Y. 9; The General Mutual Ins. Co. *v.* Sherwood, 14 How. (U. S.) 351 (both

In England this contract retains more nearly its original and proper character as a contract of indemnity measured by the actual loss; but in the United States it has been very materially modified by the introduction of various arbitrary rules; among which the most prominent are the deduction of "one third new for old,"* the doctrine of abandonment for constructive total loss, and the principles adopted in the settlement of general averages. There is no branch of the law in which the rule of compensation has been made so much to yield to that of arbitrary remuneration, if it may be so called, in other words, the principle analogous to that of the *Lex Aquilia* of the Roman law, by which, instead of an inquiry into the exact circumstances of the particular case, a fixed rate or proportion is determined, by which the recovery in all instances is governed. [250]

The losses for which the insurer becomes liable fall under one of these three heads:—

Partial Loss;
Total Loss; or
General Average.

DEFINITIONS. PARTIAL LOSS.—Partial loss is, as its name implies, a partial destruction of the thing insured.[1]

TOTAL LOSS.—A total loss occurs where the thing insured is physically destroyed or rendered valueless;[2] or where, under

* This is, however, common to the English system.

in reversal of decisions below); Street *v.* Augusta Insurance Co. 12 S. C. (Rich.) 13; De Vaux *v.* Salvador, 4 A. & E. 420. These cases establish the present rule on the point, and those of Peters *v.* The Warren Insurance Co. 14 Peters, 99; Hale *v.* The Washington Insurance Co. 2 Story, 176; although followed in Massachusetts (Nelson *v.* The Suffolk Insurance Co. 8 Cush. (Mass.) 477), which are in conflict with it, can no longer be regarded as general authority. But the underwriters in such a case are not liable to pay the owners of the insured vessel the damages which the latter have been compelled to pay the owners of the other vessel, to avoid being sold. Mathews *v.* The Howard Insurance Co. 11 N. Y. 9, *supra*. And where a policy on a boat excepts from the perils insured against, perils and misfortunes arising from a want of ordinary care and skill in lading or navigating her, the fact that the master placed her in a dangerous position for being towed, is material in determining the insurer's liability. Savage *v.* Corn Exchange Insurance Co. 4 Bosw. (N. Y.) 1. A boat insured struck a rock and sank. The insurers were sued. The wages and provisions of the crew during the detention were not allowed to be estimated as a part of the damages. May *v.* The Delaware Insurance Company, 19 Penn. St. 312.

[1] In adjusting a partial loss, it is estimated by the relative value of sound and damaged goods at the port of delivery, taking the value in the policy or the invoice price as the basis, without reference to the rise and fall in the market. Lewis *v.* Rucker, 2 Burr. 1167. Return duties received by the owners of the goods from the custom house should not be deducted from the amount to which the insurers are to contribute. Cory *v.* Boylston Ins. Co. 107 Mass. 140.

[2] The value of a vessel lost is estimated according to her value at the port of departure, making a reasonable allowance for wear and tear on the voyage up to the time of the disaster. 3 Kent's Com. 243.

the doctrine of constructive losses, the deterioration is so great as to authorize the insured to abandon and demand payment as for an actual physical total loss.[1]

General Average.—General average, or contribution in general average, is that sum which on any sacrifice of a part of the interests at risk for the joint benefit of all, becomes due from the other parties to the adventure to make up for the sacrifice.[2]

With these broad lines of division in view, it will not be difficult to understand to what extent the contract of insurance is one of indemnity, and how far it has departed from its original signification; but we should first notice the exceptions in the contract itself.

Exceptions to Rule of Indemnity.—The American policies on vessels generally contain a declaration, that "no partial loss, or particular average, shall in any case be paid unless amounting to five per cent.," or some similar clause; and the cargo policies have an analogous provision,* defining the extent of

* The following is the clause referred to in the text as it exists in the New York policies: Memorandum.—It is agreed, that bar, bundle, rod, hoop, and sheet iron, wire of all kinds, tin plates, steel, madder, sumac, wickerware, and willow, manufactured or otherwise, salt, grain of all kinds, tobacco, Indian meal, fruits (whether preserved or otherwise), cheese, dry fish, vegetables and roots, rags, hempen yarn, bags, cotton bagging, and other articles used for bags or bagging, pleasure carriages, household furniture, skins and hides, musical instruments, looking-glasses, and all other articles that are perishable in

[1] See Forbes *v.* The Manufacturers' Insurance Company, 1 Gray (Mass.), 371. As to memorandum articles, *actual destruction* is said to be necessary to enable the insured to recover for a total loss. Depeyster *v.* The Sun Mutual Insurance Company, 17 Barb. (N. Y.) 306; Navone *v.* Hadden, 9 C. B. 30.

If, however, such goods are by perils of the sea reduced to such a condition, that they could not be restored to the assured in their original character, at the original place of their destination, this is a total loss. Navone *v.* Hadden, 9 C. B. 30.

[2] Goods contribute on their actual net value; that is, on their market price at the port of adjustment, free of all charges for freight, duty, and expenses of landing. But in a case where the goods brought at the intermediate port more than they would have done at the port of destination, the court, per Abbot, C. J., refused to set aside the valuation which had been adopted, which was the price actually obtained. Richardson *v.* Nourse, 3 B. and Ald. 237.

Where the insured has been forced to make contribution in respect of an average loss, the insurers are held for that proportion of the contribution which the value of his interest as assured bears to its value as estimated for the purposes of contribution.

Where a quantity of rails shipped at London for Bombay for a sum to be paid in advance at London, ship lost or not, were insured for a sum which included the freight by a policy in which they were warranted free from particular average, unless the ship should "be stranded, sunk, or burnt," and the ship escaped these perils, but sustained a constructive total loss, and the rails were saved and forwarded to their destination, for which the assured was compelled to pay freight to an amount not exceeding the value of the rails, this freight was held not recoverable on the policy. The Great Indian Peninsula R. Co. *v.* Saunders, 1 B. and S. 41.

See as to adjustment of general average in various cases, Meeker *v.* Klemm, 11 La. Ann. 104; Nelson *v.* Belmont, 5 Duer (N. Y.) 310; Lee *v.* Grinnell, Ibid. 400; Greely *v.* The Tremont Insurance Company, 9 Cush. (Mass.) 415; Nimick *v.* Holmes, 25 Penn. St. 366.

the underwriters' liability. By these clauses it will be [251] seen that in a large class of cases no partial loss whatever is to be paid, and in others, none unless amounting to a certain portion of the whole value insured. In the former case, to found a claim for recovery, the subject at risk must be totally lost. And as to what constitutes a total loss, many very interesting cases have been decided. But this inquiry is foreign to our present subject. It is only necessary to observe, that unless the injury comes up to the limit fixed by the policy, the insured can claim no damages; he can have no remuneration or compensation for any loss less than that required by the contract.[1]

We have already had occasion to notice,* that though the plaintiff's loss had been made good by charitable contributions, his claim for legal relief is not thereby prejudiced; and there are other cases where he has been allowed remuneration beyond his positive loss. So, it is no defence to an action for a partial loss[2] on a policy of marine insurance, that the expense of the repairs for the amount of which the loss is claimed was covered by a loan made by the correspondent of the owner on a bottomry of the vessel, and that the bottomry loan was realized by such correspondent, after the subsequent total loss of the vessel, out of an insurance effected by him on his bottomry interest, and no part of the loan was ever paid by the owner.† [3]

PARTIAL LOSS—ONE-THIRD NEW FOR OLD.—In regard to partial losses, the allowance of *one-third new for old* is the most

their own nature, are *warranted by the assured free from average, unless general;* hemp, tobacco-stems, matting, and cassia, except in boxes, *free from average under twenty per cent., unless general;* and sugar, flax, flaxseed, and bread are warranted by the assured *free from average under seven per cent., unless general;* and coffee in bags or bulk, pepper in bags or bulk, and rice *free from average under ten per cent., unless general.*

No damage to be allowed for goods injured by spotting, unless caused by the immediate contact of sea-water with the articles damaged. In case of partial loss by sea-damage to dry goods, cutlery, or other hardware, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged, and not otherwise; and the same practice shall obtain as to all other merchandise, as far as practicable.

* *Ante*, 36.

† Read *v.* Mutual Safety Ins. Co. 3 Sandford, S. C. R. 54.

[1] The Irish Court of Admiralty has lately applied this rule to the claims of seamen for clothing lost by a marine collision. The Cumberland, 5 Law Times (N. S.) 496. See, as to partial loss, Paterson *v.* Harris, 1 B. & S. 336.

[2] The obligation of the insurer, in cases of partial loss, is simply to pay such loss. It does not extend to consequential losses, nor to loans obtained in a foreign port for repairs, though the expense of raising the money on bottomry is part of the partial loss which he must pay. Bradlie *v.* The Maryland Ins. Co. 12 Peters (U. S.) 378.

[3] But where a loss occurs under a valued policy, the plaintiff can only recover the difference between the amount he has received from other insurances and the agreed value. Bruce *v.* Jones, 32 L. J. Exch. 132.

important arbitrary limitation of the amount of relief which usage has engrafted on the policy. In case of a partial loss on the ship, the underwriters are nominally liable on the face of their contract to pay for the actual damage sustained. But it is considered that where old timbers or other materials are replaced by new, the vessel, when repaired, is better than she was before the damage was sustained. And accordingly, it is held, that the assured must himself bear a part of the expense of the repairs.* Says Mr. J. Story,† "If the difference between the value of the vessel before the damage and after the repairs, were to be ascertained in each particular case by actual inspection, there would be no end of controversies; and therefore general usage, which the law follows as founded on public convenience, has applied a certain rule to all cases." This rule is, "that the assured shall pay one-third part of the expense of labor and materials necessary to make the repairs, and shall recover only two-thirds of the underwriters, it being considered that in general the ship is better by the amount of one-
[252] third of the expense of the repairs. This allowance is called the deduction of *one-third new for old*." ‡

The Supreme Court of Massachusetts, speaking of this rule, have said, "That it is arbitrary, and operates in some cases unjustly, giving to the insured more or less than a full indemnity, to which only he is entitled by the policy. The rule originated from the usages among merchants and underwriters, probably from the great difficulty of ascertaining the actual loss without first repairing the damage done or estimating the cost of repairs." ‖

Other Arbitrary Rules—Constructive Total Loss.—In case of total loss, it has been settled that the assured can abandon to the underwriters, and claim payment of the sum insured. This doctrine was not introduced into the law of insurance until long after the contract was familiarly known to commerce, and is very differently applied in different commercial countries. In the United States, whenever upon a disaster taking place, the thing insured, after making the deduction of one-third new for old, is found to be damaged more than half its value, the assured can abandon to the underwriters and claim a total loss. In other words, instead of being entitled to a compensation for the actual damages sustained, he may recover the whole value of his interest at risk. This rule, in a modified form, prevails in

* Phillips on Insurance, vol. ii, p. 197.
† Peele *v.* Merchants' Ins. Co. 3 Mason, 27.
‡ Phillips on Insurance, vol. ii, p. 197.
‖ Brinley *v.* National Ins. Co. 11 Met. 195.

France, and generally on the continent; but the English law firmly maintains the more salutary doctrine that no abandonment can be sustained unless the thing assured is injured to its full value. [253]

GENERAL AVERAGE CLAIMS.—In the United States, the same principle of arbitrary remuneration is applied to claims made on the underwriters in the nature of general average, or wherever a sacrifice is made for the common benefit. The interests generally in jeopardy in these cases are the vessel, freight, and cargo; and when the sacrifice is to be made good in general average, the values of these subjects are to be arrived at as forming the basis of computation. It seems to be well settled in this country that the value of the cargo is to be arrived at by taking the invoice prices, instead of instituting any inquiry into the market value; and this also applies to cases of partial or total loss.*[1] The vessel and freight are of more fluctuating and uncertain value. The actual worth of the vessel diminishes during the voyage, with each day's wear and tear; and the value of the freight is also diminishing by reason of the wages, provisions and expenses, which are in a constant state of disbursement to earn it. In New York, to arrive at the value of the vessel, one-fifth of its value at the time of sailing is deducted; and the freight contributes on one-half, and is contributed for on the whole.†[2] And this principle of arbitrary valuation, though the rate or proportion may differ, prevails, we believe, universally throughout the United States.‡

* Le Roy *v.* United Ins. Co. 7 J. R. 343.

† This was the rule laid down in the case of Leavenworth *v.* Delafield, 1 Caines, 573, and has been acted on ever since. The principle has been recently somewhat shaken by Judge Betts in the District Court of the United States. The Mutual Safety Ins. Co. *v.* The George, vol. 8 Law Reporter, 361,[2] to which here, however, it is only necessary to call attention thus briefly.

‡ So in Massachusetts, it is held that the contributory value of freight in general aver-

[1] But although there has until recently been some want of precision in the rule on this subject, owing chiefly to the false assumption that "prime cost," "invoice price" and "market value," were synonymous and convertible terms (Gahn *v.* Broome, 1 Johns. Cases, 120; Marshall on Ins. 5th ed. pp. 502, 503; Coffin *v.* Newburyport Mar. Ins. Co. 9 Mass. 436, 451), it is now practically settled in the United States that in estimating a loss under an open policy, the rule of damages or insurable interest, is the *market value* of the vessel or goods at the beginning of the risk, ascertained according to the rate of exchange at that time, together with the premium of insurance, and in the case of goods, the expenses necessarily incurred upon them at the time of shipment. 2 Phil. on Ins. §§ 1221, 1222, 1229, 1231; Warren *v.* Franklin Ins. Co. 104 Mass. 518; Carson *v.* The Marine Ins. Co. 2 Wash. C. C. R. 468; Cox *v.* The Charleston Fire and Mar. Ins. Co. 3 Rich. 331. In England the insurable interest under open policies is now said to be its worth *to the assured* at the outset of the risk, with the expenses of insurance. 1 Arnold on Mar. Insurance, 3d ed. by Machlachlan, pp. 291, 309

[2] Since reported, Olcott, 77, 157.

[3] Where there is a total loss of part of the freight, as in the case of a ship being too damaged on the voyage to return, the loss must be estimated on the value of the ship and freight, and not that of the freight only. Moss *v.* Smith, 9 C. B. 94.

It may be proper to add, that this arbitrary remuneration has been greatly extended by the general adoption in this country of the practice of valuation. It has become habitual to value the thing assured in the policy; and these valuations fix the basis of recovery, and forbid inquiry into the actual damage sustained, unless the over-estimate is so great as to induce a belief of fraud.[1]

We have already had occasion to notice the exceptions [254] to the rule, that legal compensation is only given for actual injury, which have been introduced into this branch of the law.* It is only necessary here to remind the reader of them.

FIRE INSURANCE.—When we turn to the subjects of fire insurance, we find that the policy retains much more nearly its original character as a contract of indemnity. In this branch of the great business of insurance, the practice of valuation is unknown; the doctrine of abandonment has never been introduced; and the right to recover depends, in all cases, on the actual loss sustained, to be proved in the particular instance.†[2]

age is to be ascertained by a deduction of one-third of the gross freight. Humphreys v. Union Ins. Co. 3 Mason, 429.

* *Ante*, 242.

† An interesting discussion of some important points on the measure of damages in cases of insurance against fire, will be found in the opinion of the learned Chief Justice of the Superior Court of New York, in Laurent *v.* The Chatham Fire Ins. Co. 1 Hall, 41.

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[1] See Irving *v.* Manning, 6 C. B. 391; Lamar Ins. Co. *v.* McGlashen, 54 Ill. 513.

In cases of partial loss on goods under a valued policy, the amount payable by the insurer bears the same ratio to the value in the policy which the price which the goods, if sound, would have sold for at the port of delivery bears to that which they bring there in their damaged state. Usher *v.* Noble, 12 East, 639.

Where the policy is open, the value of the goods is fixed by taking their invoice price at the loading port, including premium of insurance and commissions. *Ibid.*

[2] In an action on a fire policy, by which the defendants were to pay, in case of loss, all damages not exceeding $2,500, to be estimated according to the cash value of the property at the time of the loss, but at the rate of two-thirds only of such cash value, the insured were held entitled to the whole $2,500, as that sum was less than two-thirds of the cash value of the property destroyed. The court sustained the refusal of the judge at Nisi Prius to charge "that as plaintiffs had another policy to the amount of $2,500 issued by another company on said goods, one-half the entire loss should be found by the jury, and the Ashland Company (the defendants) could be legally charged with only two-thirds of such one-half, and interest." The Ashland Fire Ins. Co. *v.* Houstinger, 10 Ohio St. 10.

But under a policy of fire insurance for $2,000, on property insured elsewhere for $3,000, which contained the following provisions: "When property is insured by this company solely, three-fourths only of the value will be taken; and in cases of loss this company will be liable to pay three-fourths only of the value at the time of the loss, but in no case more than is insured by this company. In case of loss or damage of property on which authorized double insurance subsists, this company shall be liable to pay only such proportion thereof as the sum insured by this company bears to the whole amount insured thereon, such amount to exceed three-fourths of the actual value of the property at the time of the loss," the plaintiff was held by the Supreme Court of Massachusetts entitled to recover only two-fifths of three-fourths of the loss. Haley *v.* Dorchester Mutual Fire Ins. Co. 12 Gray, 545.

The necessary expenses of the insurers in rescuing the insured property were allowed them, and also their expenses in selling it where such a sale was necessary, although with-

In Ireland, the general rule in cases of fire insurance has been thus laid down in a case where a mill and machinery were injured by fire. The court directed the jury to say, "what state of repairs the machinery was in, what it would cost to replace it by new machinery, and how much better, if at all, the mill in which the machinery was placed would be with the new machinery than it was at the time of the fire; the difference to be deducted from the entire expense of placing there such new machinery." * This rule has been adopted in this country, in cases where the property is injured and repaired so as to replace it substantially as it was before the accident.† But in cases of total destruction, much confusion appears to exist.

Mr. Greenleaf has said,‡ that the actual loss is to be ascertained by the expense of restoring the property, without any deduction for the difference of value between the old and new materials; and, on the other hand, an effort was recently made in Massachusetts, in a suit on a fire policy, to introduce the analogies of marine insurance; the defendants insisting on deducting from the estimated cost of a new building, the difference in value between the old and such new building. The property had been totally destroyed, and a different building had been erected on the premises. In this case both these rules were rejected; the court saying as to the latter, with [255] great justice, that it was not supported by any authority or principle. They also refused to sanction the principle laid down by Mr. Greenleaf, saying, that if it were followed, the assured in some cases would recover more than an indemnity,

* Vance *v.* Forster, 1 Irish Circuit Cases, 51; 3 Stephens' N. P. 2084.

† Brinley *v.* The National Insurance Co. 11 Met. 195.

‡ 2 Greenleaf on Ev. § 407.

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out notice to the owners, where the owners were not known and no circumstances indicated who they were. Robinson *v.* The Corn Exchange Insurance Company, 1 Ab. (N. Y.) N. S. 186.

Where by the terms of a policy of insurance upon goods contained in the public stores, the underwriters agreed to make good upon the assured, all such loss as should happen to the goods by fire, "to be estimated according to the true and actual cash value of the property at the time the loss should happen," the measure of damages was such value, notwithstanding the duties upon the goods had not been paid or secured. Wolfe *v.* The Howard Insurance Co. 3 Seld. (N. Y.) 583.

A fire policy on goods described generally as "the property of the insured, or held by him in trust," covers cloth of other parties left with him to be made into clothing, and extends to the whole value of such goods. It is not limited to the bailees' interest or lien for charges. Stillwell *v.* Staples, 19 N. Y. 401.

Warehousemen and wharfingers with whom goods are deposited, have an insurable interest in such goods, although there has been no previous authority to insure given by the real owners, nor any notice given to them of such insurance; and the insurers are entitled in such a case to recover from the insurance office the full value of the goods destroyed by fire. They are, however, liable to account to the true owners for the excess of the money received beyond the amount of their own charges in respect of such goods. Waters *v.* The Monarch Life and Fire Insurance Co. 35 Eng. L. & E. 116.

and much more when the building is dilapidated and out of repairs; that the underwriters are liable only to pay a fair indemnity for the loss; and that, whatever the rule might be when the building insured is partially injured by the peril assured against, it has no application to cases like the present, where the building is totally destroyed and to be replaced by a new one; and they proceeded to say, "If the rule laid down in Vance *v.* Forster were applied, the jury must ascertain by the estimates and opinions of witnesses, the amount of the expenses of a new building, and they must estimate the value of the old building in order to ascertain the difference, if any there be, between the new and old. We can perceive no use in requiring this double estimate; for when the plaintiff is only entitled to recover the amount of the value of the building destroyed, the estimate of the cost of the new building is useless. We are, therefore, of opinion that there is no rule of damages applicable to the present case; and that as in all cases where no rule of damages is established by law, the jury are to decide upon the question, and that to their decision there can be no legal exception." And a new trial was ordered.* [1]

I see no ground on which this decision can be maintained. To say that a contract of insurance is a contract of indemnity, and at the same time that there is no rule of damages whatever, and that the jury are to dispose of the matter absolutely, seem very contradictory propositions. Nothing can be more dangerous, in cases of insurance above all others, than to leave the matter to the uncontrolled arbitrament of the jury box. It is well known that owing to the defendants in insurance cases being in this country always corporate bodies, there exists an extreme laxity in rendering verdicts, and a very great disposition to stretch the justice of the case, so as to save individuals from loss. What then more perilous than to leave an issue of this kind to the absolute disposition of the jury?

And the decision appears the more remarkable because [256] the case of Vance *v.* Forster offers a clear and simple

* Brinley *v.* The National Ins. Co. 11 Met. 195.

[1] It is a frequent provision in (American) fire policies, that in case of loss the insurers, instead of paying it in money, may rebuild or repair the premises, on giving notice to the insured of their election to do so. The exercise of this election, by giving the notice, converts the contract of insurance into a building contract; and in case the rebuilding is thereupon begun and discontinued by the insurance company, the rule of damages is no longer the amount insured, but that necessary to complete the rebuilding. And where several companies have given the notice, and the contract thus substituted is broken by all, the insured can recover against any one of them the whole cost of completing the restoration of the building, leaving the company against whom the judgment is recovered to obtain contribution from the others. Morrell *v.* Irving Fire Ins. Co. 33 N. Y. 429.

mode of arriving at the desired result with accuracy and safety. The court say, "We perceive *no use* in the double estimate." The utility of it is twofold. In the first place, to secure the great object of not leaving the matter to the loose and unguarded decision of the jury; and in the second place, because, no practical man, whether mason or builder, or juryman, has any means of arriving at the value of an old or second-hand building, save by this very double estimate. He first calculates what it would cost to put up such a building originally, and then how much it has been deteriorated. And it is only by this twofold process that justice can be arrived at. It is a legal solecism to call the contract of insurance a contract of indemnity, if verdicts upon policies are to be governed by the uncontrolled discretion of the jury. This reasoning would not be admitted even in a common case of trespass free from malice. If a building were destroyed by ordinary negligence, would a jury ever be told that, without being governed by any estimate of its value, they are the sole masters of the subject? Nothing is more important than to reduce this branch of our law to system; and nothing short of extraordinary difficulty in laying down a rule, difficulty vastly greater than any existing in cases like this, should warrant a court to shuffle off the matter on the jury. The tribunals of Massachusetts have long been so eminent for their learning and sagacity, that it is with unaffected deference that any writer should venture to differ from them. Still I cannot persuade myself to refrain from this criticism.

Danger of Arbitrary Remuneration.—For a more complete understanding of this branch of our subject, the reader is referred to the various treatises devoted to this particular branch of the law. But I cannot quit it without expressing the opinion that the principle of arbitrary remuneration has been carried, in this country, to a very dangerous extent. It certainly removes difficulties, lessens the labor of all parties concerned in the inquiry, and may perhaps be said, on the whole, to do justice; but on the other hand, it is the business of the law and her officers not to shun but to grapple with difficulties; it hardly becomes the dignity of jurisprudence to declare its inability to do right in the particular instance; a rough average of justice is far from satisfactory to the suitor who suffers gross hardship in the individual case, and as applied to the [257]

subject of technical or constructive total loss, the fixed rule holds out infinite temptations to fraud and litigation.*

It has already been stated that nice questions often present themselves, as to the amount and character of the testimony necessary to prove damage; and in no branch of the law are they more perplexing than in insurance cases. We shall have occasion to recur to the subject when treating of evidence. I shall at present content myself with referring to the judicious language of Mr. Justice Story.†

LIFE INSURANCE.— Contracts of assurance on lives form another very important division of this branch of our subject. Where the policy was taken out on the life of a third person, it was originally said that, like marine and fire policies, it was a mere contract of indemnity; that if not damnified, the plaintiff could not recover; and so, where the creditors of Mr. Pitt had effected an insurance on his life, and their debts had been subsequently paid, it was held that they could not recover.‡ But this case has been overruled; and it has been decided by the Exchequer Chamber that a contract of life assurance is a mere contract to pay a certain sum of money upon the death of a person, in consideration of the payment of certain premiums; that it is not a contract of indemnity; and that the termination of a creditor's interest before the death does not defeat the recovery.‖ [1]

* It is superfluous to name the leading English and French authors on the subject of this chapter, or Mr. Phillips' work, which is equally well known; but I can, with propriety, mention the learned treatise with which Mr. Duer, of New York, is now enriching our libraries; and I may also be allowed to state the pleasure and benefit that I have received from the very able work of M. Alouzet,—Traité Général des Assurances.

† Rogers *v.* Mechanics' Ins. Co. 1 Story, 603. See also *post*, ch. xxv.

‡ Godsall *v.* Boldero, 9 East, 72, cited, with approbation, in Tyler *v.* Ætna Fire Ins. Co. 12 Wend. 507.

‖ Dalby *v.* India and London Life Assurance Co. 15 C. B. 365; 28 Eng. L. & E. 312; 18 Jur. 1024; 3 Com. Law, 61.

[1] On a policy issued to one person on another's life, the sum insured is the measure of the insurer's liability. Hoyt *v.* N. York Life Ins. Co. 3 Bosw. (N. Y.) 440; Theobald *v.* The Railway Passengers' Assurance Co. 10 Exch. 45. But where in a suit on a policy of insurance by which £1,000 was to be paid to the representatives of the assured in case of his death by railway accident, and a proportionate part of that sum to him in case of his injury by such accident, the injury had fallen short of death, it was held not to be a true measure of damages to assume the sum insured as the value of the life, and to estimate a proportionate sum for the injury. In such a case, the measure of damages is the amount of injury the plaintiff has sustained as a direct consequence of the accident, having reference to his occupation in life, besides compensation for the personal expense and pain. Loss of time or profits in such a case are not regarded. Theobald *v.* The Railway Passengers' Assurance Co. 26 Eng. L. & E. 432; 10 Exch. 45; 18 Jur. 583.

A policy upon life is in its nature an insurance upon the benefits which will or may result to the assured from the continuance of the life; and in that respect is like an insurance upon profits. Miller *v.* The Eagle Life and Health Insurance Co. 2 E. D. Smith's (N. Y.) C. P. R. 268.

CHAPTER X.

MEASURE OF DAMAGES UPON THE BREACH OF CONTRACTS FOR THE SALE OF PERSONAL PROPERTY.

Roman Law.—General Rule as against Vendor is, the Difference between the Contract Price and the Value of the Article on the Day fixed for Delivery.—How far this Rule is modified by Payment of the Price in Advance.—Examination of the Decisions.—As against Vendee, the whole Price may be recovered, although the Article be not delivered.—Rules of the Modern Civil Law.—Molinæus.—Pothier.—Measure of Damages against Vendor upon Breach of Warranty, is the Difference between the Value of the Article as warranted, and its Value as delivered.

Contracts for Sale of Personal Property.—We now approach the consideration of a large class of cases falling under the head of the common-law action of assumpsit,—that of contracts for the sale of chattels or personal property. These contracts may be broken, either completely, by the vendor's neglect to deliver the article, or by the vendee refusing to pay the price; or partially, by the article proving different from some warranty made in regard to it at the time of sale. Generally it may be said that these arguments furnish their own measure of damages; in other words, that courts of justice, without desiring to fix any arbitrary rate of remuneration, endeavor solely to carry into effect the contract of the parties; and to this rule the only exception that can be said to exist, is that in regard to agreements of an unconscionable and oppressive character, which we have already considered.*

Justinian's Laws.—The general language of the Roman law is, that in case of the breach of contract of sale by non-delivery, the measure of damages is all that the buyer loses or fails to gain in relation to the thing itself, over and above the price paid; *id quod interest propter rem ipsam non habitam.* And, embarrassed by no form of action, the civil law inquires in each case into the motives of the defendant, [259] and apportions the damages according to his delay, fault, or fraud.

* *Ante*, 221, *et seq.*

The language of the Digest on the subject of damages for non-delivery is as follows: *Si res vendita non tradatur, in id quod interest agitur; hoc est quod rem habere interest emptoris.** *Si traditio rei venditæ, juxta emptoris contractum, procacia venditoris non fiat, quanti interesse compleri emptionem fuerit arbitratus prœses provinciæ, tantum in condemnationis taxationem deducere curabit. Hoc autem pretium egreditur, si pluris interest quam res valet, vel empta est.* And so, again, *Quum per venditorem steterit quominus rem tradat, omnis utilitas emptoris in œstimationem venit, quæ modo circa ipsam rem consistit. Neque enim si potuit ex vino (puta) negotiari et lucrum facere, id œstimandum est: non magis quam si triticum emerit, et ob eam rem quod non sit traditum, familia ejus fame laboraverit. Nam pretium tritici, non servorum fame necatorum, consequitur. Nec major fit obligatio quod tardius agitur, quamvis œstimatio crescat, si vinum hodie pluris sit: merito; quia, sive datum esset, haberet emptor, sive non: quoniam saltem hodie dandum est quod jam olim dare oportuit.*

The form of action prescribed against the seller of any merchantable commodity, who was in default for not delivering, was the *Condictio triticiaria*;† and when treating of this subject, the Digest says: *Si merx aliqua, quæ certo die dari debebat, petitia sit; veluti vinum, oleum, frumentum, tanti litem* [260] *æstimandum, Cassius ait, quanti fuisset eo die quo dari debuit; si de die nihil convenit, quanti tunc judicium acciperetur.*‡

But these and other texts of the Justinian law on this subject, as on many treated of in that wonderful repository of acute and profound but ill-arranged decisions, are contradictory and perplexing. And their general terms throw little light on the complex relations of modern commerce.

SELLER'S FAILURE.—We have first to consider the cases arising from the failure of the seller to perform his agreement.

* Pandects by Pothier, vol. 7, pp. 120, 121, lib. xix. tit. 1, de Actionibus Emti et Venditi.

† Condictio triticiaria a tritico, tanquam nobilissimo mercium genere, vel a primis edicti verbis dicta, est actio personalis arbitraria ad rem quamlibet, præter pecuniam numeratam spectans, et ex quâcumque causâ debitam, vel etiam nostram, ex causis quibus condici potest, veluti ex causâ furtivâ vel re mobili vi abrepta. Vicat: Vocabularium Utriusque Juris, in voc. Conf. Hevelke, Juristisches Wörterbuch.

The original Roman proceeding, *per condictionem*, one of the earliest of their curious and complex forms of action, and the true character of which had become dubious even in the time of Gaius, took its name from the act peculiar to it, namely, the *condictio*, or notice given by the plaintiff to the defendant, to be present on the thirtieth day to select a judge, ut adjudicem capiendum, die tricesimo adesset. Das Römische Privat Recht, von Wilhelm Rein, book 5. The *condictio* of the Digest, in the time of Justinian, was a more modern form. It seems to have been analogous to our action of debt, in that it demanded some certain thing, or a sum certain of money, the price of it.

‡ Dig. De Con. Trit. lib. xiii. tit. 3, § 4.

When contracts for the sale of chattels are broken by the vendor failing to deliver the property according to the terms of the bargain, it seems to be well settled, as a general rule, both in England and the United States, that the measure of damages is the difference between the contract price and the market value of the article at the time when it should be delivered,[1] upon

[1] See as authorities for the general rule, The Southwestern Railroad Co. *v.* Rowan, 43 Geo. 411; Chapman *v.* Ingram, 30 Wisc. 290; Hewitt *v.* Miller, 71 Barb. (N. Y.) 567; Norton *v.* Wales, 1 Robertson (N. Y. Superior Court), 561; Hall *v.* Pierce, 4 West Virginia, 107; Weltners *v.* Riggs, 3 West Va. 445; Frink *v.* Tatman, 36 Ind. 259; Nixon *v.* Nixon, 21 Ohio St. 114; Deere *v.* Lewis, 51 Ill. 254; Thompson *v.* Howes, 14 La. Ann. 45; Crosby *v.* Watkins, 12 Cal. 85; Bartlett *v.* Blanchard, 13 Gray (Mass.) 429; Zchner *v.* Dale, 25 Ind. 433; Fessler *v.* Love, 43 Penn. 313; White *v.* Tompkins, 52 Penn. St. 363; Bush *v.* Holmes, 53 Me. 417; Doak *v.* Snapps' Ex'rs, 1 Coldwell (Tenn.), 180; Dana *v.* Fiedler, 2 Kern. (N. Y.) 40; McKnight *v.* Dunlop, 1 Seld. (N. Y.) 537; Billings *v.* Vanderbeck, 23 Barb. (N. Y.) 546; Barnard *v.* Conger, 6 McLean C. C. R. 497; Halsey *v.* Hurd, *Ibid.* 102; Rawdon *v.* Barton, 4 Tex. 289; Smith *v.* Dunlap, 12 Ill. 184; Gemmison *v.* Gray, 29 Iowa, 537; Cannon *v.* Folsom, 2 Iowa, 101; see also, McAllister *v.* Douglas, 1 Cr. C. C. R. 241. So the damages for the breach of a warranty that cows are with calf, are measured by the difference between their value in that maternal condition and in the less promising condition they in fact are in. Richardson *v.* Mason, 53 Barb. 601.

Where a vendee, therefore, has between the time of making the original contract and that limited for its performance, made a sub-contract for the resale of the goods at a higher price than the market rate at the time fixed for delivery under the original contract, he cannot recover for his loss of the profits he would have made by carrying out the resale. Williams *v.* Reynolds, 34 L. J. (N. S.) 2 Q. B. 221. Nor can the rule be varied by an offer of the defendants to sell to the plaintiffs at a price below the market value on the day of delivery. Havemeyer *v.* Cunningham, 35 Barb. (N. Y.) 515; and it applies where there is a delivery of a part only of the goods contracted for. Valpy *v.* Oakly, 16 Q. B. 941. Where the vendor puts it out of his power to fulfil his contract of sale by selling a portion of the goods to a third party before the time stipulated for the delivery, the vendee in an action for the breach of the contract is entitled to the difference between the market value and the contract price, on all the goods contracted to be sold, and not merely those which the vendor had thus put it out of his power to deliver. Crist *v.* Armour, 34 Barb. (N. Y.) 378. Where the defendant, having contracted to deliver his crop of corn growing on about 30 acres of ground in merchantable order at a stipulated time and price, one-fourth of the crop only turned out sound, and he refused to deliver that portion only, but insisted on delivering the whole, if any, it was held a breach of the contract, and the vendees were held entitled to recover the difference between the contract price and the market value of the merchantable corn on the ground. Hamilton *v.* Ganyard, 34 Barb. 204.

The "market value" of the article on the day of delivery, which this rule fixes as the test, requires the investigation of the actual condition of the market, and does not warrant the consideration of the conjectural consequences of a state of things which did not exist, *e. g.* a probable fall in the price of the article in question, which would have resulted had the defendant delivered the quantity specified in the contract to the plaintiff, and had the plaintiff offered it for sale in the market. The principle on which the rule rests is the indemnification of the injured party for the injury which he has sustained. A complete indemnity requires that the vendee should receive that sum which, with the price he had agreed to pay, would enable him to buy the article which the vendor had failed to deliver. The value in the market on the day, forms the readiest and most direct method of ascertaining the measure of this indemnity in both cases; and accordingly, where a market value for the article exists, the law has adopted that standard. Dana *v.* Fiedler, 2 Kern. (N. Y.) 40; affirming s. c. 1 E. D. Smith's C. P. R. 463. See also, Gemmison *v.* Gray, 29 Iowa, 537 (*supra*); Peterson *v.* Ayre, 13 C. B. 353; s. c. 24 Eng. L. & E. 382. The difference in value making the rule in the text is to be taken at the *place* as well as time of delivery, where it can be there ascertained. Worthen *v.* Wilmot, 30 Vt. (1 Shaw) 555; Phelps *v.* McGee, 18 Ill. 155; White *v.* Salisbury, 33 Mo. 150. But as to the range of inquiry in determining the market value, see *infra*, 279, note. As to the test of market value by a resale in case of the bidder's failure to comply with his bid at an auction sale, see *post*, 354, note. A refusal to deliver stock which is to be paid for, is in strict analogy to the rule under discussion, and the measure of damages in such case is the same. Van Allen *v.* The Illinois Cent. R. R. Co. 7 Bosw. 515. See 261, note 3. Where, however, in an action for damages by the vendee of stock purchased in consequence of the vendor's false representations as to its intrinsic value, it appears that the stock was *actually* worthless, the price at which it sold in the market is entitled to no weight on the question of value. Hubbel *v.* Meigs, 50 N. Y. 480.

the ground that this is the plaintiff's real loss,[1] and that with this sum he can go into the market and supply himself with

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And where it is known to the seller that the goods were ordered by the buyer for a particular occasion, and were to be delivered in time for that occasion, and the contract is broken by the seller, and no time remains to the buyer after the breach to purchase similar goods elsewhere, the seller may be held for such damage as directly and naturally arises from the breach, although "beyond to this extent, the difference between the contract and the market price." Richardson *v.* Chynoweth, 26 Wisc. 656; see *ante*, 76, notes.

Under a contract by the defendant to sell and deliver a large quantity of coal at a fixed price during a certain time, to be transported at the plaintiff's expense to their factory, it was held in an action to recover for a breach of the contract by delivering inferior coal, and in not delivering it till after the contract time, that the measure of damages for the inferior quality was the difference between the value at the factory of the coal called for by the contract, and that of the coal delivered; and the measure of damages for the failure to deliver in time was not the difference in market value, but the difference between the actual charge for freight and insurance, and the average rates during the time covered by the contract, especially in the absence of evidence that the average rates were higher than the rates at the end of the contract period. Merrimack Mfg. Co. *v.* Quintard, 107 Mass. 127.

Where the articles delivered are not what the contract calls for, as in the case of defective machines, the measure of the vendee's damages is what it would cost to supply the deficiency without regard to the contract price. Benjamin *v.* Hilliard, 23 How. (U. S.) 149. If the value is unproved at the trial, the plaintiff can only recover nominal damages. Billings *v.* Vanderbeck, 23 Barb. (N. Y.) 546. Interest upon the difference between the contract price and the market value, to be computed from the day agreed on for the delivery, is included in the recovery. Fishell *v.* Winans, 38 Barb. 228; Lattin *v.* Davis, Hill & D. Supp. 9; Dana *v.* Fiedler, 2 Kern. 40.

[1] Another question in regard to the "market value," not yet, so far as we are aware, directly decided, but which the operations of stock speculators, continually increasing as they are in boldness and extent, is likely, sooner or later, to bring before the courts, is this, namely: Whether the rule which makes the "market value" the measure of damages in ordinary cases of breach of contract for the delivery of goods, is applicable to certain cases of contract for the delivery of stocks, where their value in the market is neither determined by their intrinsic value, nor regulated by the natural laws of demand and supply, but is artificially inflated by the seller for the purpose of increasing his profit. It is not unfrequently the case that certain capitalists combine secretly to buy up the stock of a particular railroad or other corporation, and in this way get the whole, or nearly the whole, of it into their possession or control, so that substantially it can only be purchased from them, or by their permission. Having done this, they induce other parties to agree to sell them stipulated amounts of the stock "short," as it is called in the technical jargon of stock operators—that is, to sell them at an agreed price, deliverable on or before a certain day, stock not owned or possessed by the seller at the time of making the agreement of sale. This agreement is made by the seller in the hope or expectation of purchasing the stock before the stipulated day at a lower price than that at which he has contracted to sell. Before that day comes, however, as the stock is wholly in the buyer's control, or so far in his control that it is impossible to procure in the general market an amount of it sufficient to satisfy the contract, the seller finds himself obliged to procure it from the buyer himself, or on the buyer's own terms, and at a price immensely beyond its actual value, and sometimes exceeding by one or more hundred per cent. what its market value was immediately before the transaction, and, of course, exceeding in a similar ratio the price at which he had agreed to deliver it. This operation, which, in stock-jobber's slang, is called a "corner," seems to be tolerated by brokers and stock dealers of decent reputation. Yet, in principle, it cannot be distinguished, we think, from what, in other transactions, would be a conspiracy to cheat. Whenever the question shall come to be thoroughly discussed in the legal forum, as to what should be the rule of damages under such circumstances, we trust it will be determined judicially, as we think, on principle, it should be determined, that as the market values in such a case are really fictitious, the parties are to be remitted to the actual value, as far as ascertainable, as a measure of the damage sustained by a breach of the contract. Where there is no market value of a security as of other property, the real value is to be ascertained from such elements of value as are attainable. Murray *v.* Stanton, 99 Mass. 345. In the cases to which we refer, the buyer cannot fairly be said to have lost anything more than the actual value of the stock by its non-delivery, and the so-called "market value," which is the result of his own secret machinations, furnishes no measure of actual damage. "A mere speculative price," observed Nelson, J., in a case elsewhere cited, "got up through the contrivance of a few interested dealers, with a view to control the market for their own private ends, is not the true

the same article from another vendor.*[1] It follows from this rule, that if at the time fixed for the delivery the article has not risen in value, the vendee having lost nothing can recover nothing. And it will also be observed that in laying down this rule, the analogies of real estate are departed from, and that the price paid or the consideration money is not considered conclusive, but that the actual value is inquired into.

A doubt may arise as to what is the time stipulated for delivery.[2] Where oats were to be delivered "on or about" a certain day, it was held that the plaintiff was not limited to the difference between the contract price and the market value on the precise day named, but might recover the difference between the contract price and the market value within a reasonable time after that day.†

PAYMENT IN ADVANCE.—But a different case is presented where the purchaser has paid the price in advance, or has otherwise, as by the transfer of stock, been deprived of the use of his property; and here it has been insisted that the purchaser is not to be limited to the value of the article at the time of delivery, but shall have the advantage of any rise in the [261] market value of the article which may have taken place up to the time of the trial;[3] and on this point different and

* Dey *v.* Dox, 9 Wend. 129; Davis *v.* Shields, 24 Wend. 322; Beals *v.* Terry, 2 Sandf. S. C. 127; McKnight *v.* Dunlop, 1 Seld. 537; Owen *v.* Routh, 14 C. B. (5 J. Scott), 327.

† Kipp *v.* Wiles, 3 Sandf. S. C. R. 585.

test." Smith *v.* Griffiths, 3 Hill, 333 (*infra*, 359). This remark, we think, as far as it goes, suggests, or rather leads to the principle which should govern such cases, no matter how extended the operations may be which control the market, and notwithstanding there is, for the time being, no other market value than the one so produced. If this value is essentially a fictitious one, created to affect the amount of profit to be made out of a particular transaction or set of transactions, it "is not the true test," and the real value is to be ascertained as nearly as practicable. These remarks apply, of course, only to such stocks or products as from their limited amount are essentially subject to the artificial control of the speculator. The financial power of capitalists and moneyed corporations has grown to such an extent as to enable them, by artificial combinations, to affect to some extent the market rates of stocks of the most substantial and important corporations, and even the public funds. For the mischief done in this way, the rules of damages can afford no remedy; it can be controlled, if at all, by legislation only.

[1] Josling *v.* Irvine, 6 H. & N. 512; s. c. 30 L. J. R. (N. S.) Exch. 78; 4 L. T. R. (N. S.) 251; Clark *v.* Dales, 20 Barb. 42; Belden *v.* Nicolay, 4 E. D. S. 14. But if it be readily in the power of the vendee to procure the article elsewhere, it is his duty to do so, and his damages in such case are limited to compensation for the delay and expense thereby sustained. Taylor *v.* Read, 4 Paige, 561.

[2] If no time is fixed for the delivery, it is said that damages will be calculated from the period at which the defendant refuses to perform. Williams *v.* Woods, 16 Md. 220. But in Tennessee, if no time is fixed for delivery, the article is deliverable in a reasonable time. What such time is must depend on the circumstances of each case; and the difference between the stipulated price and the price at the time proper for the delivery, is the measure of damages. Thompson *v.* Woodruff, 7 Coldwell (Tenn.) 401.

[3] See the discussion of the rule in trover which is the same; *post*, 479, note, and the cases there cited. *Quære* as to the rule where there is a *fall?* Owen *v.* Routh, 14 C. B, 327. In

conflicting decisions have been made. In England and in New York the latter rule is laid down, upon the ground that the purchaser, having been deprived of the use of his property, is entitled to the best price he could have obtained for the article up to the time of the settlement of the question.[1]

A review of the decisions will best illustrate this rule. In an early case* the defendant had agreed, in consideration of the receipt of £262 10*s.*, to convey five shares of the Welsh copper mines, as soon as the books should be opened; this was done on the 22d of August, but the defendant refused to deliver. The value of the stock was then £175; and this sum was held to be the measure of damages; for, said Lord Mansfield, though the defendant received from the plaintiff £262 10*s.*, yet the difference money only of £175 was retained by him against conscience, and therefore the plaintiff *ex æquo et bono* ought to recover no more; if the five shares had been of more value, yet the plaintiff could only have recovered the £262 10*s. in this form of action*, namely, *for money had and received.* It is to be noticed of this case, as was well observed by Mr. Justice Sutherland, in the Supreme Court of New York,† that it decides nothing as to the rule of damages where the action is not for money had and received, but is brought upon the contract itself.

In a later case in the King's Bench,‡ a writ of inquiry was issued to assess damages on a bond given by the defendant, conditioned to replace, on the 1st of August, 1799, a quantity of stock lent him by the testator. The only question was whether the damages should be calculated at the price of the stock on the 1st of August, or at the price on the day of trial; and the latter sum was held the true rule of damages. Grose, J., said, "The true measure of damages, in all these [262] cases, is that which will completely indemnify the

* Dutch *v.* Warren, 2 Burr. 1010; also, but not so clearly reported, 1 Str. 406, cited by Lord Mansfield in delivering his judgment in Moses *v.* Macferlan, 2 Burr. 1005.

† Clark *v.* Pinney, 7 Cowen, 681 and 689.

‡ Shepherd, Ex'or, &c., *v.* Johnson, 2 East, 211.

Belden *v.* Nicolay, 4 E. D. S. (N. Y.) 14, while the rule giving the vendee the advantage of the rise in value where the price is paid in advance is recognized, no distinction is made between the case of the sale of stocks and other personal property where the price is not paid in advance, and in the former case as well as the latter, is restricted to the difference in market value on the day when the property should have been delivered. See Jones *v.* Just, 9 B. & S. 141, *post*, 293, note.

[1] Such is the rule in Texas. Cartwright *v.* McCook, 33 Tex. 612. Where at the time of making a contract for the purchase of personal property *in futuro* a small sum was paid as earnest money, but was returned before the vendor's breach of the contract, or any tender of the rest of the purchase money, this was held not such a payment in advance as to come within the rule stated in the text. Worthen *v.* Wilmot, 30 Vermont (1 Shaw), 555.

plaintiff for the breach of the engagement." And Lawrence, J., said, "Suppose a bill were filed in equity, for a specific performance of an agreement to replace stock on a given day, which had not been done at the time, would not a court of equity compel the party to replace it at the then price of stock, if the market had risen in the mean time?"

In a still more recent case,* of a bond to retransfer stock, the same principle was laid down. It was contended for the plaintiff, that he was entitled, at his option, to the best of three prices: either the value of the stock on the day fixed for the transfer; or, secondly, the price at the day of trial; or, thirdly, the highest price which the stock had borne between the day of delivery and the day of trial. But the court held, on the particular circumstances of the case, that the third claim could not be sustained. It seems difficult, however, in reason, to say why, if the plaintiff is entitled to a subsequent rise, provided it maintain itself to the day of trial, he should be prejudiced by a fall that may be due only to the delays of litigation.†

Where an action was brought‡ to recover damages for the breach of a contract, by which the defendant had engaged to furnish the plaintiff a certain quantity of tallow in *all December*, at 65*s.* per cwt., the defendant had apprised the plaintiff, on the 1st of October, that he could not execute the contract, and he insisted that the difference between the contract price (65*s.*) and that of the first of October (71*s.*) was the rule of damages, on the ground that the plaintiff could, as soon as apprised that the contract would not be executed, have [263] gone into the market and supplied himself at the then rates. The plaintiff, however, insisted that he was entitled to the difference between the contract price (65*s.*) and the price on the 31st December (81*s.*), that being the last day for the

* M'Arthur *v.* Seaforth, 2 Taunt. 257.

† Two later decisions in the English books hold substantially the same doctrine. In an action on a bond conditioned to replace stock at a particular day, the defendant not having replaced it, Lord Ellenborough held, at Nisi Prius, that the plaintiff was entitled to claim according to the value upon the day of the trial. Downes *v.* Back, 1 Starkie, 318. In an action on a bond to replace stock, Best, C. J., at Nisi Prius, held that the price of the stock should be taken as at the time of the trial, saying, "When the defendant had the money, he promised to restore the stock. Justice is not done if he does not place the plaintiff in the same situation in which he would have been if the stock had been replaced at the stipulated time. We cannot act on the possibility of the plaintiff's not keeping it there. All we can say is, that the defendant has effectually prevented him from doing so." Harrison *v.* Harrison, 1 Car. & P. 412. The subject has again been recently examined, and this rule adhered to. Owen *v.* Routh, 14 C. B. (5 J. Scott) 327.

In a recent case of detinue for railway shares, the plaintiff demanded the shares on the 17th May, 1845, when they were worth £3 5*s.* per share, and they were not delivered till the 25th of November of the same year, when they had fallen to £1. The measure of damages was held to be the difference between these two sums. Williams *v.* Archer, 5 Man. Gr. & Scott, 318; Archer *v.* Williams, 2 Car. & Kir. 26.

‡ Leigh *v.* Patterson, 8 Taunt. 440; 2 Moore, 588, S. C.

performance of the contract; and of that opinion was the court. Park, J., said, "For anything that appears, the plaintiff never assented to rescind the contract, and the defendant might have delivered the tallow at any moment up to the 31st of December; and the price on that day should have regulated the verdict of the jury."

The principle of this case was also applied in a recent decision,* in which the distinction between contracts altogether executory and those where payment has been made, is clearly taken. Assumpsit was brought for the non-performance of contracts for the sale and delivery of 50 bales of bacon, to be shipped from Waterford in 1823. On the assessment of the writ of inquiry, the jury were told that they were at liberty to calculate the damages according to the price of bacon on the day when the inquiry was executed, and that the difference between that and the contract price ought to be the measure of damages. On a rule, *nisi*, to set this inquisition aside, upon the ground that the plaintiff was only entitled to recover the difference between the contract price and the price on the day when the bacon was to be delivered, the court said that the cases of Shepherd *v.* Johnson, and M'Arthur *v.* Seaforth, did not apply. "*In the case of a loan of stock, the borrower holds in his hands the money of the lender, and thereby prevents him from using it altogether.* Here the plaintiff had his money in his possession, and he might have purchased other bacon of the like quality the very day after the contract was broken; and if he sustained any loss by neglecting to do so, it is his own fault. We think the undersheriff should have told the jury that the damages should be calculated according to the price of bacon at or about the day when the goods ought to have been delivered;" and the rule was made absolute.

So in an action for the non-delivery of railway shares on a given day,† pursuant to contract, the property not having been paid for, the measure of damages is the difference be-
[264] tween the contract price and the market price on the day when the contract was broken.[1]

* Gainsford *v.* Carroll, 2 B. & Cres. 624.

† Shaw *v.* Holland, 15 Mees. & Wels. 136. In this case, Parke, B., said, "With respect to the amount of damages, I was at first disposed to think that this was like an action for not replacing stock, in which the measure of damages is the difference of price on the day on which it ought to have been replaced and on the day of trial; but upon consideration, I think it more resembles an action for the non-delivery of goods. Here the plaintiff had his money in his own possession."

[1] Rand *v.* The White Mountains R. R. Co. 40 N. H. 79. See Jones *v.* Chamberlain, 30 Vt. 196; Tayloe *v.* Turner, 2 Cr. C. C. R. 203.

Where persons contracting to perform certain work in constructing a railroad, agreed to receive a portion of their compensation in the stock of the company, at its par value, to be

So the vendee of shares in a projected railway, under a contract to be completed at a future day, may recover as damages for the non-delivery the difference between the price agreed on and the market price on the day on which the defendant refused to complete the sale, and that only.[1] He is not entitled to damages in respect to an advance of price taking place afterwards at the time of the actual issue of the scrip. In other words, the time when the defendant refused to comply with his contract, is the determining point.*

The principle of the English cases has been followed in New York.[2] In a case in that State,† assumpsit was brought by a pawnor against a pawnee who had sold the pledge (a note) before application to redeem; and it was held that the plaintiffs were entitled to recover the value of the note at the time of the application, and not at the time of the pledge.

In the same State,‡ suit was brought on a contract to deliver salt which had been paid for; and the court held that the measure of damages was the highest price between the time fixed by the contract, and the time of trial.[3]

In a late case in the same State,‖ the subject was very fully discussed, and the distinction, accompanied, however, by some proper qualifications, clearly declared. It was an action of assumpsit on a note, promising, for value received, to pay one hundred and fifty dollars in good salt, at one dollar and a half per barrel, to be delivered on the 15th of April then next. This the court held to be a contract to deliver salt, and decided, that as the goods had been paid for, the measure of damages was the difference between the contract price and the highest value at any time between the period for delivery and the day of trial;[4] and Sutherland, J., said,—

* Tempest *v.* Kilmer, 3 Man. Gr. & Scott, 249.

† Cortelyou *v.* Lansing, 2 Cai. Cas. 200.

‡ West *v.* Wentworth, 3 Cowen, 82.

‖ Clark *v.* Pinney, 7 Cowen, 681.

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paid within thirty days after the receipt of the engineer's certificate of completion; *Held*, that the company were not bound to seek the contractors, and tender the stock on that day. This was not an agreement to pay a certain sum in *specific articles*, but an agreement to receive payment in a depreciated currency—in stocks known to be much below par. The contract was undoubtedly made, and the prices fixed with direct reference to the medium of payment. Moore *v.* The Hudson River Railroad Co. 12 Barb. (N. Y.) 156. See Jones *v.* Chamberlain, 30 Vt. 1 Shaw, 196.

[1] So in Van Dieman's Land Company *v.* Cockerell, 1 C. B. (N. S.) 732.

[2] Day *v.* Perkins, 2 Sandf. Ch. 359.

[3] Such is the rule also in California. Dabovich *v.* Emeric, 12 Cal. 171; Maher *v.* Riley, 17 Cal. 415. In the latter case the court sustained an alternative instruction to the jury that they might find the amount of the purchase money and interest, or the highest market price of the property to the time of trial. The rule in *trover*, however, in that State seems to have been somewhat modified by a late decision. See Page *v.* Powler, 39 Cal. 412, cited *post*, 481, note.

[4] Whatever question there may be on principle as to this rule, it seems now settled in New

"We hold it, therefore, to be settled by authority, and rightly settled upon principle, that where a contract is made for the sale and delivery of goods or chattels, and the price or consideration is paid in advance, and an ac-
[265] tion is brought upon the contract for the non-delivery, the plaintiff is not confined, in measuring his damages, to the value of the articles on the day when they should have been delivered. But we doubt the propriety of giving the vendee, *in all cases*, as a measure of damages, the highest price of the article, between the day when it should have been delivered, and the day of trial; *if he immediately, or without any unreasonable delay, commence and prosecute his action*, we think it just and proper that the fluctuations in price should be exclusively at the hazard of the defendant, the plaintiff having done everything in his power to have the contract settled and adjusted, and which is prevented solely by the laches or default of the defendant. In such a case, therefore, the plaintiff is entitled to the highest price between the day when the delivery should have been made, and the day of the trial. But when he delays the prosecution of his claim beyond the period which may be considered reasonable for the purpose of endeavoring to make an amicable arrangement, he must be considered as assenting to the delay, and ought to participate in the hazard of it. In such a case we are inclined to think the rule of damages should be the value of the article at the commencement of the suit.

"Whether this rule of damages would be applicable to contracts for the sale and delivery of individual articles, purchased for the use and accommodation of the vendee, and not for the purpose of sale, we express no opinion. The case at bar is evidently a contract for the purpose of trade and commerce, and to that class of cases we wish to be understood as at present confining our opinion.

"The consideration in this case is acknowledged to have been received at the time of making the contract. Whether it was in money or in anything else, is not, perhaps, material; but the presumption of law is, that it was in money."

And in Texas, also, upon much consideration, the rule has been declared that on breach of a contract to deliver chattels, where the purchase money has been paid, the highest price at any time between the time appointed for delivery and the day of trial, and interest from the time appointed for delivery, is the true measure of damages.* [1]

It will be seen here that an expeditious prosecution of the demand is insisted upon as indispensable to a successful claim for the highest price prior to the verdict; and this must certainly

* Randon *v.* Barton, 4 Tex. 289; Calvit *v.* M'Fadden, 13 Tex. 324.

York, both as regards the breach of contracts for the delivery of stock (Arnold *v.* Suffolk Bank, 27 Barb. 424) and of other personal property. See, however, the discussion of the rule in trover, *post*, 481, note.

[1] Brasher *v.* Davidson, 31 Tex. 190. And the rule is the same in trover. Stephenson *v.* Price, 30 Tex. 715.

be so, for it would never be tolerated that the plaintiff should derive benefit from delays of litigation caused by himself.[1]

In a still later case,* the principle "that where the vendor is in default for not delivering goods or chattels in pursuance of the contract of sale, *and no money has been advanced by the vendee*, the true measure of damages is the difference between the contract price and the value at the time the article should have been delivered," was affirmed; and again, it has been since held† "that the rule of damages on the breach of an agreement to sell goods, is the market price on the day appointed for the delivery, less the contract price *where the latter is* [266] *not paid.*" ‡

But the authority of these cases has been much shaken by a recent adjudication in the same State. In an action of replevin against the sheriff for certain barrels of flour levied on by him, the plaintiff failed to prove his title; and the defendant, on the trial, elected to waive a return, and to take judgment for the value of the property. The value at the time of the sheriff's levy was $4 56 per barrel; at the time of the replevin, it was $4 43; and at the time of the defendant's election, it had risen to $6 25. The referee, before whom the cause was tried, took the last value, and gave interest thereon. On a review of this decision, the Superior Court of New York went into an elaborate examination of all the cases on the subject, and came to the following conclusions: They held, in the first place, that the rule for ascertaining the sum to be received by the injured party in all cases where personal property is wrongfully taken or detained, whether by force, fraud, or process of law (leaving out of view the exceptional cases in which exemplary damages are given), ought to be the same without reference to the form of action; and that it was, *that the owner to whom compensation is due must be fully indemnified, and the wrong-doer not permitted to derive any benefit or advantage from his wrongful act; and that this just indemnity will be arrived at by adding to the value of the property, at the time the owner is dispossessed of it, the damages which he is proved to have sustained from the loss of its possession, and every increase of value which the wrong-doer has obtained, or has it in his power to obtain;* and that the

* Dey *v.* Dox, 9 Wend. 129.

† Davis *v.* Shields, 24 Wend. 322; Beals *v.* Terry, 2 Sandf. S. C. 127, S. P.

‡ This case was reversed in error, 26 Wend. 341, on a question growing out of the Statute of Frauds; but the rule of damages was not touched.

[1] Such is the rule in Iowa, though whether the time should be estimated to the rendition of the verdict or the bringing of the suit is left undetermined. Davenport *v.* Wells, 3 Iowa, 242; Cannon *v.* Folsom, 2 Iowa, 101.

highest price at which the property could have been sold at any time after the cause of action accrued, cannot be considered the measure of damages, *unless the evidence shows that such higher price could have been obtained by the true owner, or has been in fact received by the wrong-doer.* And in the principal case, judgment was given according to the price of the flour when replevied.* [1]

In the other States of the Union, the decisions are [267] not harmonious. In regard to the general principles, undoubtedly there is no variance; but whether the payment of the price alters the rule and gives the plaintiff a right to greater damages, does not appear clear.

The question has been considered but not determined, by the Supreme Court of the United States. Where a contract was made † to redeliver to the plaintiffs flour left with the defendants and not paid for, the plaintiff claimed damages only at the rate of the price of flour on the day fixed for delivery; and though the case went up to Washington, nothing was decided.

In an action brought in Louisiana,‡ by petition or libel, the forms of action of the English law being there unknown, on a contract for the delivery of cotton at 10 cents per pound, on or before the 15th day of February, when the article was 12 cents per pound, it appeared that it had risen to 30 cents, before the suit was brought; the plaintiffs insisted that they were entitled to the highest market price up to the rendition of the judgment. But the unanimous opinion of the court was, "that the price of the article at the time it was to be delivered, was the measure of damages." ‖ Marshall, C. J., said, "For myself only, I can say that I should not think the rule would apply *to a case where advances of money* had been made by the purchaser under the contract. But I am not aware what would be the opinion of the court in such a case."

* Suydam *v.* Jenkins, 3 Sandford, S. C. 614, per Duer, J. The opinion is very able, and deserves careful attention.

† Douglass *et al. v.* McAllister, 3 Cranch, 298.

‡ Shepherd *v.* Hampton, 3 Wheat. 200.

‖ And this appears to have been adhered to in that State. Arrowsmith *v.* Gordon, 3 La. An. R. 105.

[1] Under a contract to purchase a certain quality of merchandise within a specified period, if the purchaser refuses to perform it within the time fixed, the seller can either hold the goods subject to his order and sue him at once for the contract price, or sell them, after notice to him, for the best price which can be obtained; and in adopting the latter course, the vendor need not sell immediately, but may wait as long as he chooses to take the risk of the purchaser's solvency, holding them meanwhile subject to the purchaser's order on his making payment. After such a sale, the measure of damages in an action against the purchaser for breach of contract is the difference between the best price that could be obtained at the sale and the contract price, with interest. The market price, on the latest day fixed by the contract, is immaterial. Dustan *v.* McAndrew, 10 Bosw. 130; aff'd 44 N. Y. 72.

This distinction between contracts executory and partially executed, does not appear to be recognized in Massachusetts.* An action was brought against a corporation which had increased its capital, by an original subscriber, for not permitting him to subscribe for new stock. The point decided by both the judges who delivered opinions was, that, the chattel not being paid for, the price at the time of delivery was the rule of damages. The language, however, of Sedgwick, J., is very broad; he says, "The general rule invariably adhered to here is, that the price of stock at the time it should be transferred or delivered, shall be that by which the damages shall be [268] assessed; and the same rule applies to other personal property." But it will be noticed that the price of the stock had in this case only been tendered.†

In Pennsylvania, in the Circuit Court of the United States, in an action for not delivering teas of the price fixed by the contract,‡ Mr. J. Washington laid down the general rule as we have found it above, without adverting to the distinction which we are now considering.

In Connecticut, it has been held that where the price is paid in advance, the advance at all events can be recovered without any investigation into the state of the market. In a case in that State, suit was brought on an agreement to deliver flour. The plaintiff paid part of the price in advance. At the time fixed for the performance, flour had fallen in price, and it was held that he was entitled to recover his advance with interest. It was admitted that where one contracts to deliver any article other than money, and fails to do it, the rule of damages is the value of the article at the time and place of delivery, with interest for the delay, because it is supposed that the party will have supplied himself elsewhere with the article at that price; but it was held that this reasoning did not apply to a case where the plaintiff had violated his contract and retained the plaintiff's money without consideration.‖ In a case in the same State, on an agreement by the defendant to give a deed of

* Opinion of Sewell, J., in Gray *v.* The President of the Portland Bank, 3 Mass. R. 364.

† In a later case in Massachusetts, the Supreme Court declares the general rule of damages on all contracts to deliver goods on demand, to be the value of the property at the time of the demand; and the court also repeats the assertion, the precise correctness of which we have heretofore examined, that on all contracts and obligations, the party injured by the breach or non-performance, is entitled to a *full indemnity*. Swift *v.* Barnes, 16 Pick. 194.

‡ Gilpin *v.* Consequa, Peters' C. C. R. 85.

‖ Bush *v.* Canfield, 2 Conn. R. 485. See an able dissenting opinion by Hosmer, J. This case presents, in fact, the question whether the loss by the depreciation of the article should fall on the vendor or purchaser; the court, in awarding to the plaintiff his advance and interest, really extricated him from a losing bargain.

certain land in consideration of the transfer to him of a farm worth $2,000, the defendant insisted that the plaintiff could only recover the value of the farm conveyed by him; and it was so held at the trial. But the rule that the value of the article at the time and place of delivery, and interest for delay, furnished the measure of damages, was again declared by [269] the court. It was said, "that the *consideration of a contract* is never the rule of estimating the damages for the breach of an express agreement;" and a new trial was granted.* The whole subject has, however, recently been reviewed in that State, and the rule as established in England has been finally adopted,† the court saying, "that it was founded upon principles of natural justice."

In Pennsylvania, any difference resulting from the payment of the price has been distinctly rejected. Woolston bought of Bosler 13,000 *morus multicaulis*, and paid the price; the trees were not delivered. Smethurst, the defendant, gave a guaranty for the performance by Bosler of his contract to deliver the trees on five days' notice. Smethurst being proved liable, the defendant insisted that the measure of damages was the value of *morus multicaulis* at the time of the breach of contract, or about that time. But the judge who tried the cause said that the sum paid by Woolston, the plaintiff, to Bosler, furnished the rule. On writ of error, the Supreme Court of Pennsylvania held the charge wrong. After noting the case of Shepherd *v.* Hampton, above cited, the court said, "It is evident that C. J. Marshall failed to advert to the difference between a suit on the contract itself, and a suit grounded on the rescission of the contract." In the latter case, the court said, "The money paid could be recovered; but in the former, the value must be always the measure of damages." ‡[1]

* "The reason of the rule," said Hosmer, J., "is so complete and obvious, that it has been universally embraced, except in cases of stock contracts; and the anomaly in such cases has arisen from the specific relief which chancery has been in the habit of giving, and which courts of law, not universally, but in most instances, have in substance thought proper to pursue. Whenever a case on this subject occurs, I shall be desirous of putting an end to this exception without cause, by the establishment of perfect uniformity, as no just reason can be assigned for any discrimination." Wells *v.* Abernethy, 5 Conn. R. 222.

† West *v.* Pritchard, 19 Conn. R. 212.

‡ Smethurst *v.* Woolston, 5 Watts & Serg. R. 106. The language of Rogers, J., is as follows: the distinctions are very acute.

"The value of the article at or about the time it is to be delivered, is the measure of damages in a suit by the vendee against the vendor, for a breach of the contract. This principle is ruled in Meason *v.* Philips (Addi-

[1] But compare the case of The Bank of Montgomery *v.* Reeve, 26 Penn. St. 143, where it is held that where bank stock has been wrongfully withheld from a party entitled to it, "the measure of damages, if the consideration for the stock has been paid, is the highest market value between the breach and the trial, together with the bonus and dividends which have been received in the meantime; but if the consideration has not been paid, the plaintiff should

CONFLICT OF DECISION.—It may be proper to notice how complete is the contrariety of these decisions. One [270]

son, 346); is recognized in Edgar *v.* Boies (11 S. & R. 45), and is in effect affirmed by all the authorities cited. Indeed, the general principle is not denied, but it is contended that this is an exception; that the rule holds good only when the purchase money has not been paid, but that when the purchase money has been advanced by the vendee, the measure of damages is the sum paid or the value of the article which forms the consideration of the contract. But, for this distinction no authority has been cited except a *dictum* (doubtless entitled to great respect) of Chief Justice Marshall, in Shepherd *v.* Hampton, 3 Wheat. 200. After affirming the general principle, he adds, 'For myself only, I can say that I should not think the rule would apply to a case where advances of money had been made by the purchaser under a contract; but I am not aware what would be the opinion of the court in such a case.' Taking the remarks of the Chief Justice in the broadest sense, and supposing them to be directly applicable to the case in hand (of which there is some room to doubt), it is very evident that he failed to advert to the difference between a suit on the contract itself, and a suit grounded on the rescission of the contract. But this distinction, which pervades all the authorities, governs the whole case; for the purchaser may declare specially for the breach of the contract; or simply for money had and received, to recover back the deposit, if any be made, or the purchase money if it be paid; or he may join both causes of action in the same declaration. And when this is done, it is granted that under the money count, the money advanced may be recovered back, or where a specific article has been given in satisfaction, the purchaser may when default is made, elect to consider the contract at an end, and recover the article itself, or its value, from the vendor. But on the other hand, where the purchaser declares specially for breach of the contract, and thereby affirms it, the only rule of damages is the value of the article, at or about the time it is to be delivered.

"Where the vendor fails to deliver the article bought, the purchaser may elect to rescind the contract and recover back the money paid, or he may bring suit on the agreement, and recover the value at or about the time it ought to be delivered. And this is a just rule, for if it has risen in value he has the advantage of the increased price; if it has decreased, why should he, when he adheres to the contract, recover more from the vendor than for the injury he has sustained by the non-performance of the agreement? And the vendee has the less reason to complain, because he may, as before stated, rescind the bargain and place himself in the same situation as before it was made. It is said that the vendor is, in the case supposed, in default, and this is true; but where *there is any circumstance of aggravation, which is rarely the case, the jury may do justice by a liberal estimate of the value of the goods.* It has been suggested that the contract, on failure of the vendor to perform his part of it, is *ipso facto* rescinded; but this is a novel idea, for it can be rescinded only with the assent of the vendee, who may in a given case elect to consider the agreement at an end. And in the latter case, that is, where the purchaser agrees that the contract be rescinded, the remedy against the guarantor is gone; for it is only on the footing of the subsistence of the contract between the vendor and vendee, which he guarantees, that he is liable. This is so plain as not to need the aid of argument. It is very true that a deposit, or even the interest on a deposit, may, in certain cases, be recovered on a special count against the vendor. But these cases form rather the exception than the rule. Usually the damages sustained are much less than the deposit; and besides, this is necessary, for otherwise it could not be recovered at all against the vendor, who has not received the money, the deposit being in the hands of the auctioneer

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be allowed the difference between it and the value of the stock, together with the difference between the interest on the consideration and the dividends on the stock."

The modification of the general rule in case of payment in advance is sanctioned in Indiana, in regard to commercial transactions. In the case of Kent *v.* Ginter, 23 Ind. 1, the court after stating that the ordinary rule for measuring damages in suits by the vendee against the vendor is the value of the property at the time and place of delivery, declare that one exception is well established in the case of stocks, and approve also those authorities which make a second exception in the case of the payment in advance for an article which is one of a class or quantity. In this case the vendee has two remedies: one to treat the contract as rescinded, and sue to recover the money paid with interest; the other, to sue for damages which include, besides the value of the article at the time of the purchase, the benefit of its rise; whether this second exception extends to the case of a specific article, the title to which passed by the purchase, so that trover or replevin could be maintained for it, by the vendee, the court leaves undecided.

may well be tempted to exclaim with Vinnius, *Quæstio hæc valde perplexa est, nullusque est hodie, vel judex, vel* [271] *patronus, vel jurisconsultus, qui non hæreat, maneatque suspensus quoties, cum condemnatio facienda in rei petitæ æstimationem, quæritur ad quod tempus æstimatio referri debit.** In the courts of England and Connecticut, it would seem that if the price be paid, in advance, the vendee is entitled to the highest value up to the time of trial, and the right to rescind is denied. But the judges of these tribunals do not appear to agree upon the question which presents itself where the article falls in value after the price is paid.

In New York, the subject seems to be thrown into confusion by the introduction of a new qualification; while in Pennsylvania the right to rescind is maintained, and the vendee, even where he has paid the price, is only allowed to recover according to the value of the article, unless under the count for money had and received. In this perplexing conflict of opinion, I am admonished to refrain from any dogmatical declaration of the existing rule; and this especially as it cannot be denied that some doubt has been thrown on the entire subject by a late decision of the Court of Exchequer in England.

In a recent case in that court, the defendants, in 1833, agreed to sell and deliver on board the plaintiff's vessel a certain quantity of Odessa linseed, at that place, at 30*s.* per quarter. The plaintiff's vessel arrived at Odessa, and they paid the defendants £1,575 in October, 1833, being a moiety of the purchase money of the expected cargo. The defendants gave notice that they could not comply with the contract. In February, 1834, when the cargo would have arrived in England if it had been delivered to the plaintiffs at Odessa, the price was from 47*s.* to 50*s.* per quarter; at the time of trial it would have been about 56*s.* The defendants paid into court, in September, 1835, £2,072, which was at the rate of 47*s.*, and which was paid

and he alone is liable for money had and received. Besides, the cases cited are on sales of lands by auctioneers, and the same rules cannot hold as on the sale of chattels; for lands, unlike stocks, etc., have no market value. There is nothing in the suggestion that the agreement takes the case out of the general rule. The suit is brought for breach of an agreement, the performance of which the defendant agreed to guarantee. It is, therefore, from necessity, a suit in affirmance of the contract. The defendant agrees, in effect, that if the vendor fails to perform the agreement he will pay the value of the trees at the time they ought to have been delivered."

When we come to the subject of warranties, we shall see that the right to rescind, here declared, is more than doubtful; nor can it be considered correct to leave a question of this kind to a jury with any instructions so vague or dangerous, as that they are at liberty to make "a *liberal estimate*" of the value of the property.

It will be perceived, also, that this decision is directly opposed to that above cited from Connecticut, throwing the loss of the speculation on the plaintiff.

* Vinnius, Selectæ Questiones, lib. 1, ch. 39.

over to the plaintiffs, who contended that as they had paid a portion of the purchase money and lain out of it for a long time, they were entitled to damages according to the [272] price at which the seed was selling at the time of the trial. Lord Abinger, at the trial, charged, "That in his opinion the plaintiffs were not entitled to treat this as a case resembling contracts for the replacing of stock where the damages are estimated at the price of the funds, and they were not entitled to damages according to the then price of the seed, and that taking the price at the time the cargo would arrive, it appeared to him that enough had been paid into court; but with these observations he left the case to the jury for their deliberation," who designing, as Lord Abinger remarked, to give no more than the *money advanced and interest on it*, found a verdict for the defendants. A motion was made for a new trial, on the ground of misdirection; but the rule was discharged.

Lord Abinger, C. B., said, "The plaintiffs did not prove that they wanted this seed for any particular purpose, or that they sustained any peculiar injury from its non-delivery. I told the jury that neither the witnesses nor the plaintiffs had pointed out any precise line which should mark the proper estimate of the damages; for they had not stated what they had intended to do with the seed, whether to crush it or to sell it. The plaintiffs, however, insisted that they were entitled to the profits which they might possibly have made upon it, if it had been delivered. The jury appeared to me to wish to give no more than the money advanced and interest upon it. I am not aware of any rule for estimating damages for speculative profits, besides taking the interest on the money advanced. It was not proved that the plaintiffs could have made more than 5 *per cent.* on that money, or that they had not credit at their bankers' to that extent, and thereby had sustained any peculiar inconvenience. The money had been paid into the court, and the plaintiffs received it as soon as the practice of the court allowed them so to do. I felt a difficulty as to how the damages ought to be computed; but one of the witnesses gave something like a rule, which I pointed out to the jury. He said that *Odessa* linseed was about the same quality as *Sicilian* linseed, though it usually sold at a somewhat lower rate. The ship arrived in *England* in *March*. He stated that at that time *Sicilian* linseed was well sold at 50*s.*, and that he himself had furnished good seed at that price; and deducting 2*s.* for the difference in value, the fair price of the *Odessa* seed was 48*s.*; and allowing a discount, the price would have been about that which the defendants had paid into court. It is to be remarked, that by the terms of the contract, supposing the cargo to have been shipped in pursuance of it, the plaintiffs would have been obliged to pay the residue of the purchase money at that time. I did not, however, prescribe any line to the jury upon which they ought to proceed; but I told them they ought not to give speculative or vindictive damages."

Alderson, B., said, "the only question in the case was as to the amount of damages. The contract was to deliver a certain quantity of linseed at
[273] a certain time, namely, on the arrival of the ship in London. Previously to that period, a notice was given by the defendant that he was unable to perform his contract. It appears that the price at that time was not the proper criterion for estimating the damages; for, as the plaintiffs had already parted with their money, they were not then in a situation to purchase other seed. The more correct criterion is the price at the time when the cargo would have arrived in due course, according to the contract; when, if it had been delivered, the plaintiffs would have been enabled to resell it. Another criterion is to consider the loss of the gain which the party would have made if the contract had been complied with. In the present case, the loss which the plaintiffs have sustained, arises from their having been kept out of their money. That is a matter to be calculated by the interest of the money up to the time when, by the course of practice, the money could have been obtained out of court. It appears from the report of the trial that there were no circumstances submitted to the jury to show that the plaintiffs had sustained any special damage. The verdict is, therefore, in my opinion right." *

No Just Distinction between Stock and Merchandise.—There appears no solid reason for making any difference between stock and any other vendible commodity. Where stock is loaned, or the price of the article paid for, in either case the party entitled to the delivery parts with his property on the faith of the contract, and in either case is prevented from using it, up to the time of trial. The question is, whether, in either case, the law should act on the assumption that the plaintiff would have retained the property if the contract had been complied with, till the period of the highest value, and have realized that price, and thus give damages which are purely conjectural. It will be noticed that in the case of Clark v. Pinney,† it was intimated by the Supreme Court of New York, that the rule ought to be limited to the case of articles intended for sale; and that in Startup *v.* Cortazzi ‡ it was suggested that the plaintiffs had given no proof of the purpose for which the article was intended; the niceness of the first distinction, the difficulty of furnishing satisfactory proof under the second head, and the general policy of the law which denies conjectural relief, seem to me strongly to point to the period of breach as the true time, in all cases, of estimating the damages, unless it be shown that the article was to be delivered for some specific object
[274] known to both parties at the time, and that thus a

* Startup *v.* Cortazzi, 2 Cr. Mees. & Roscoe, 165.

† *Ante*, 279.

‡ *Supra.*

loss within the contemplation of both parties has been sustained. The fact of payment in advance throws no light on the injury sustained by the purchaser; nor does it at all increase the probability that he would have retained the article till the rise of price. The value of the article at the time of breach, with interest for delay, and subject to the above exception, seems to me as near an approach to the actual loss sustained as can be effected, without embarking upon a vague search after facts impossible, in most cases, to be proved with any degree of satisfaction.*[1]

SAME REASON FOR RULE WHERE PROPERTY HAS FALLEN.— And if this rule be sound, it applies as well to cases where the

* The opinion expressed by Mr. Chancellor Kent is also well worthy of notice. The text of the original edition of this work contained the following passage: "Chancellor Kent, in his Commentaries, vol ii, p. 480, lect. xxxix, says, 'The general rule is well settled, that in a suit by vendee, for a breach of contract on the part of the vendor, for not delivering an article sold, the measure of damages is the price of the article at the time of the breach.' The learned chancellor appears here to overlook the distinction resulting, as we have seen, from the payment of the price beforehand, which runs through these cases, and which is entirely analogous to the rule in trover: that the value of the chattel, not at the moment of the conversion, but its highest value up to the time of trial, is the rule of damages." To which the chancellor, in his sixth edition, replied as follows: "The learned author is mistaken in supposing I had overlooked that distinction. These commentaries are not calculated to embody all the nice or arbitrary or fanciful distinctions that are to be met with in the Reports. I do not regard the distinction alluded to as well founded or supported. It is disregarded or rejected by some of the best authorities cited. The true rule of damage is the value of the article at the time of the breach, or when it should have been delivered. Mr. Sedgwick seems, himself, to come to that conclusion amid the contrariety of opinion and cases which he cites." 2 Kent's Com. 480. lect. 39. See Owen *v.* Routh, 14 C. B. (5 J. Scott) 327; *ante,* 262, note.

[1] The rule in Vermont is thus stated by Redfield, C. J., in delivering the opinion of the Supreme Court of that State, in the case of the Copper Co. *v.* Copper Mining Co. 33 Vt. 92: "The only general damages which the vendee of personal property is entitled to recover for failure to deliver the articles according to the contract, *whether the price be paid or not,* is the difference between the contract price and the market price of the article at the stipulated time and place of delivery, when the price has advanced, together with the money paid towards the price." And in the case of Hill *v.* Smith, 32 Vermont, 433, the same learned court, after adverting to the conflict of authority on this question, say, "It has not been adjudged in this State that payment in advance in such a case varies the rule of damages, and so far as any indication can be gathered from the cases, it seems to be in the direction of not permitting that fact to affect the rule. Upon principle, as well as in view of practical consequences, we prefer the result at which Mr. Sedgwick has arrived, upon a most elaborate and able examination of the subject, that the market value or price on the day of the breach of the contract controls the measure of damages." So in the same State, Mr. Justice Aldis, after stating the same rule in delivering the opinion of the same court in the case of Rider *v.* Kelley, 32 Vt. 268, says (p. 273): "It stands upon the reasonable ground that as the title to the property remains in the seller, he can, upon non-acceptance by the vendee, sell the property at once for its market price, and the contract price will indemnify him against loss." See *post,* 481, note. In England, actions for the non-delivery of railway shares pursuant to a contract of sale are distinguished from actions for not replacing borrowed stock, and in the former class of cases the market price on the day when the contract of sale is broken, instead of that on the day of trial, is fixed as the standard for the computation of the damages. *Ante,* 263. See Barned *v.* Hamilton, 2 Railw. Ca. 624; Shaw *v.* Holland, 15 M. & W. 136; Tempest *v.* Kilner, 2 C. B. 300; 3 C. B. 249. In the late English Nisi Prius case of Elliott *v.* Hughes, 3 F. & F. 387, the rule is approved by which the measure of damages for the non-delivery of goods paid for in advance is the difference between the price paid and the highest price up to the trial.

property has fallen, as to those where it has risen.[1] The purchaser claims his advance; but if he gets the value of the article at the time of the breach, the contract is performed; and if this sum be less than his advance, his loss is ascribable purely to his own bargain. It may undoubtedly be urged, and with force, that the contract being violated by the defendant, the retention of any part of the plaintiff's money is against conscience. I have already, however, said that in actions of contract the only object of the tribunal must be to carry into effect the agreement of the parties, as far as possible, and that the motives of the defaulter are not to be taken into view. If this be correct, then certainly it removes the last objection to the adoption of the general rule, that the value at the time of the breach, with interest for the delay, is, with the exception of the de-
[275] fendant's liability to make remuneration for loss resulting from facts within the knowledge and in the contemplation of both parties at the time of the contract, to furnish the measure of damages.[2]

I may be allowed to say, with great respect for the very able court which decided the case of Startup *v.* Cortazzi, that the vagueness and generality of its observations cannot be justified; no clear and definite rule can be deduced from it, and the question as to the amount of damages would seem to have been left as a matter for the mere discretionary control of the jury. If the subject of compensation is ever to be reduced to anything like certainty, if any hope can be entertained that it is to be relieved from the vexatious contradictions and perplexities with which it is now infested, the reins must be held with a firmer hand and the power of the court over the amount of relief more clearly and definitely declared.*

* In Louisiana, on an agreement to transfer stock, which afterwards had risen in value but which had not been paid for, and which, at the time of the breach of the contract, was at the same price, the Supreme Court said that the damages at the time of the default or the breach of contract, are the only damages which the plaintiff can recover. Vance *v.* Tourne, 13 La. Rep. 225.

It has been held generally in Maine, in an action on an agreement to deliver certain chattels on demand, that the market value of the

[1] In the English Common Pleas it was lately held that payment in advance did not affect the rule in such a case. The measure is the difference at the time of the delivery, between the value of goods of the quality contracted for and that of those delivered, provided the goods can then be resold. Where there is a necessary or reasonable delay in the resale, the difference is to be computed on the day of the resale. Loder *v.* Kekule, 3 C. B. (N. S.) 128.

[2] The observations in the text are cited at length by Mr. Justice Judge of the Supreme Court of Alabama in Rose *v.* Boseman, 41 Ala. N. S. 678, in which case it was held that the measure of damages for the breach of a contract to deliver cotton at a specified time and place was its value at the time of the breach, and that the payment of the price in advance did not affect the rule. See S. C. 40 Ala. 212.

PRINCIPLES OF SCOTTISH DECISIONS.—In Scotland, indeed, the whole subject that we are now considering, has been distinctly declared to belong to the province of the jury, [276] who are to be allowed to enter into a wide range of investigation into the objects of the parties, the purpose of the contract, and the conduct of the defaulter. Where the defendants had *wrongfully* failed to deliver certain hemp at St. Petersburg, and the plaintiff could not have supplied himself at that place during the season with the article, the whole matter was very elaborately considered, and the English rule rejected. It should be mentioned that the price of the article had not been paid; but no stress is laid on this fact. Lord Medwyn, who delivered the leading opinion of the Court of Sessions, said that—

"The law of England, taking as the standard the market price of the article on the day fixed for delivery, appeared to be adopted chiefly in regard to articles of ordinary production in the country, as bacon, tallow, etc., where the same article may be easily procured in the market, and where the party could easily supply himself if disappointed by the seller."

He then proceeded to examine the Scotch cases, and deduces from them the following principles;

First. "That the damage will be differently estimated according as the failure to implement (perform) has been thought the fault of the seller or not. In the latter case, on payment of the loss actually incurred, the seller ought to be free. Equity interposes to make the damage as light as possible."

Second. "But this principle will not apply, and equity cannot be pleaded

property at the time of demand was the measure of damages. Smith *v.* Berry, 18 Maine R. 122.

In a case in Massachusetts, the contract was, that George should deliver to Quarles 1,000 barrels of flour at $6 per barrel, at any time within six months—George to give Quarles six days' notice prior to delivery; Quarles to pay the price aforesaid, and either party to be released, if desiring it, within three months, on paying $500 to the other. This last provision was not taken advantage of. On the 13th of February, Quarles demanded it: it was not delivered; and the question was, on what day the damages were to be computed, it being agreed that such damages were the difference between the price mentioned in the contract and the actual value. The court held that the defendant had to do the first act, *i. e.* give notice; that he had still six days before the 14th of February to give notice; and as, if he had then given notice, he would have had till the last day to deliver the flour, the actual breach by the non-delivery of the flour must be taken to have occurred on that day, and damages were computed accordingly. Quarles *v.* George, 23 Pick. 400.

Where a purchaser at a sheriff's sale did not fulfil his contract, and the property was resold, it was held, in an action by the sheriff, that the measure of damages was the difference between the first and second sales. Gaskell *v.* Morris, 7 Watts & Serg. 33.

In Kentucky, where one Yoder covenanted to furnish Allen, by a given day, two slaves, in consideration of $450 then paid, and $210 to be paid on their delivery, it was said by the Court of Appeals, that "for a failure to furnish the slaves according to contract, the obligors were liable for damages to Allen. The measure of those damages was the value of the negroes described at the time and place of performance. This was the province of the jury to ascertain. It has done so, and the amount of consideration did not form a subject of material inquiry." Yoder *v.* Allen, 2 Bibb. 338.

if the non-delivery has arisen from the fault of the seller, in order to obtain a higher price from another. . . . . But circumstances in the buyer's conduct also may affect the estimate of damage due to him, even where the non-implement has been blamable; for it is indemnification of loss merely he is entitled to, and his claim does not proceed on the principle of punishment for a wrong."

Third. "Hence if the buyer had before delivery resold the article, he can claim only the difference of price between the two sales, as this is the amount of his loss, unless the parties who made the purchase also claim and obtain damages."

Fourth. "If the person supplied himself at the market price with the article he must limit himself in his claim of indemnification to the difference between the price paid and the contract price, although he could show that the seller, by the rise of the market, had made double the sum by non-delivery."

The learned judge then proceeds to inquire,—

"What is the legal rule for fixing the damage in a case where the non-delivery is wilful, and performance (implement) refused." And he says,
[277] "The conclusion would not seem unreasonable, that if this is withheld by the seller for the gain he is to make or has made by disposing of it to another at a higher price, the purchaser is entitled to have the highest price of the article till the decree is pronounced in his favor, provided always there be no undue delay in bringing his action, and no improper delay in carrying it on, and that if the market has been rising all along, the very highest price prior to decree is to be assumed as the estimate of the damage."

But after stating that the English and the civil law are against this rule, he proceeds,—

"The reason for resisting such a mode of estimating the damage is, that it gives the plaintiff (purchaser) the utmost price of speculation without any risk of loss, and takes it from the seller, who, unless he has held on to the goods (a very unlikely supposition, as the temptation to dispose of them about the time of breaking the contract probably led to it), will be made to suffer not only much beyond his own profit, but will be compelled to put into the pocket of his adversary much beyond indemnification for his loss. . . . This further reason may be assigned against this rule for estimating damage, that much uncertainty and great inequality would be introduced into such claims." He then proceeds: "Still, it is to be inquired whether there is any principle in our law for claiming as damages the profit which might have been made by a sale of this article in a rising market. . . . . There really seems to me to be much good sense in this conclusion, that no fixed rule as to time will suit each case, but that it may vary according to circumstances. . . . . In estimating damages we are entitled to look at the use the one party intended to make of it, and which the other might presume was intended. It is upon this principle that the seller is only bound to repair the loss which relates to the thing itself, and which results directly from it, not consequential damage. It is that only which the parties are

called upon or can be supposed to contemplate at the time of the sale or the breach of bargain. And if the article were purchased by a dealer in it, with a view to be resold for profit, and this was in the contemplation of both parties, I am unable to see how that can be laid out of view in estimating the loss sustained by non-delivery, more especially when that very advantage which the purchaser would have had, the seller has obtained, and which in fact has occasioned his bad faith in the transaction. . . . . In the present case, it must be held that the defenders could have given delivery, and that they only put it out of their power wilfully and wrongfully, in order to obtain a higher price for it; that this higher price is now in their pocket, which would *most probably have been* the profit on the sale of the article by the purchaser. . . . . We cannot doubt that the higher price was the temptation for their breach of bargain; and I think that this affords the true estimate of damage. I am quite aware that this throws much uncertainty into every case, but not greater than if we adopt either the date of the summons or of the verdict as the period for estimating damage; one would probably give too little and the other too much in a rising market. I see no better principle than this, in such a case, that [278] the profit which the one would have made, the other probably has made; and justice requires that the one should not suffer by the other's wrong, nor the other benefit by his own. No doubt it is the price of speculation without any risk of loss; but if we reject the price at the date of delivery as offering any encouragement to bad faith in a rising market, and also the date of citation or of verdict as putting it too much in the purchaser's power to protract his judicial demand and influence his claim to what he never would have obtained as a profit, nor the other party have secured by the actual sale of the article, I really do not see what other rule can be adopted. It is always a difficult matter to fix on the amount of damages; the elements out of which they are to be estimated are various and anomalous. I think *it is peculiarly a jury question.*"*

Having thus endeavored to arrive at the general result that the market price or value on the day of the breach controls the measure of damages, it still remains to be seen how that value is to be determined.

MARKET VALUE HOW DETERMINED.—In a case on the Pennsylvania Circuit,† where suit was brought on a contract to deliver coffee, not paid for, the rule was declared to be the market price on the day fixed for performance; but it also became necessary carefully to determine what was the market price. In charging the jury, Baldwin, J., said, "You must take what

* Watt *v.* Mitchell, 1 Dunlop, Bell & Murray's Session Cases (2d series), 1157. The whole case should be carefully examined. See also, Dunlop *v.* Higgins, in House of Lords, 12 Jurist, 295 (1 H. of L. Cases, 381), where the power of the jury over the subject is distinctly declared to be the Scottish law.

† Blydenburgh *et al. v.* Welsh, 1 Baldwin, 331.

you believe the market price or value, but may take the range of the market as proved by the witnesses, fixing on the highest, lowest, or medium rate at your discretion. We think the rule applicable to contracts to deliver stocks a correct one in cases of this kind, by keeping within the range of the market on the day of delivery, to fix on the higher, lower, or medium value, as the breach of the contract may have been wilful or innocent in your opinion. The plaintiff is entitled to your verdict for such value, with interest from the day of delivery." A motion was made to set aside the verdict, on the ground of excessive damages, which was granted, and in delivering his opinion, Hopkinson, J., said,—

"It is the price, the market price of the article that is to furnish the measure of damages. Now, what is the price of a thing, particularly the market price? We consider it to be the value, the rate at which the thing is sold. To [279] make a market there must be buying and selling, purchase and sale. If the owner of an article holds it at a price which nobody will give for it, can that be said to be its market value? Men sometimes put fantastical prices upon their property. For reasons personal and peculiar, they may rate it much above what any one would give for it. Is that its value? Further, the holders of an article, as flour, for instance, under a false rumor, which if true would augment its value, may suspend their sales, or put a price upon it, not according to its value in the actual state of the market, or the actual circumstances which affect the market, but according to what in their opinion will be its market price or value provided the rumor shall prove to be true. In such a case it is clear that the asking price is not the worth of the thing on the given day, but what it is supposed it will be worth at a future day, if the contingency shall happen which is to give it this additional value. To take such a price as a rule of damages, is to make a defendant pay what never in truth was the value of the article, and to give the plaintiff a profit by a breach of the contract, which he never could have made by its performance.

"The law does not intend this; it will give a full and liberal indemnity for the loss sustained by the injured party, and means to impose no higher penalty than this on the defaulter."

Where a given place is fixed on by the parties as that for delivery, it seems to be well settled that the inquiry as to prices is limited peremptorily to that particular place.[1] So in New

[1] Worthen *v.* Wilmot, 30 Vt. (1 Shaw, 533); Phelps *v.* McGee, 18 Ill. 155; Field *v.* Kinnear, 4 Banks (Kansas), 476. But, although this is the general rule, yet, like most legal principles, it must be taken reasonably, without a blind exactness in its practical application, and may be modified by circumstances. If there is no market value, or but an uncertain one, the value should be ascertained by comparison of such prices and sales as can be shown, and by reference to the reasonable probabilities of the case. Thus, in such a case, recourse may be had to the sales which were made nearest in time and in the nearest market. See Berry *v.* Dwinel, 44 Maine, 255; Wemple *v.* Stewart, 22 Barb. N. Y. 154; Young *v.* Lloyd, 65 Penn. St. 199. So where the value of lumber at Detroit was the measure of damages, and the wit-

York, where assumpsit was brought for breach of a contract to deliver 100,000 shingles at a landing-place called Bailey Town, on Seneca Lake, on the 1st of June, 1828, for which the plaintiff was to pay $125, or $1 25 per thousand, the plaintiff proved the value of the shingles at the place of delivery on the day (1st of June) to have been $1 87 or $2 00 per thousand. The defendant was allowed to prove the value of shingles at Geneva, *and other places*, and from an *average of prices* to find the value; but, the plaintiff moving for a new trial, this was held wrong, and that the true rule of damages was the difference between the price as fixed by the parties on the day and *at the place of* delivery, and the market value at the same time and place; and a new trial was ordered.* [1]

* Gregory *v.* McDowell, 8 Wend. 435. In a case in Arkansas, in an action on an agreement by which Hanna sold Harter ten hogs, the defendant below refused to deliver, it was

ness a dealer in lumber at Wayne, a place eighteen miles from Detroit, knew the market value of such lumber at Wayne, but not at Detroit, but knew the value at Detroit was higher than at Wayne, his evidence of the value at Wayne was held proper. Savercool *v.* Farwell, 17 Mich. 308. The same latitude is allowed, if necessary, in trover. Selkirk *v.* Cobb, 13 Gray, 313; *post*, 474. So in an action on the defendant's promise to pay for logs which he had converted on their way down the river to the plaintiff's mill, evidence is admissible of their market price at the mill, and of the cost of their transportation from the place of conversion thither. Saunders *v.* Clark, 106 Mass. 331. So where the defendants were liable for injuries to the plaintiff's rafts, caused by an artificial flood which was produced by a dam which they had illegally constructed, and there was no definite value of rafts on the creek where the injuries occurred, the price of rafts at the nearest market was some guide in determining the value at the creek, and proper to be considered. Dubois *v.* Glaub, 52 Penn. 238 (cited *ante*, p. 80, note 1). See, also, Hazleton Coal Co. *v.* Buck Mountain Coal Co. 57 Penn. St. 301. So evidence of the cost of the goods in the market where they were purchased, adding the expenses of transportation, the duties, and a fair allowance for profits, and also evidence of the sales of like articles for several months before and after the sale in question, and of the repurchase of some of the goods for cash by the plaintiff at advanced rates within two months afterwards, was held admissible in relation with other evidence, as the measure of damages at the time and place. Eaton *v.* Mellus, 7 Gray (Mass.) 566. Where, however, cheese sold to the plaintiff had been warranted to be worth nineteen cents a pound in the New York market, and was proved to be worth there only twelve, proof that it was shipped to London and netted to the plaintiff, over all expenses, by sales made in the ordinary course of business, 16½ cents a pound, was held inadmissible to reduce the damages. Durst *v.* Burton, 2 Lans. (N. Y.) 137; aff'd, 47 N. Y. 167. And to justify a reference to a distant market, there must be really no other. See Cox *v.* England, 65 Penn. St. 212; *post*, 484, *n.* The value at another time and place is not material, unless it tends to prove the value at the time and place in question. Where the evidence is explicit at the place of delivery, the value elsewhere is not strictly competent. Durst *v.* Burton, 47 N. Y. 167, *supra*. And see Chapman *v.* Ingram, 30 Wisc. 290.

"If at any particular time there be no market demand for an article, it is not on that account of no value. What a thing will bring in the market at a given time is perhaps the measure of its value then, but not the only one." Trout *v.* Kennedy, 47 Penn. 387. Opinion of the court, per Strong, J. And where a contract was payable in gold coin or its equivalent in legal tender notes, and no place of payment was agreed on, it was held that the market where the relative values of the coin and the currency should be determined should be the place of trial. Wells, Fargo, & Co. *v.* Van Sickle, 6 Nev. 45.

The value for a special use is usually immaterial. Bouton *v.* Reed, 13 Gray, 530. In trover, however, as we shall see, the rule is more enlarged, and where the property has little or no market value, its actual value to the owner is the rule. Stickney *v.* Allen, 10 Gray, 352; *post*, 474. In cases where the damages depend on on the market value, proof of a single sale is not enough to establish such market value. Graham *v.* Maitland, 1 Sweeny (N. Y.) 149.

[1] But this rule may be affected by that in the case of Hadley *v.* Baxendale (9 Exch. 341),

CONTRACTS PARTLY FULFILLED BY VENDOR, MUST BE WHOLLY AFFIRMED OR RESCINDED BY VENDEE.—Contracts of sale may be broken by the seller in still another mode. The goods
[280] when tendered by the vendor may not prove to be of the kind or quality required by the contract. In such case the vendee must either affirm or rescind the contract *in toto*. The buyer cannot, on receiving a part of the quantity sold, retain it, and claim damages for the non-delivery of the entire quantity. Nor can he require the delivery of the residue, retaining a claim for damages. He must either receive the article as it is, or he must return the portion delivered, and then enforce his claim for damages.* [1]

CONTRACTS WITH OTHER THAN A PECUNIARY STANDARD.—We have already considered the subject in regard to notes payable in specific articles,† and have also examined a class of barter contracts,‡ where the price of the article sold is agreed to be paid not in money but some certain specific article. In all these cases the sound rule seems to be that the parties shall be considered as having elected a criterion of value different from the ordinary pecuniary standard; and having so made their contract, the only duty of the courts is to enforce it by awarding the value of the thing agreed to be delivered in payment.[2]

FAILURE OF PURCHASER.—Having thus considered the measure of damages as against the vendor, when he fails to deliver the article contracted for, we have now to examine the cor-

held that the measure of damages was the difference between the price agreed on between the parties and the market price of the pork at the time of the delivery at the place fixed on by the agreement. Hanna *v.* Harter, in error, 2 Ark. 397.

* Shields *v.* Pettee, 2 Sandf. S. C. 262.

† *Ante*, 252.

‡ *Ante*, 212.

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considered *ante*, 76, *et seq.* So where a quantity of pork, although contracted for delivery at one place, was known to the vendor to be intended for use by the vendee at another place, and when it had reached the latter proved to be damaged, the difference in value at the ultimate point was held to furnish the measure. Converse *v.* Prettyman, 2 Minn. 229.

[1] Where a vendor has wholly failed to comply with his part of the contract, yet if the vendee have received and made use of part of the property purchased and is benefited by it, he must still pay for the property so received and used within the limit of the contract price, provided its value exceed the damage he has sustained from the failure to complete the contract. Koeltz *v.* Bleekman, 46 Mo. 320. In an action to recover the price of goods sold, the buyer may show in reduction of damages that the goods were not of the quantity or quality alleged. Westcott *v.* Nims, 4 Cush. (Mass.) 215.

[2] So, also, in actions for rent, payable in kind, the measure of damages for failure to deliver, is the value of the articles at the time and place of delivery. Safely *v.* Gilmore, 21 Iowa, 588. And the court rejected the rule of the highest intermediate value, as extending to such actions, assuming it to be established as to sales of chattels.

responding questions as to the purchaser, upon his failure to make payment.

In these cases, the contract fixes the price or it does not. If this point be left doubtful, and the vendee resell the article, he can be made liable for the price received, deducting usual charges and commissions. He is treated as a trustee or agent of the plaintiff, selling on his account and for his benefit; and it is both equitable and legal that having received the money he should pay it over to the owner, after retaining a due compensation for his services.* But this is a very unusual case; and the contract generally fixes the price.

Where a vendee is sued for non-performance of the contract on his part, in not paying the contract price, if the goods have been delivered, the measure of damages is of course the price named in the agreement;[1] but if their possession has not been changed, it has been doubted whether the rule of damages is the price itself, or only the difference between the [281] contract price and the value of the article at the time fixed for its delivery. It seems to be well settled in such cases, that the vendor can resell them if he see fit, and charge the vendee with the difference between the contract price and that realized at the sale.†[2] Though perhaps more prudent, it is not necessary that the sale should be at auction;[3] it is only requisite to show that the property was sold for a fair price.‡ But if the vendor does not pursue this course, and without reselling the goods sues the vendee for his breach of contract, the question arises which we have already stated, whether the vendor can

* Greene *v.* Bateman, 2 Woodb. & M. 359.
† Langford *v.* Tyler's Adm'r, 1 Salk. 113; s. c. 6 Mod. 162; Cuddee *v.* Rutter, 5 Vin. Abr. 540; Sands *v.* Taylor, 5 J. R. 395.
‡ White *v.* Kearney, 2 La. Ann. R. 639.

[1] On a contract of sale, where no price is agreed upon, the value of the article in the market is the rule. Henckley *v.* Hendrickson, 5 McLean's C. C. R. 170. Where plaintiff and defendant contracted for the sale of 50,000 bricks, and the plaintiff delivered 20,000, when the defendant wrongfully rescinded the contract and refused to receive any more, it was held, that plaintiff was entitled to recover the full market value of those delivered. Terwilliger *v.* Knapp, 2 E. D. Smith's (N. Y.) C. P. R. 86.

[2] Tompkins *v.* Haas, 2 Penn. St. (Barr) 74; Pickering *v.* Bardwell, 21 Wisc. 562. But in order to have this rule apply the sale should be made in a reasonable time, and should be on notice to the vendee. The vendor cannot by his voluntary act and without notice to the vendee, fix the measure of damages; and where the agreement of sale is executory only, and the title is still in the vendor, his remedy and the measure of his damages are the recovery of the difference between the real value and the contract price, in an action against the vendee for that purpose. Mallory *v.* Lord, 29 Barb. 454. Where the vendor has actually taken all the steps necessary to vest the title to the goods sold in the vendee, he may sue for goods sold and delivered, and the rule of damages would be the contract price. But where he is ready and willing to perform and offers to do so, but the vendee refuses, even though the title is not vested in the vendee, the vendor still has his action on the contract for damages. But the rule of damages in such case would be the actual injury sustained, which is ordinarily the difference between the value of the property at the time of the refusal and the price agreed on. Ganson *v.* Madigan, 13 Wisc. 67.

[3] Crooks *v.* Moore, 1 Sandf. (N. Y.) 597.

recover the contract price, or only the difference between that price and the value of the goods which remain in the vendor's hands; and the rule appears to be, that the vendor can recover the contract price in full.[1]

In a suit brought by vendor against vendee, the plaintiff had contracted to sell the defendant three hundred tons of Campeachy logwood; "such as may be determined to be otherwise by impartial judges, to be rejected;" the defendant refused to accept the wood offered, because it was not all Campeachy logwood; it was insisted on his behalf that he was not bound by the contract price, as a part only of the stipulated quantity had been furnished; and that the measure of damages was the difference between the contract price and what the article would have sold for at the time when the true quantity of Campeachy logwood was ascertained. But the Court of King's Bench held, that the defendant was bound to take the part which was Campeachy, and that he having repudiated the whole contract, the measure of the damages was the contract price on that quantity, *i. e.* the Campeachy wood.*

* Graham *v.* Jackson, 14 East, 498. We have already (*ante*, 197) had occasion to consider the analogous doubt that exists as to the measure of damages on contracts for the sale and purchase of lands; whether the vendor, having done all in his power to complete his agreement, is at liberty to recover the entire contract price, or confined to the actual injury resulting from the loss of his bargain. See a recent case at Nisi Prius, Dunlop *v.* Grote, 2 Car. & K. 153, where the plaintiffs in a somewhat special case, were held entitled to recover the whole contract price.

[1] "The vendor of personal property in a suit against the vendee for not taking and paying for the property," says Earl, Commissioner, in delivering the opinion of the Commission of Appeals of New York, in the case of Dustan *v.* McAndrew, 44 N. Y. 72, "has the choice ordinarily of either one of three methods to indemnify himself: (1) He may store or retain the property for the vendee, and sue him for the entire purchase price; (2) He may sell the property, acting as agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale; or, (3) He may keep the property as his own, and recover the difference between the market price at the time and place of delivery and the contract price."

But the rule of allowing the vendor to recover the contract price in full, in the case of an ordinary contract for the sale of goods, where the goods have *not* been delivered, is questioned by the Supreme Court of New Hampshire, in a late case on a review of the authorities, and the rule sanctioned by the weight of authority is held to be the difference between the contract price of the thing sold, and its market value at the time when the defendant should have received it. Gordon *v.* Norris, 49 N. H. 376.

In an action for the non-acceptance of property sold or contracted for, the measure of damages is the amount of actual injury sustained by the plaintiff in consequence of such non-acceptance, which is usually the difference between the price agreed and its value, where the price exceeds the value. If it is worth the price the damages are nominal only. But where the property is worthless in the hands of the plaintiff, the whole price agreed should be recovered. Allen *v.* Jarvis, 20 Conn. 38; Williams *v.* Jones, 1 Bush (Kentucky), 621. In order to give the vendor complete indemnity, he must recover the difference between the agreed price and that at which he could sell on the day when the vendee was bound to receive and pay for the thing bought. Dana *v.* Fiedler, 2 Kern. (N.Y.) 40; see also, Haskell *v.* McHenry, 4 Cal. 411; Whitmore *v.* Coats, 14 Mo. 9; Orr *v.* Bigelow, 14 N. Y. 556; Ballentine *v.* Robinson, 46 Penn. 177. Where a quantity of straw was sold, a portion of which only was taken away, and the buyer subsequently refused to take the remainder, the vendor threw it, the next spring, it having become damaged, into the barn-yard to his cattle. Held, that the measure of damages against the vendee for refusing to complete his contract, was the contract price less its value to the vendor for the use to which it was applied. Chamberlain *v.* Farr, 23 Vt. 265.

The question has been considered in New York, and decided in the same way.* The plaintiff, a carriage- [282] maker, was employed to build a sulky for the defendant. A due tender having been made of the carriage, and it being deposited with the plaintiff for his use, the defendant having refused payment, and suit brought, it was insisted that the measure of damages was not the value of the sulky, but only the expense of taking it to the residence of the defendant, delay, loss of sale, etc.; but the court held otherwise, using this language:—

"Upon principle, I would ask what should be the rule? A mechanic makes an article to order, and the customer refuses to receive it; is it not right and just that the mechanic should be paid the price agreed upon, and the customer left to dispose of the article as he may? A contrary rule might be found a great embarrassment to trade. The mechanic or merchant, upon a valid contract of sale, may, after refusal to receive, sell the article to another, and sue for the difference between the contract price and the actual sale.

"Where there has been a valid contract of sale, the vendor is entitled to the full price, whether the vendee receive the goods or not. I cannot see why the same principle is not applicable in this case. Here was a valid contract to make and deliver the sulky. The plaintiff performed the contract on his part; the defendant refused to receive the sulky. The plaintiff might, upon notice, have sold the sulky at auction; and if it sold for less than $80 the defendant must have paid the balance. The reason given for this rule by Kent, C. J.,† is, that it would be unreasonable to oblige him to let the article perish on his hands and run the risk of the insolvency of the buyer. But if, after tender or notice, whichever may be necessary, the vendor chooses to run that risk, and permit the article to perish, or, as in this case, if he deposit it with a third person for the use of the vendee, he certainly must have a right to do so, and prosecute for the whole price. Suppose a tailor makes a garment, or a shoemaker a pair of shoes, to order, and performs his part of the contract, is he not entitled to the price of the article furnished? I think he is, and that the plaintiff in this case was entitled to his verdict." ‡[1]

* Bement *v.* Smith, 15 Wendell, 493.

† Sands *v.* Taylor, 5 Johns. R. 411.

‡ It has been held in Pennsylvania, where goods are sold at auction on credit, and the vendee refuses to take them, the owner may, before the expiration of the credit, sue the vendee for his breach of contract; and in such case, the measure of damages is the difference between the price agreed to be paid for the goods and their value at the time that the vendee refused to take them. This is clearly so, because no action can be brought *for the price* of the goods until the time of credit is expired. But in this case, Gibson, J., proceeded to say, "Properly speaking, the seller cannot *recover the price when he has retained the goods* in consequence of the buyer's refusing to comply with any part of the contract." Girard *v.* Taggart, 5 Serg. & R. 19.

[1] See Dustan *v.* McAndrew, 10 Bos. (N. Y.) 130; affirmed, 44 N. Y. 72, *supra.*

In the case of an agreement for the sale of an article not in existence, but to be manufactured for the vendee in a particular way, there is no room for question that when the article is made according to the contract and tendered or duly offered, if the vendee decline to pay for it, and although he do not receive it, the vendor may recover as damages the full contract price. See Gordon *v.* Norris, 49 N. H. 376, *supra.*

So in Massachusetts, where a contract had been made for the purchase of railway shares, and a part of the price paid, [283] and the vendor caused them to be transferred on the books of the company, but the defendant refused to accept them after such transfer, it was held that the measure of damages was the contract price.*[1]

Where, however, the plaintiff has not the goods that he agrees to sell, but makes a side-contract with another party to furnish them, he will only be allowed to recover the difference between the original contract price and the market price at the time of the offer, with interest.†[2]

Where goods are sold to be paid for by note or bill payable at a future day, and the note or bill is not given, it is well settled in England and in this country, that the vendor cannot maintain assumpsit on the general count for goods sold and delivered, until the credit has expired; but he can sue immediately for a breach of the special agreement.‡ And in New York it has been held, that in such action, he will be entitled to recover as damages the whole value of the goods, with the suggestion that there should be a rebate of interest during the stipulated period of credit;‖ the court, Bronson, J., saying, "The right of action is as perfect on a neglect or refusal to give the bill as it can be after the credit has expired. The only difference between suing at one time or the other, relates to the *form of the remedy.* In the one case, the plaintiff must declare specially, in the other he may declare generally. The remedy

* Thompson *v.* Alger, 12 Met. 428.

† Stanton *v.* Small, 3 Sandf. S. C. R. 230. So, too, in Ohio, M'Naughton *v.* Cassally, 4 M'Lean, 530; though in this case it is said a portion of the property was ready to be delivered.

‡ Mussen *v.* Price, 4 East, 147; Dutton *v.* Solomonson, 3 Bos. & Pull. 582; Hoskins *v.* Duperoy, 9 East, 498; Hutchinson *v.* Reid, 3 Camp. 329; Loring *v.* Gurney, 5 Pick. 16; Hunneman *v.* Inhabitants of Grafton, 10 Met. 454.

‖ Hanna *v.* Mills, 21 Wend. 90. In the English cases nothing is said as to the amount which the plaintiff is entitled to recover. In the case of Hutchinson *v.* Reid, the plaintiff, though without discussion, was permitted to take a verdict for the price of the goods.

[1] Thorndike *v.* Locke, 98 Mass. 340.

[2] The sufficiency of this distinction is questioned by Professor Parsons. 3 Pars. Conn. 5th ed. p. 210, and note *u.*

Where there is an executory contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more, as he has no occasion for them, and will not accept or pay for them, the vendor may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of contract. And where, by the terms of such a contract, the goods were to be delivered at stated periods, but were not all delivered at the respective times, the purchaser not countermanding them, but requesting from time to time that the supply might be delayed, and finally refusing to accept any more; it was held, that damages might be given for the whole quantity remaining on hand, though consisting in part of quantities which, without being actually countermanded, had, by desire of the purchasers, been kept back at the times appointed for delivery; and that it was a proper direction to the jury to give such damages as would leave the plaintiffs in the same situation as if the defendants had fulfilled their contract. Cort *v.* The Ambergate, &c. R. R. Co. 17 Q. B. 127.

itself is the same in both cases. The damages are the price of the goods. The party cannot have two actions for one breach of a single contract, and the contract is no more broken after the credit expires than it was the moment that the bill or note was wrongfully withheld."

So in a case in Pennsylvania,* it was charged at the trial, that where goods are sold on credit, the vendee to [284] give his note, which he refuses to do after the goods are delivered, suit may be brought for a breach of the contract before the expiration of the credit, in which case the measure of damages is the price of the goods. But the direction was held right.†

NOTICE OF NON-PERFORMANCE BY VENDEE INEFFECTUAL.—An effort has been made in many cases by the purchaser to relieve himself from the contract of sale before the time fixed for performance, by giving notice that he would not be ready to complete the agreement; and in these cases it has been insisted that the damages should be estimated as at the time of giving notice; but the English courts have justly denied the right of either party to rescind the agreement, and have adhered to the day of the breach as the period for estimating the damages.

In an action of assumpsit by plaintiff against defendant for not accepting a quantity of wheat which the plaintiff, early in January, 1839, contracted to sell to the defendant, to be delivered at Birmingham, as soon as vessels could be obtained for the carriage thereof, the defendant gave notice, on the 26th of January, that he would not accept the wheat if delivered—wheat having then fallen in price. It was at that time on its way to Birmingham, and on its arrival was offered to the defendant; but he refused to take it. On the trial, it was contended that the measure of damages was the difference between the contract price and the price on the 26th of January,

* Rhinehart *v.* Olwine, 5 Watts & Serg. 157.

† In a somewhat similar case, the same rule was laid down in Connecticut; the defendant promised the plaintiff to give a note immediately for one hundred dollars, payable in sixty days. On refusal to give the note, and before the expiration of the sixty days, suit was brought; and it was insisted that the plaintiff could only recover nominal damages. But the court held the plaintiff entitled to recover the full amount of the note, saying, "The plaintiff can have no other action than upon this special contract; and it is very obvious that in some action and at some time, he is entitled to recover the actual damage sustained, one hundred dollars, which the defendant promised to pay. The special promise of the defendant to give his note, was as effectually broken when the action was commenced, as it was after the expiration of the sixty days; and if the plaintiff recover nominal damages now, we do not see but he will be debarred from a recovery of his actual damages hereafter; because, if he sues again, he can only sue for the same breach of promise, in the same form of action, and in the same manner of declaring as he is now doing. The second action would be for the same cause of action as the first, and must so appear to be from the record itself." Stoddard *v.* Mix, 14 Conn. 12.

[285] when notice was given. But on argument, the Exchequer held that the true rule was the difference between the contract price and that on the day when it was offered at Birmingham; and they relied on the case of Leigh *v.* Patterson.*

So in another case,† which was an action of assumpsit for not accepting certain railway shares, the contract of sale was made on the 26th of August, 1840; on the 7th of September, the defendant refused to take them. On the 15th the plaintiff resold the shares at a loss of £161 from the price agreed on; and the jury, under the charge of the judge, found a verdict for this amount. The defendant, on a motion for a new trial, insisted that the damages should have been calculated only to the 7th of September, when the defendant declared off. But Alderson, B., said, "The damages are to be calculated at the difference between the contract price and the price to be obtained within a reasonable time after the breach of contract; and it was for the jury to say what was such reasonable time."

So where a person had contracted for a certain quantity of oil, it was held, that in an action for not accepting and paying for the oil, the proper measure of damages was the difference between the price he had contracted to pay for the oil, and the market price at the time when the contract was broken.‡

In New York Foreign Creditor can recover only Par of Exchange.—The same question that we have heretofore discussed in regard to notes and bills of exchange when made in one country and put in suit in another, may arise in regard to sales; and in such a case it has been held in New York, that when goods have been purchased in England, and the vendee is sued here for the price, the creditor can recover the price at the par of exchange only.‖[1]

Corporate Stock.—In a late case,¶ it was held in Massachusetts, that where the defendant had agreed to deliver a certificate of ten shares of the corporate stock of a certain manufacturing company, whose capital was to be one hundred thousand dollars, divided into not more than 200 shares; and instead thereof made a tender of a certificate of ten shares of the stock of the company, of which thirty-four thousand dol-

* Phillpotts *v.* Evans, 5 Mees. & Wels. R. 475. *Ante*, 277.

† Stewart *v.* Cauty, 8 Mees. & Wels. R. 160.

‡ Boorman *v.* Nash, 9 Bar. & C. 145. ‖ *Ante*, 250.

¶ Dyer *v.* Rich, 1 Met. 180.

[1] See *ante*, 238, note.

lars only were paid, divided into seventy shares; that the measure of damages was the value of ten shares in the full capital stock, if it had been made up at the time stipulated, and the company had then been ready in good faith to operate upon the capital, pursuant to their charter.[1] [286]

WARRANTIES.—We come next to the subject of warranties. The contract of sale may be complied with on the part of the vendor, so far that delivery may have been made, but the article may still not satisfy the warranties either express or implied, that have been made at the time of the sale; and in this case, the rule of damages is now to be investigated. We for the present assume that no fraud enters into the transaction, inasmuch as in that case we shall presently see different rules apply, and, moreover, it transfers the subject of compensation in a great degree to the discretion of the jury.[2] It will be noticed that, in one branch of the question which we now proceed to examine, the rights and liabilities of the parties concerned are often identical with those of principal and surety; but reserving for separate inquiry that subject in its more extended form, we shall confine ourselves at present to the examination of warranties as contained in sales.

In cases of executory contracts, or contracts to deliver a specific article, if on delivery they prove not to satisfy the agreement, the plaintiff, as we have seen, is not bound to retain the articles, but he may return them within a reasonable time.*[3] So it was originally held in regard to chattels sold with warranty, that if they did not answer the agreement, the plaintiff had his election of two remedies: he might either return the article and recover the price paid; or he might sell the article, and recover damages in an action on the warranty.[4]

The better opinion, however, seems now to be, that where

* Freeman *v.* Clute, 3 Barb. S. C. R. 424.

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[1] Struthers *v.* Clark, 30 Penn. 210.

[2] The purchaser of a vessel, falsely and fraudulently represented by the seller as eighteen instead of twenty-eight years old, having sent her to sea before he had knowledge that such representation was false, and the vessel being afterwards condemned in a foreign port, it was held that the purchaser was entitled to recover his actual damages occasioned by sending her to sea, not exceeding her value. Tuckwell *v.* Lambert, 5 Cush. (Mass.) 23.

[3] If the article is returned, the vendee may recover the price paid with interest from the time it was returned. Kuntzman *v.* Weaver, 2 Penn. St. 422. And in an action for breach of warranty of soundness of a slave who has died, the measure of damages is the price paid and interest, and, if the vendee offered to return the slave and the offer was refused, the subsequent expenses of his keeping. Scranton *v.* Tilley, 16 Tex. 183.

[4] So held in the Special Court of Appeals of Virginia. Graham *v.* Bardin, 1 Patt. & H. 206.

there is no fraud and no agreement to return, the vendee cannot, at his own option, rescind the contract, but has only
[287] an action on the warranty.* So in New York, it has been said in a case of simple warranty, there being no provision in the contract for the return of the articles, that the title to the property becomes vested in the vendee as soon as delivered, and he can only recover for the difference in value between it as it is in fact, and as it ought to have been.†[1]

VALUE, NOT PRICE, GOVERNS THE COMPENSATION.—This fluctuation of judicial opinion has produced a corresponding variety of decisions as to the measure of relief. It seems originally to have been held, that the measure of damages in these cases was the difference between the price paid and the actual value; but it is now well settled, that the rule is the difference between the actual value[2] and the value that the article would have pos-

* In England the cases were considered, in Street *v.* Blay, 2 Barn. & Adol. 456; and though the cause was not decided on this ground, strong opinions to this effect were expressed. See also, in the State of New York, Voorhees *v.* Earl, 2 Hill, 288. So in Vermont, a warranty and breach of it will only entitle the vendee to recover damages for the breach, and not authorize him to rescind and recover back the consideration money. West *v.* Cutting, 19 Verm. 536; Thornton *v.* Wynn, 12 Wheat. 183. As to the difference taken between sales with warranty, and executory contracts where the chattels may generally be returned as soon as they are found not to satisfy the contract, see Gompertz *v.* Denton, 1 Cr. & Mees. 207; Pateshall *v.* Tranter, 3 Ad. & Ell. 103; Thornton *v.* Wynn, 12 Wheat. 183. In Maryland the right of rescission is maintained. Franklin *v.* Long, 7 Gill & J. 407. In Alabama, fraud and breach of warranty are still held to give an equal right to rescind. So the offer to return in a reasonable time after the breach of a warranty by the vendor, or the discovery of a fraud practiced by him, will be as effectual to rescind the contract as if the offer had been accepted. Burnett *v.* Stanton, 3 A. R. (N. S.) 181. In Pennsylvania, also, *ante*, 284. See also, *infra*, as to right of rescission in cases of fraud.

† Freeman *v.* Clute, 3 Barb. S. C. R. 424.

[1] Prentice *v.* Dike, 6 Duer, 220; Pritchard *v.* Fox, 4 Jones (N. C.) L. 140; and compare Davis *v.* Dickey, 23 Ala. 848; Foster *v.* Baer, 7 La. Ann. 613.

[2] Street *v.* Chapman, 29 Ind. 142; Conor *v.* Dempsey, 49 N. Y. 665; Reggio *v.* Braggiotti, 7 Cush. (Mass.) 166; Tuttle *v.* Brown, 4 Gray (Mass.) 457; Morse *v.* Brackett, 98 Mass. 205; Foster *v.* Rodgers, 27 Ala. 602; McGavock *v.* Wood, 1 Sneed (Tenn.), 181; Worthy *v.* Patterson, 20 Ala. 172; Sharon *v.* Mosher, 17 Barb. (N. Y.) 518; Stearns *v.* McCullogh, 18 Mo. 411; Andree Smith *v.* Steinkampler, 16 *Ibid.* 150; Verdier *v.* Trowell, 6 Rich. (S. C.) L. 166; Lane, Adm'x, *v.* Lantz, 27 Md. 211; also Foster *v.* Rodgers, 27 Ala. 602, where the difference between the actual value and the value if sound, *with interest*, was held to be the rule. See also, Fales *v.* McKeon, 2 Hilt. (N. Y.) 53; Lacey *v.* Straughan, 11 Iowa, 258; Smith *v.* Cozart, 2 Head (Tenn.), 526; Tuttle *v.* Brown, 4 Gray (Mass.), 257; Whitmore *v.* South Boston Iron Co. 2 Allen (Mass.), 52; Carr *v.* Moore, 41 N. H. 131. It was held erroneous, therefore, in an action on a note given for the price of a female slave, for the court to charge the jury that although they should find the covenant to have been broken, if at the time of the sale, the slave in her unsound state was worth the price for which she was sold, the defendant had sustained no damage. Hook *v.* Stovall, 26 Geo. 704. Nor is the rule affected by proof that the purchaser afterwards sold the property for as much as and more than he paid for it. If such evidence is competent, it ought to appear affirmatively that such resale was made by the original vendee on such terms as would preclude him from any loss by reason of the breach of warranty by the original vendor. Brown *v.* Bigelow, 10 Allen, 242. But, as we shall see, the rule is sometimes broader than is here stated in the text. (*Post*, 292, note 1.) And it seems that damages sustained by a dealer from selling goods with a warranty in reliance on his vendee's warranty, can be recovered from his vendor. It

sessed if it had conformed to the warranty, the price paid being mere evidence of that value.[1]

English Cases.—In an early case,* Mr. J. Buller, discussing the question whether money had and received would lie on an executed contract, said, "In a late case before me, on a warranty of a pair of horses to Dr. Compton, that they were five years old when in fact they turned out to be only four, I held that, *as the plaintiff had not rescinded the contract*, he could only recover damages; and then the question was, what was the difference *of the value* of horses of four or five years old."

In a subsequent case,† it was insisted that the plaintiff should have returned the animal which had been warranted sound. [But it was held by all the judges that neither such return, nor notice of the unsoundness, was necessary to enable the plaintiff to maintain his action for the damages sustained.] In another case,‡ an action being brought on the warranty of a horse sold by the defendant to the plaintiff for £20, the warranty and the unsoundness being proved, the jury was directed that if the horse was kept, the verdict *ought to be for the difference between the value and the price paid.* The jury, however, con- [288] trary to this direction, found for the plaintiff £30 10*s.*; £20 for the horse, and 10 guineas for its keep. The defendant moved for a new trial; and the verdict was reduced to £20, the

* Towers *v.* Barrett, 1 Term Rep. 133 (1786).

† Fielder *v.* Starkin, 1 H. Bl. 17 (1788.)

‡ Caswell *v.* Coare, 1 Taunt. 566 (1809).

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is intimated by the English Court of Common Pleas that they are not too remote. Dingle *v.* Hare, 7 C. B. (N. S.) 145; 1 Law T. R. (N. S.) 38.

But if the property is not valueless, and the purchaser does not rescind on discovering the fraud, and if having an opportunity to return the property he does not do so, he cannot recover its entire value, although it becomes lost to him, through a fault warranted against. So held in Alabama in the case of a slave running away, who had been warranted by the vendor to have an "excellent character," which was regarded as incompatible with a habit the slave had of running away. Ward *v.* Reynolds, 32 Ala. 384. And a custom to substitute another article in lieu of the one as to which the warranty is broken, is invalid and does not vary the rule of damages. Johnson *v.* Gilfillan, 8 Wis. 395. See Van Deusen *v.* Young, 29 N. Y. 37.

The defendant sold plaintiff a quantity of apples to be delivered at Barre in New York. At the time of the sale it was agreed, that the apples were to be "good ingrafted winter-fruit," and it was understood that they were intended to be put up for the Canada market. They were accordingly delivered to the plaintiff at Barre, and he took them to Toronto, Canada, where the barrels were opened, and some of the apples found to be damaged. Held, in an action for breach of warranty, that the true measure of damages was not the difference between the real value of the apples, as they proved to be, and the price of good merchantable fruit *in the Canada market*, deducting the price of transportation to that place, but the difference in value between a sound and the unsound article *at the place of delivery*; and that the plaintiff was not entitled to recover anything on the ground of a loss of profits. If the apples had been wholly lost in consequence of the fault of the vendor, the vendee might recover the expenses of transportation to the contemplated market, in addition to the price paid for the fruit. But he could in no event go beyond that, and recover anything on the ground of a loss of profits. New York Supreme Court, 1842; Lattin *v.* Davis, Hill & D. Supp. 9. But see *infra*, 293, note.

[1] See Holmes *v.* Boydston, 1 Nebraska, 346.

plaintiff undertaking to deliver back the horse, *free of any expense for its keep.*

The rule of damages here laid down, is the difference between the *sum paid and the actual value* of the chattel, as proved to be deteriorated by the defect warranted against; but as I have already said this is no longer the law. In another case,* in an action of assumpsit on a warranty of soundness in a horse, Lord Eldon spoke of the difference between the value of the article warranted and its actual value when sold, as the measure of damages; but the case did not turn on this point. Recently, however, the precise subject has been considered, and this rule finally adopted.

It was also an action brought for the breach of a warranty.† The plaintiff had bought a horse of the defendant for £45, warranted sound. The plaintiff had sold the horse with warranty to one Collins for £55; Collins returned the horse as unsound; and the plaintiff was obliged to repay the £55, and the animal was sold for £17 15*s.* The plaintiff claimed the difference between that sum and £45, the price paid; the expense of bringing the horse to London; his keep from the time of purchase to the sale as unsound; the £10 paid to Collins; £1 15*s.* for an examination at the veterinary college; and £1 15*s.* for opinion of counsel. Lord Denman, C. J., at the trial of the cause said, "As the warranty and the unsoundness are admitted on the record, the only question is the amount of damages. I am of opinion that the amount of damages is what the horse would *be worth if sound*, deducting the price it sold for after the discovery of the unsoundness; and I think the price at which it was sold to the plaintiff *is not conclusive as to its value*, though I think it very strong evidence. The fair value of the horse, if sound, is the measure of damages; and the sum the plaintiff gave is only the evidence of the value." He refused to allow the £10 paid Collins, because there was no evidence that the horse was worth more than the plaintiff gave for it. The expense [289] of bringing the horse to London, and of keeping him there, was also allowed. The court was moved for a new trial as to the £10 paid Collins; but they refused to disturb the verdict, saying that this claim in substance amounted to a claim of compensation for the loss of a good bargain, which could not be allowed as damages in such an action.‡ [1]

* Curtis *v.* Hannay, 4 Esp. 82 (1800).

† Clare *v.* Maynard, 7 Car. & Payne, 741 (1837).

‡ From the report of this case in the King's Bench, 6 Adol. & Ellis, 519, it appears that a question arose as to the sufficiency of the dec-

[1] Muller *v.* Eno, 14 N. Y. 597; Burton *v.* Young, 5 Harring. (Del.) 233.

In addition to the remuneration thus given, the plaintiff is entitled to recover the expenses of keeping the animal for such a reasonable time as may be necessary to sell him to the best advantage.* Mr. J. Littledale said, in the case first cited, "a contrary doctrine very generally prevailed, but he thought the plaintiff was entitled to recover the expenses of keeping for so long a time as might reasonably be occupied in endeavoring to sell the horse to the best advantage."[1]

AMERICAN CASES.—The principle that it is the value and not the price which governs the compensation, has been recognized by the courts of this country. In a case in New York,† assumpsit was brought on a warranty that 120 barrels of flour were superfine flour, of good quality. The price paid was $9 50 per barrel; 60 barrels were defective. The defendant's counsel insisted that the measure of damages was the difference in value between the 60 barrels when sold, and the value of superfine flour; but Willard, C. J., held at the trial, that the plaintiffs were entitled to recover back the balance of the whole purchase-money paid for the 60 barrels, with interest, crediting the amount realized by them from their sale at auction. On a motion for a new trial, Cowen, J., said, "Regarding this case as one of simple warranty without fraud, the measure of damages adopted at the trial was wrong. It should have been the difference between the *value of the sixty barrels* at the time of the sale considered as good superfine flour, and *the value of the inferior article sold.* The purchaser is entitled to have the article made equal in quality to what the warranty assured it to be." A new trial was granted. [290]

The question has been still more distinctly decided by the same court in another case.‡[2] Gruman sued Cary on a warranty of soundness in a horse; the price paid was $90, and the breach was a disease of the eyes. The defendant insisted

laration. The plaintiff insisted that the £10 should be allowed as expenses, if not as profit. But to cover this, the court said there was no adequate allegation. See, also, Cox *v.* Walker, in notes to this case.

* M'Kenzie *v.* Hancock, Ryan & Moody 436 (1826); Chesterman *v.* Lamb, 2 Adol. & Ellis, 129 (1834); and Ellis *v.* Chinnock, 7 Car. & Payne, 169 (1835).

† Voorhees *v.* Earl, 2 Hill, 288.

‡ Cary *v.* Gruman, 4 Hill, 625 (1843), per Cowen, J.

[1] In those cases of breach of warranty of soundness in the sale of animals, where the rule of compensation cannot be enlarged so as to include consequential damages pursuant to the rule hereafter stated (*post*, 296, n.), the jury should be instructed as to what evidence tends to show the difference in value between the animals sound and unsound, and what recoverable expenses have been seasonably, properly and reasonably incurred in taking care of them and trying to cure them. Pinney *v.* Andrews, 41 Vt. 631.

[2] And see Comstock *v.* Hutchinson, 10 Barb. (N. Y.) 211.

that the proper measure of damages was the difference between the real value of the horse, if sound, and his value with the defect complained of. The court below, however, decided that the measure of damages was the difference between the price paid and the value with the defect. A verdict being found in conformity to this charge, on exception and writ of error, it was said by the Supreme Court,—

"The court below erred in laying down the rule of damages. The warranty cannot be satisfied, except by paying to the vendee such sum as, together with the cash value of the defective article, shall amount to what it would have *been worth* if the defect had not existed. . . . The rule, undoubtedly, is, that the agreed price is strong evidence of the actual value; and this should never be departed from unless it be clear that such value was more or less than the sum at which the parties fixed it. . . . It is impossible to say, nor have we the right to inquire, whether the real value of the horse in question, supposing him to have been sound, would have turned out to be more or less than the $90 paid. Suppose the jury thought, with one witness whom the court allowed to state such value for another purpose, that it was not more than $80, the plaintiff then recovered ten dollars, not on account of the defect, but because he had been deficient in care or sound judgment as a purchaser. On the other hand, had the horse been actually worth $100, the defendant would have been relieved from the payment of the ten dollars, because he had made a mistake of value against himself. The cause might thus have turned on a question entirely collateral to the truth of the warranty." And a new trial was granted.[1]

And so the law has been recently declared in Vermont;* and in Alabama;† in Virginia also;‡ and so in Louisiana.‖[2]

* Woodward *v.* Thacher, 21 Vt. 580.

† Marshall *v.* Wood, 16 Ala. 806.

‡ On a warranty of soundness in an animal, the measure of damage is the difference between the value of the animal sound as warranted, and his value at the time of the sale, in the condition in which he really was. And the price at which the animal was sold is the proper evidence of value he would have had at that time, if he had been sound to the extent of the warranty. Thornton *v.* Thompson, 4 Grattan, 121.

‖ Slaughter *v.* M'Rae, 3 La. Ann. R. 455.

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[1] Where, in an action for damages for a breach of warranty, the consideration given for the warranted article consisted in another article which was exchanged for it, evidence of the value of the exchanged property will be allowed as tending to show what the value of the other would have been if it had corresponded with the warranty. Chaplin *v.* Warner, 23 Wisc. 448; Fisk *v.* Hicks, 31 N. H. 535. See *ante*, 193, *n.*

[2] In Illinois the old rule laid down in Caswell *v.* Coare, 1 Taunt. 566, *ante*, 288, making the difference between the price paid and the value of the thing with the defect, has been adopted, and seems after some hesitation to be adhered to. Morgan *v.* Ryerson, 20 Ill. 343; Crabtree *v.* Kile, 21 Ill. 180; Wallace *v.* Wren, 32 Ill. 146. But where the consideration is not a fixed price, as where one horse is exchanged for another, the rule is the difference between the sound and unsound value. *Ib.*

The court proceed upon the ground that when the price paid is more or less than the sound value, the party having the best of the bargain ought not to be deprived of the benefit of it. If the purchaser agree to pay an extravagant price, there is no reason, as the court considers, in the absence of fraud in the seller, why he should not be held to it, nor if a low one, why he should lose the advantage of his shrewd bargain.

In the earlier case of Woodworth *v.* Woodburn, 20 Ill. 184, the rule in the text, making

RESULT OF AUTHORITIES.—From these cases the result is, that in an action brought on a warranty, the true measure of damages is the difference between the value which [291] the thing sold would have had at the time of the sale, if it had been sound or corresponding to the warranty, and its actual value with the defect;[1] that the price is very strong but not conclusive evidence of the value at the period first named; and that the plaintiff is entitled to recover his expenses for keeping the article during such time as is reasonable for its advantageous sale.[2] Mr. Chancellor Kent* seems to prefer the rule as laid down in Curtis *v.* Hannay, cited above, on the ground of its being in harmony with the measure of damages on the covenant of warranty in the sale of land. But it is proper to notice that the doctrine settled is in analogy to the principle in another class of cases. It has been laid down as a general rule,† in regard to actions for non-performance of contracts (other than conveyances of lands), that the party ready to perform may recover damages to the extent of his injury,[3] and that the price agreed to be paid on actual performance is not the measure of damages. This also seems the rule in Pennsylvania, where in the case of sale by sample, in an action on the implied representation or warranty, the measure is held to be the difference between the value of the articles delivered and the commodity sold.‡[4] The rule which we have been considering does not at all apply where fraud intervenes. In such case, as we shall presently more fully see, the contract can be rescinded, the thing returned, and the price paid recovered back,

* Com. vol. ii, p. 480, in notes.
† Shannon *v.* Comstock, 21 Wendell, 457.
‡ Borrekin *v.* Bevans, 3 Rawle, 23.

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the value as warranted instead of the price agreed, the standard by the departures from which the damages are measured, is assumed to be right, though the decision is placed on another point. This case, it may be observed, was decided at the same term of the court (April, 1858) with that of Morgan *v.* Ryerson, above cited.

[1] Callanan *v.* Brown, 31 Iowa, 333.

[2] The price realized on a second sale is admissible as one mode of determining the value. Reggio *v.* Braggiotti, 7 Cush. (Mass.) 166; Foster *v.* Rodgers, 27 Ala. 602.

[3] Feagin *v.* Beasley, 23 Geo. 17. Interest on the difference in value up to the time of trial is allowed in Alabama. Buford *v.* Gould, 35 Ala. (N. S.) 265. In a suit on the warranty of a slave, his reasonable medical and other expenses, sustained by reason of the unsoundness warranted against, may be included in the damages; Feagin *v.* Beasley, *supra;* Stone *v.* Watson, 1 Ala. Select Cases, 236; Buford *v.* Gould, *supra;* see Holloway *v.* Cotten, 33 Ala. (N. S.) 529; Perrine *v.* Serrell, 1 Vroom (N. J.) 454; with interest from the time of payment. Roberts *v.* Fleming, 31 Ala. 683. Nor in Alabama does the right of their recovery depend on the fact of their payment. It is enough that they have been fairly incurred. Kelly *v.* Cunningham, 36 Ala. (N. S.) 78.

[4] See Roberts *v.* Carter, 28 Barb. 462; Murry *v.* Meredith, 25 Ark. 164; Tatum *v.* Mohr, 21 Ark. 349.

or the party defrauded may stand to the bargain and recover damages for the fraud.* [1]

WARRANTY OF QUANTITY.—There is sometimes a warranty of quantity, either expressed or implied; and in that case the purchaser is entitled to have the article made equal in quantity to what the warranty declared it to be, but not to be remunerated for injury remotely resulting from the deficiency.† [2]

CONSEQUENTIAL DAMAGES FOR BREACH OF WARRANTY.—The rights of the parties in a case of warranty are not, however, always presented in the simple form that we have just been considering. The vendee, in some instances, confiding in [292] the warranty, is subjected to indirect or consequential loss.[3] And the recovery of such consequential loss will depend on the general principles which we have heretofore examined.[4] So where a slave was sold with warranty of sound-

* Campbell *v.* Fleming, 1 Ad. & El. 40; 2 Kent Com. 480; Voorhees *v.* Earl, 2 Hill, 288; Putnam *v.* Wise, 1 Hill, 234, where the doctrine is considered at length in a learned note.

† Voorhees *v.* Earl, 2 Hill, 288; Hargous *v.* Ablon, 3 Denio, 406.

[1] Sharon *v.* Mosher, 17 Barb. (N. Y.) 518.

[2] So, again, there may be a warranty that the thing sold shall, without reference to its intrinsic quality or value, be worth a certain price or have a certain value in the market within a specified time. In a late case in Massachusetts the defendant had sold the plaintiff twenty shares of the stock of an express company, with a warranty that it should be "worth $700 market value, within one year." The highest price reached by the stock during the year was $500. At the end of the year its market value was $330. The plaintiff insisted the measure of the damages was the difference between $330 and $700. But the defendant contended he was only liable to pay the difference between $500 and $700, and the court so held. Woodward *v.* Powers, 105 Mass. 108.

[3] In such cases the damages should make good besides the defect in the thing itself such additional injury as is the direct consequence of the seller's breach. Wintz *v.* Morrison, 17 Tex. 372; *post*, 295, note 2; Rose *v.* Wallace, 11 Ind. 112.

So in an action for breach of a contract to construct and set up within a specified time engines on a steamboat of a stipulated quality and power; where it proved that the engines were not delivered within the time fixed by the contract, and did not conform to it, the measure of the plaintiff's damages was held to be the difference between the machinery furnished and that called for by the contract, together with expenses actually incurred by the plaintiff as a consequence of the breach, which would include the wages of the officers and crew while they remained idle during the delay in furnishing the machinery, and such reasonable further time as was consumed in testing and repairing it, or procuring other machinery instead, to which might be added interest. Fisk *v.* Tank, 12 Wis. 276. See cases cited *infra*, 2[illegible]3, note 1.

[4] One had sold another for the price of good pork, well packed in good barrels, a quantity of pork in barrels with a warranty that the barrels would not leak. After the barrels had been properly stowed by the vendee he found that a part of them were leaky, and the brine had in consequence escaped. He thereupon, under the advice of some experts in the article, filled up the barrels with new brine, in good faith, intending and expecting thereby to preserve the pork, but the barrels continuing to leak, a portion of them were either wholly spoiled or deteriorated to an extent exceeding the balance due for the pork. The vendee did not notify the vendor of the leaking of the barrels, nor offer to return the imperiled pork, nor did he repack the pork in new barrels, which it appeared it was customary and necessary to do after the expedient of refilling the old barrels with new brine, in violation of Scriptural

ness, and two months afterwards he received a gunshot wound and died, and it was proved that he had labored under a chronic affection of the lungs at the time of the sale, and but for that disease the wound would not have proved mortal; it was held, notwithstanding, that the vendor was liable only for the diminution of his value at the time of the sale in consequence of the disease, and not for the combined consequences of the wound and the disease.*

EXPENSES OF LITIGATION.—But the vendor may be liable for the expenses of litigation incurred in consequence of his warranty. It seems when the chattel has been sold a second time by the vendee, relying on the original warranty, and he is prosecuted by the second vendee, and recovery had, the first vendor, if duly notified of the claim, and it is not unnecessarily resisted, is liable for the whole amount of the damages and costs recovered against the first vendee by the second vendee, as well as his costs of defence.[1] So in an action on the warranty of a horse, the defendant had sold the horse to the plaintiff with warranty, and the plaintiff had resold with warranty to one Dowling. Dowling sued the plaintiff, and recovered the price of the horse, with £88 costs. The plaintiff had given the defendant notice of Dowling's action. This action was brought for the price of the horse and the costs, and the plaintiff had a verdict for the whole amount. On a motion for a new trial, and to set aside the verdict as to the costs of Dowling's action, it was urged that, if the horse was unsound, the plaintiff had incurred this expense needlessly, and in his own wrong. But the rule was refused, the court saying, "That as the plaintiff received no directions from the defendant to give up the cause, the costs were a part of the damages which the plaintiff had sustained." †[2]

* Marshall *v.* Gantt, 15 Ala. 682.

† Lewis *v.* Peake, 7 Taunt. 152; but it has been since held that notice is not conclusive. The same question was presented in Wright

warning, was proved not to suffice. Whether the vendee in fact knew of this custom or necessity did not appear. Both parties were free from fraud. In an action by the vendor for the unpaid balance of the purchase money, it was held that the vendee was entitled to no deduction on account of the loss of the pork, but only to what it would have cost to procure new barrels in lieu of the old ones and repack the pork therein. Hitchcock *v.* Hunt, 28 Conn. 343.

[1] So Marlatt *v.* Clary, 20 Ark. 251.

[2] If the vendee of a chattel under warranty has sold it with a like warranty, and judgment has been recovered against him for breach of the warranty, he may, if he gave notice to his vendor of the action against himself, recover his taxable costs incurred in the action, as part of his damages under the original warranty; but he cannot recover counsel fees. Reggio *v.* Braggiotti, 7 Cush. (Mass.) R. 166; to the same effect is Jeter *v.* Glenn, 9 Rich. (S. C.) Law, 374.

[293] We shall see when we come to examine the subject of principal and surety in its more extended aspect, that it has been frequently held that the party, though holding a warranty, defends the suit at his peril, and that if it appear to have been unnecessarily defended, the expense will be charged on him.[1] The only effect of notice is to shift the burden of proof. If no notice be given, the warrantee will be held to proof of the propriety of the litigation. If such notice has been given, the original warrantor will be obliged to prove that the expense was unnecessarily incurred.

Where the defendants had sold the plaintiff a picture, warranted to be painted by Claude, but in fact not painted by him; and the plaintiff sold it to a third party with like warranty; and the second vendee sued the plaintiff on the warranty, and recovered damages and costs,—it was held that if the sale was a *bonâ fide* sale, the plaintiff could recover the costs paid the subvendee, and all the costs of his own defence; nothing is said in the case of notice or the propriety of the litigation.*[2]

v. Chamberlain, 7 Scott, 598, and it "being found that the plaintiff, before he defended the action brought against him, might have ascertained, by a reasonable examination of the horse, that it was not sound," the court said that the defence was a rash one, and the plaintiff not entitled to charge the defendant "with the costs of such improvident defence." And in Penley *v.* Watts, 7 Mees. & Wels. 609, this case is spoken of as reconsidering that of Lewis *v.* Peake.

* Pennell *v.* Woodburn, 7 Car. & P. 117.

[1] So, where one Davis professing in good faith to have authority to let certain premises, but having no authority in fact, made a parol lease of them for seven years, and the lessee was dispossessed by the owners, in an action of ejectment which he defended relying on the authority of Davis and on his own attorney's advice, it was, in an action by the lessee against the professed agent, held by the Court of Queen's Bench, that he could recover the expense of certain repairs he had put on the premises, but not of the defense of the ejectment suit, since that could not have been defended, if the agent had possessed authority, the parol lease being void. The attorney's bad advice did not make the defendant liable. Pow *v.* Davis, 1 B. & S. 220; 4 L. T. R. (N. S.) 399. See *ante*, 78, note 1.

[2] Whether the warranty of a vendor can be carried by intendment of law beyond its literal terms, so as to affirm by implication that the article warranted is not only such as it is expressly declared by the warrantor to be, but also fit for the purpose to which he knew the vendee intended to apply it, and whether, as a consequence, the vendor may be held liable for the damages sustained by the vendee by reason of such special unfitness, are questions which have lately been much considered.

The rule of the civil law that a sound price implies a warranty, is not that of the common law. *Caveat venditor*, says the civil law, belonging to uncommercial peoples, and exercising its jurisdiction in the matter of buying and selling, for the most part to protect the subject in the purchase of articles intended for domestic use. *Caveat emptor*, says the common law, the vigorous growth of a commercial community, seeking to stimulate a spirit of mercantile adventure and to cultivate the shrewdness and self-reliance essential to success in trade. Therefore, although it is a general rule of the common law, that a vendor is equitably, if not legally bound to communicate to a vendee his knowledge of material facts of which he knows the other to be ignorant (2 Kent's Com. 482; 1 Story Eq. Jur. § 207), yet in the case of executed sales of personal property made without false representations or artifice, in which the buyer has had an opportunity of examining his purchase, the law does not imply any engagement on the part of the seller that he warrants the article sold against latent defects. If he knows of such defects, and either volunteers information in regard to the qualities of the article, or answers the queries of the vendee respecting it, he will be held responsible in damages for the truth of his assertions, provided they are statements of fact and not merely of opinion. But if

WARRANTY OF TITLE.—The same questions which we are

in such case he makes no untrue affirmation, whether because he knows nothing on the subject, or because he is not asked, the maxim of *caveat emptor* applies. Parkinson *v.* Lee, 2 East, 314; Paul *v.* Hadley, 23 Barb. 521; Eagan *v.* Call, 10 Casey (Penn.) 236.

But with the very growth of commerce became apparent the necessity of absolute good faith in dealing, as still more necessary to its protection and success than sharpness of wit. Accordingly, two exceptional rules, rather natural offshoots of the common law under the influence of commerce, than enforced grafts upon it, were established.

First, it was early declared that the law implied in sales of articles by the manufacturer of them, that they should be of merchantable quality. See Misner *v.* Granger, 4 Gil. 69; Laing *v.* Fidgeon, 6 Taunt. 108; Gardiner *v.* Gray, 4 Camp. 144. This rule is based on the manufacturer's means of knowledge, and the presumption of his actual knowledge of any defect, and was afterwards extended to or interpreted to include sales of other articles to be furnished, or which the purchaser had no opportunity to inspect, as in the case of sales by sample only. See Fish *v.* Roseberry, 22 Ill. 288; Waring *v.* Mason, 18 Wend. 425.

By the second exception it was required that the thing sold should be reasonably fit for the purpose for which the vendor knew it was intended by the vendee, although such purpose was not named in the warranty.

This last exception has given rise to much discussion, involving both its existence and extent. It has lately been denied by respectable authority, and is still not universally admitted. But in England it is now established, and it is also fully recognized in New York and several other States of the Union. Where it thus prevails, it results that the second branch of the rule in Hadley *v.* Baxendale (9 Exch. 341), considered *ante*, 76, *et seq.* applies to it.

It perhaps originated in the case of Gray *v.* Cox, 6 D. & R. 200, where Abbott, C. J., expressed the strong inclination of his opinion in its favor, but the remaining judges inclining the other way, the point was left undecided. But it has been since repeatedly recognized in England and this country. Williamson *v.* Allison, 2 East, 446; Bluett *v.* Osborne, 1 Stark. (N. P.) 384; Jones *v.* Bright, 5 Bing. 533; Ollivant *v.* Bayley, 5 Q. B. 288; Getty *v.* Rountree, 2 Chand. (Wis.) 28; Walton *v.* Cody, 1 Wis. 420; Bird *v.* Mayer, 8 Wis. 362; Beals *v.* Olmstead, 24 Vt. 114; Overton *v.* Phelan, 2 Head, 445. In these and similar cases, the damages, flowing beyond the bounds which limit the responsibility for an ordinary breach of warranty, include compensation for the mischief resulting from the failure of the article warranted to answer the special purpose to which it is applied. Thus in Brown *v.* Edgington, 2 Man. & Gr. 279, the defendant was held liable for the value of a cask of wine, lost by the breaking of a rope sold by him to supply the plaintiff's crane.

This rule does not apply where a party purchases on his own judgment. Hoe *v.* Sanborn, 21 N. Y. 554. Nor has it been established by a uniform course of decision.

In Shepherd *v.* Pybus, 4 Scott's N. R. 434, in an action for breach of warranty, it appeared that the defendant had sold the plaintiff a new barge, warranting it reasonably fit for use, and knew that it was designed by the vendee to be applied to carrying cement in casks. After the purchase it was found so defectively built as when subjected to this severe test to let in considerable quantities of water, whereby a cargo of cement was damaged, and the plaintiff put to expense in repairing the barge and making it fit for use in this particular business. The breach was held not to be sustained by evidence that the barge, though fit for ordinary use, was unfit for the carrying cement.

In Chanter *v.* Hopkins, 4 M. & W. 399, the defendant sent to the plaintiff, who was the patentee of an invention known as "Chamber's smoke-consuming furnace," a written order, as follows—"Send me your patent hopper and apparatus to fit up my brewing copper with your smoke-consuming furnace." The furnace, having been accordingly put up on the defendant's premises, was found not to answer the purposes of a brewer. It was held there was no implied warranty it should be fit for the purposes of a brewery, and that the defendant having defined the particular machine wanted, the plaintiff fulfilled his contract in sending it.

So where the defendant warranted a steam engine with a boiler as sound, in good condition, of good quality, and of a certain capacity, this was held a general warranty merely, and the damages for its breach were the difference between the value of the engine and boiler if they had corresponded with the warranty, and their actual value. Edwards *v.* Collson, 5 Lansing (N. Y.) 324.

In Keates *v.* Cadogan (2 Eng. L. & E. 318), the lessor of a house knew it to be in a ruinous condition. No warranty was held to be implied that it was fit for occupation, and he was held not liable for special damages from its unfitness.

The distinction is taken in the case of sales, that if an order be given for an undescribed and unascertained thing, stated to be for a particular purpose, which the merchant or manufacturer supplies, the article must answer the purpose. But if the purchaser define the particular thing wanted, the vendor fulfils his contract by furnishing it, and is not liable to damages, although he knows what the purchaser wants it for, and knows also that it is unfit for

now considering, are sometimes presented where the warranty,

such purpose. Chanter *v.* Hopkins, 4 M. & W. 399 (*supra*); Prideaux *v.* Bunnett, 1 C. B. (N. S.) 613.

But in a late English case (1868) the plaintiffs had contracted to purchase of the defendants certain specified bales of Manila hemp, to arrive. The shipping documents were delivered and the price paid. The bales afterwards duly arrived, but in a damaged condition. It was held that the contract implied that the hemp should be merchantable, and the ruling of Blackburn, J., at the trial, that the damages should be measured by what the hemp would have realized had it been shipped in proper condition, thus giving the plaintiffs the benefit of a rise in the market, was sustained. Mr. Justice Mellor in delivering the opinion of the court, after giving a careful statement of the law of implied warranty as applied to different classes of cases, observed that the buyer must be taken to have trusted to the judgment, knowledge and information of the seller, as it was clear he could exercise no judgment of his own; that that this appeared to be at the root of the doctrine of implied warranty, and that in this view it made no difference whether the sale was of goods specially appropriated to a particular contract, or goods purchased as answering a particular description. Jones *v.* Just, 9 B. & S. 141; 3 L. R. Q. B. 197; 37 L. J. Q. B. 89; 18 L. T. (N. S.) 208.

In Prentice *v.* Dike, 6 Duer, 220, which was the case of a sale of wool to be made into hats, with a warranty that it contained no cotton, the contract being merely for the sale of the goods in their actual state, it was held by the Superior Court of the city of New York, that though the wool was in fact unfit to make hats of, the expressed warranty excluded an implied one that it was fit for the intended manufacture, and the vendor was held not liable for the results of the unfitness.

Again, in the case of Milburn *v.* Belloni (34 Barb. 607), in the same State, where coal-dust was warranted to contain no dust of soft or bituminous coal, and was sold by the vendor with the knowledge that it was intended by the vendee for the manufacture of brick, for which purpose the dust of soft coal was unfit, the warranty was broken, but the warrantor was held liable only for the difference in value between the article as represented and its actual value, and not for the damage caused by its attempted use in the manufacture.

But the two cases last cited do not appear to us to consist with the late English decisions and are in effect overruled by a late decision in the court of last resort in the same State, the principle of which applies, as we think, wherever, as in these cases, the article is sold with reference to its reproduction in a certain new form, or its fitness for a special purpose, and the quality it is warranted to have is essential to such reproduction or special purpose. Passinger *v.* Thorburn, 34 N. Y. 634, *infra*. And since the foregoing remarks appeared in the fourth edition of this work, the case of Milburn *v.* Belloni has been reversed by the Court of Appeals of New York (39 N. Y. 53).

In the case of Randall v. Raper, 1 Ellis, B. & Ellis, 84 (96 Eng. Com. Law, 82), the defendant had sold the plaintiff some barley, warranting it to be "Chevalier seed barley." The plaintiff on the faith of that warranty had resold it with a similar one. The barley proved to be not "Chevalier seed barley," but of an inferior quality, in consequence of which the plaintiff's vendee obtained a poor crop. It was held, Mr. Justice Wightman doubting, that the plaintiff was entitled to recover the amount to which he had become liable to the vendee, although it was unliquidated as between him and his vendee.

In Passinger *v.* Thorburn, 34 N. Y. 634, the last cited case was approved by the New York Court of Appeals in a judgment affirming that of the court below (35 Barb. 17). The defendant sold cabbage seed, warranting that it would produce Bristol cabbages, and the plaintiff having sowed it in the anticipation of producing that crop, the warranty proved untrue. The damages were held to be the value of a crop such as should have been produced by the seed that year, had it conformed to the warranty, deducting the expense of raising the crop, and the value or product of the one in fact raised. The strong cases of Borradaile *v.* Brunton, 8 Taunt. 535, and Brown *v.* Edgington, 2 Man. & Gr. 279 (*supra*), with other English cases to the same purport, are cited and approved; and the doctrine of Hadley *v.* Baxendale is applied to its full extent to the case of a breach of warranty. So also, in the recent case of Flick *v.* Wetherbee (20 Wis. 392), the lessor of farming land having covenanted to supply seed, was held bound to supply good seed, and the same measure was applied to the lessee's damages by reason of a partial failure of the crop in consequence of the inferiority of the seed furnished. See, also, Park *v.* Morris Axe and Tool Co. 70 Barb. (N. Y.) 140; 4 Lansing, 103.

A marked advance, keeping pace with the enlarged views and commercial spirit of the age, will be observed by a comparison of these cases with the earlier one of Poulton *v.* Lattimore, 4 M. &. G. 208 (A. D. 1829), *post*, 448.

By the doctrine of the late decisions, therefore, where from the want of a certainly defined, existing, and intrinsic quality which an article sold is warranted by the vendor to have, consequential damages naturally ensue as the direct result of its application by the vendee to the

instead of referring to the quality of the article, is one of title.[1] The result of the older English authorities is, that by the law of England there is no warranty of title in the actual contract of sale, any more than there is of quality; and so it has recently been held in a case in the Court of Exchequer.* But according to the Roman law,† and in France,‡ and Scotland, and generally

* Morley *v.* Attenborough, 3 Exchequer R. 500; where the English cases are examined.

† Domat, book i. tit. 2, § 2, art. 3.

‡ Code Civil, ch. 4, § 1, art. 1603.

purpose for which he intended it, and the vendor knew he intended it, the vendor is liable for such damages. In Connecticut, however, a more restricted rule has been adopted in the case of seeds. Where the warranty broken was that the seed was "fresh and warranted to grow," it was held, that the plaintiffs' damages should be the cost of the seed, the value of the labor in preparing the ground for it, (less the general benefit to the land from such labor), the value of the labor in planting it, with interest on the several amounts. Ferris *v.* Comstock, 33 Conn. 513.

See, for careful statements of the limitations of the doctrine of implied warranty, the notes appended to the two Nisi Prius cases of Walker *v.* Milner, 4 F. & F. 745, and Sanborn *v.* Herring, 6 Am. Law Reg. (N. S.) 457.

So again, as a correlative principle, it may be said, on the authority of a corresponding class of cases, that where unsoundness or disease in the thing sold is of a contagious or communicable nature, and the vendor at the time of the sale is aware of the vendee's intention to put it with others of the same kind, so that the disease or defect, if it exist, will be liable to be communicated to them, the same rule as to consequential damages will apply in the case of a warranty of soundness as would exist in the case of intentional fraud, and in addition to the loss in value of the subject of the sale, the warrantor will be liable also for the deterioration or destruction of the others of its class, so far as the contact had been intended by him and expected by the vendee.

So in Knowles *v.* Nunns, 14 Law Times R. 592 (Q. B.), where in an action on a warranty of soundness of two oxen sold by the defendant to the plaintiff, which had the rinderpest at the time, and after the purchase died of it, and nine other cattle belonging to the plaintiff also died in consequence of being placed with them, and it appeared that the plaintiff had told the defendant he wanted to put them with his other stock, and would not have them if there were the least fear of disease, on which the defendant gave the verbal warranty on which the action was brought, the rule in Hadley *v.* Baxendale was applied, and the defendant held liable not only for the value of the two oxen sold, but for that of the other nine. So again, where white lead had been spilled on the defendant's hay, and he had partially separated the poisoned hay from the rest, and wrongly supposed he had done so completely, and under this impression sold some of the remaining hay to the plaintiff, and the plaintiff's cow died from eating the hay, it was held that the defendant was liable, and that the rule of damages was the value of the cow. French *v.* Vining, 102 Mass. 132. For the same rule in recoupment, see Bradley *v.* Rea, 14 Allen, 20. See Mullet *v.* Mason, 1 L. R. 559, *post*, 296, note.

It is presumed, however, that this doctrine would not apply to a plainly expressed written warranty, where it would tend to vary the written contract by parol evidence. And in conformity with the principles of the law of contracts it should be resorted to only where the contract itself does not explicitly furnish the rule. In the absence of fraud no responsibility should be imposed on either party to the contract, which the contract itself plainly shows he did not intend to assume.

It may be observed that where the breach of warranty is brought by the assignee of the right of action, the measure of damages is the same as if the action had been brought by the assignor. The amount of the consideration of the assignment is immaterial. Sweet *v.* Bradley, 24 Barb. 549 (*ante*, 152; note 2).

But in actions of this kind against the assignor of a claim acting in good faith, the measure of damages is the price paid with interest.

And where a claim on the government had been assigned for a valuable consideration, but was not paid in consequence of its having before been paid under an authority previously given by the assignor, the assignee was held entitled to recover only the consideration paid with interest from the time of presenting the claim to the government according to the legal rate here, although the transaction took place in a foreign country. Eaton *v.* Mellus, 7 Gray (Mass.), 566.

[1] As to right of recovery, and measure of damages, for breach of warranty of title to fixtures sold by lessor to lessee, see Wilkinson *v.* Ferrel, 24 Penn. St. 190; Beckmann *v.* Bormann, 3 E. D. Smith's (N. Y.) C. P. R. 409.

in the United States, there is always an implied contract that the vendor has a right to dispose of the subject which he sells. In an action (on the case)* on the warranty of title implied in the sale of a horse, Blasdale bought the horse of Babcock, but was afterwards sued by Snow in trover for the animal; he gave notice to the defendant of the suit; and judgment was obtained against him for the value of the horse, with costs. It [294] was held at the trial that the judgment was strong but not conclusive evidence of Snow's title; and that, if not rebutted, the measure of damages was the amount of the recovery against Blasdale in the other action (verdict and costs). And this was held right by the Supreme Court of New York.[1]

In an action (of assumpsit) under somewhat different circumstances,† the plaintiff bought a horse of the defendant for $55 cash, and another horse valued at $85, in all $140; the plaintiff sold the horse to one Milligan, and shortly after, one Gordon replevied the horse of Milligan, and recovered judgment, $72 32 for damages, and $33 95 costs, which were paid by Milligan; Milligan also paid the costs of his own defense. The plaintiff then settled with Milligan amicably, and claimed of the defendant the original amount paid by him, and also the damages and costs paid by Milligan and repaid by the plaintiff to him. The cause was referred; and the defendant insisted that the measure of damages was the price of the horse, with the interest thereof, deducting his services since the sale to the plaintiff, and that the plaintiff was not entitled to recover the costs and expenses in the replevin suit of Gordon. On a motion to set aside the report, the court held that the referees should have allowed the plaintiff the price paid the defendant for the horse, and interest, together with the costs which he became liable to pay Gordon, in the suit brought to establish his title; and the expenses paid by Milligan in his own defense were disallowed. It may be proper to observe that the court here appears to have lost sight of the principle laid down in the cases already cited, that the recovery should be estimated, not by the price paid, but by the real value.[2] If this rule is true in regard to a warranty of sound-

* Blasdale *v.* Babcock, 1 J. R. 517. † Armstrong *v.* Percy, 5 Wend. 535.

[1] The measure of damages in Alabama for breach of a warranty of title to a chattel, is the value of the chattel at the time of the purchase with interest, and the necessary costs of defending a suit brought against a vendee to test the title, with interest from the time of payment. Rowland's Adm'r *v.* Shelton, 25 Ala. (N. S.) 217. So in Missouri. Johnson *v.* Blank, Ex'r, 34 Mo. 255. And where the warranty of title to an infant slave, whose services were worth nothing, was broken, the expenses of taking care of it were allowed. *Ibid.*

[2] So in Case *v.* Hall, 24 Wend. 102, Mr. C. J. Nelson, in delivering the opinion of the court, said, "In case of a breach of warranty the measure of damages is the purchase money and interest." And in the case of Burt *v.* Dewey, 31 Barb. 540, the Supreme Court adopts the same nominal rule. In neither instance, however, did the case turn on the distinction between the

ness, there seems no reason why it should not apply to a warranty of title.[1]

IMPLIED WARRANTY.—In a case * where the defendant had sold the plaintiff certain merchandise, called in the bill of parcels scarlet cuttings, intended for the China market, which turned out not to be so, Lord Ellenborough held that such a description implied a warranty that they were the article named, and charged that the plaintiff was entitled to recover [295] such a sum as he would have received had the warranty been true with reference to the China market; the value to be

* Bridge *v.* Wain, 1 Stark. 504.

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value and the price paid, nor does it appear that they were not in fact the same. The latter case was reversed by the Court of Appeals, on another ground, 40 N. Y. 283. The rule elsewhere repeatedly mentioned in reference to breaches of contract, that damages can be recovered for actual loss only, and not mere liability to loss, applies in these cases. *Ib.* (*ante*, 158 *n.*)

[1] Analogous to a warranty of title is that of one who wrongfully or by mistake holds himself out as to authorized to sell another's goods. In such case, the damages are measured, not by the contract which the pretended agent had no power to make, but by the injury resulting from such want of power, and include the costs of an unsuccessful suit against the alleged principal to enforce the contract.

In a late English case, the defendants warranting themselves as agents of Lloyd & Co., contracted for the sale to the plaintiffs by Lloyd & Co. of certain cargoes of American wool which were soon to arrive. Lloyd & Co. having repudiated the contract, which they had not sanctioned, the plaintiff filed a bill in equity against them for specific performance, which was dismissed with costs. In the action on the warranty, the Court of Queen's Bench held that the damages should include the difference between the contract price of the wool and the value of like wool at the time and place where the cargoes would have been delivered, had the contract been binding, taking into account all the mercantile circumstances affecting the value, and including the costs of the chancery suit taxed as between attorney and client. Hughes *v.* Graeme, 33 Law Journ. (N. S.) Q. B. 335.

The same rule substantially has been recently declared in a similar case by the New York Court of Appeals. White, Rec'r, *v.* Madison, 26 N. Y. 117.

So in a like case in the Court of Queen's Bench, Mr. Justice Crompton remarked, "The damages are to be measured by what was lost to the plaintiff by not having the valid contract, which the agent warranted he had." And a verdict for the difference between the price named in a contract made without authority and repudiated by the alleged principal and that obtained on a resale fairly made, was held right. Simons v. Patchett, 7 E. & B. 568; 26 L. J. Q. B. 195. And see Maxwell *v.* Parnell, 1 Irish R. (Com. Law Series), 234.

An attorney at law executed to a deputy sheriff in the name of the plaintiff in sundry writs the following agreement: "Know all men by these presents, that we agree to hold harmless A B, sheriff, for selling stoves and iron on the executions in his hands at this time, to wit, one in Knight *v.* Cheshire Iron Works, the other, Dooley *v.* Same, and from all costs, damages, and expenses whatsoever, that may result or accrue to him for attaching or selling Cheshire Iron Works' property, or property claimed or which belongs or belonged to Cheshire Iron Works." In an action by the deputy sheriff against the attorney for falsely representing that he had authority so to execute it, it was held that the jury might consider on the question of damages a judgment recovered against and paid by the plaintiff for taking and selling the property mentioned in the agreement, deducting therefrom so much as consisted of damages resulting from attachments made by the plaintiff after the making of the contract, or, if that amount could not ascertained, the rule of damages might be the amount of the judgments in favor of the parties whose names had been signed by the defendant to the contract, and which had been satisfied by the application thereon of the avails of the sale of the property so taken by the plaintiff. The plaintiff was, moreover, entitled to recover the expenses of sundry litigations directly necessitated by the fraud, and proper compensation for his own time and services in the matter, besides interest on his expenses up to the verdict. Jones *v.* Wolcott, 2 Allen (Mass.), 247.

recovered being the value which the plaintiff would have received had the defendant faithfully performed his contract.

INDORSEMENTS.—It has been held in Massachusetts,* that where a warranty is given that the indorsements on a note are genuine, and they prove to be forged, "the measure of damages will be the difference between the amount of the note and its actual value, whatever that may be." But I apprehend in practice it will be found that, unless the evidence in regard to a note place the solvency of its maker beyond doubt, it is almost impossible to prove its value with any tolerable degree of accuracy.

It has been decided in the same State, in an action of assumpsit, brought on a warranty of an indorsement as genuine, that the plaintiff was entitled to recover as part of his damages the costs incurred by him in an unsuccessful suit against the supposed indorser, if the plaintiff commenced the suit in good faith, not knowing that the signature was forged, and gave the warrantor seasonable notice of the pendency of the suit, and requested him to furnish evidence of the genuineness of the signature; and the court held that the rule established in actions for a breach of the covenant of warranty in the conveyance of real estate, must govern the case.† [1]

FRAUD.—We have thus far considered the subject without any admixture of fraud.[2] Where that occurs, the rights of the

* Coolidge *v.* Bringham, 1 Met. 547.

† Coolidge *v.* Bringham, 5 Met. 68; Swett *v.* Patrick, 3 Fairfield, 9. In Alabama, it is held that, in an action by the vendee of personal property against the vendor, upon a warranty of title, a judgment against the vendee, at the instance of a third person, claiming to be the rightful owner, of which suit the vendor had no notice, is not evidence to prove that the title of the latter was defective. But it seems that such judgment is admissible to prove the amount of damages recovered, and is conclusive of the validity of the vendor's title, if it was obtained without fraud or collusion, upon notice given to him of the pendency of the action. And the measure of damages in an action for a breach of a warranty of title on the sale of personal property, cannot exceed the damages sustained by the vendee. Salle *v.* Light's Ex'rs, 4 Ala. (N. S.) 700.

[1] And in Tennessee, the courts have applied to actions on covenants for the failure of title to chattels the same measure as in the case of land, which in that State is the price paid and interest. Crittenden *v.* Posey, 1 Head (Tenn.), 311.

[2] See *post*, 559. In such case the *lowest* measure of damages is that in the action on the warranty, namely, the difference between the actual and sound value. Thompson *v.* Burgey, 36 Penn. 403. The ordinary rule is, the difference between the actual value of the property and what that value would have been had the representations been true. Graves *v.* Spier, 58 Barb. (N. Y.) 349; Page *v.* Parker, 40 N. H. 47; 43 N. H. 363; Carr *v.* Moore, 41 N. H. 131 (11 Foster), 535 (*ante*, 291). To which the jury are at liberty to add something by way of punishment for the fraud. McAvoy *v.* Wright, 25 Ind. 22 (*post*, 454, note).

The *highest* rule includes all the damages which the vendee has sustained as the manifest consequence of the fraud. Thus where a cattle dealer sold a cow, fraudulently representing her as free from infectious disease, knowing that she was not, and the plaintiff placed her with

parties are altered. If the vendor of a chattel make fraudulent representations in regard to the value of the property, or is otherwise guilty of fraud in making or performing the contract, to the injury of the vendee, the latter has his election of remedies; he may stand to his bargain even after he has [296] discovered the fraud, and recover damages on account of it,[1] or he may rescind the contract and recover back what he has paid; or again, he may wait till the vendor bring his action,

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five others which caught the disease and died, the plaintiff in an action for the fraud was held entitled to recover as damages the value of all the cows. Mullett *v.* Mason, 1 L. R. (C. P.) 559. See Knowles *v.* Nunns, 14 L. T. R. 592 (23), *ante*, 90, 293; Faris *v.* Lewis, 2 B. Munroe, 375; Bradley *v.* Rea, 14 Allen, 20.

So where one sold a drove of horses which he knew to be infected with a contagious disease, and concealed the disease from the buyer, who bought for a sound price, the buyer, in case of exercising his right to rescind the contract, was held entitled to recover the money paid, with interest, and the value of his care, attention, and expense in preserving the herd. If he should elect not to rescind, he would be entitled to damages equivalent to the value of such as had died, and the difference between the value at that time of the surviving horses and the price paid for them, with interest on these sums from the date of sale; also the value of his care, time, and expense in preserving the herd. The buyer's damages are not, in such case, confined to the value of those actually diseased at the time, but the disease is regarded as infecting the whole herd to the extent proved up to the trial. The latter is liable also for damages sustained by the buyer to the extent of the contagion communicated to other animals of the buyer without his default. Wintz *v.* Morrison, 17 Tex. 372. And see Wheeler *v.* Randall, 48 Ill. 182.

And as we have elsewhere seen (*ante*, 79, note 2), the recovery of consequential damages in actions for wrongs is not subjected to the limitation there noticed as applicable to actions of contract. It is not therefore necessary to the recovery of the kind of damages here mentioned to show that the vendor knew that the diseased animal was to be placed with others belonging to the plaintiff. Packard *v.* Slack, 32 Vt. 9. The defendant is presumed to anticipate that the animals he sells will be placed with others, as a natural consequence of his act. Sherrod *v.* Langdon, 21 Iowa, 518. For the analogous rule in trespass, see *ante*, 135.

And where the chattel sold has different values, according to the use for which it is intended, the value which measures the damage, as in the case of certain warranties (*ante*, 293, note 1), is that which the vendor represented it to have with reference to the purpose to which he knew it was to be applied by the vendee. And where oxen purchased for work, and represented sound, proved unsound, and by reason of the unsoundness were worth ten dollars less for beef and twenty-five dollars for work, the larger sum was held to be the measure. Ladd *v.* Lord, 36 Vt. 194 (*ante*, 293, note).

Where there are several false representations, the rule of damages in an action founded on the *deceit*, is the difference between the actual value of the property and its value estimated by such of the representations as were not only false but fraudulently made. In the case of the action for the deceit, the rule is the same as in an action on the warranty only, where the warranty covers the same ground and no more than is covered in the other case by representations which are at once false, fraudulent, and material. Page *v.* Parker, 43 N. H. 363.

[1] Heastings *v.* McGee, 66 Penn. St. 384. Where one had been induced by the fraudulent representations of another's creditor to take from the debtor certain goods and give the creditor his own note for the debt, and it proved that the goods were worth much less than represented, but it did not appear whether the creditor had received them by way of absolute purchase or as collateral security only, the instruction of the judge to the jury to find for the defendant if the difference in value between the goods as represented and their actual value equaled the balance due on the note, which would have been the rule in the case of an absolute sale, was held inapplicable and therefore erroneous, because if the goods were taken as security only, the defendant should have been held to account on the note for what they were worth. Stevenson *v.* Greenlee, 15 Iowa, 96.

As has been already observed (*ante*, 30), damage resulting from fraud or deceit always furnishes a cause of action. Where, in an action of deceit, property fraudulently sold but retained by the vendee has any value, such value must be allowed the defendant in the assessment of the damages. McLaren *v.* Long, 25 Geo. 708.

and then recover the damages he has sustained by the fraudulent act. *

And in a case of this kind where on a contract to give personal property at specified prices for land, the contract having been part performed, but the land not being conveyed in consequence of the defendant's fraud, it was held that the plaintiff, in an action to recover the value of the property delivered by him, was not limited to the prices specified in the contract, but could recover its true value. †

In Louisiana, in an action of restitution brought to rescind the sale of a slave which had been fraudulenty warranted sound, the plaintiff was allowed to recover the price paid with interest from the date of sale,[1] and expenses incurred in medical treatment. ‡ [2]

In the same State, the Code provides that when the seller knows of the vice of the thing sold and omits to declare it, an action of restitution may be brought. In such an action brought on account of the vice of running away in a slave, the plaintiff can only recover such damages as would at the time of defendant's refusal to restore the price have indemnified him; that is, the price with interest, the expense of advertising the runaway, and the costs of the act of sale. Counsel fees in the restitutory action cannot be recovered. They are too remote. ‖

[297] CIVIL LAW AUTHORITIES.—The modern writers of the civil law furnish us with but little assistance on the ques-

* 2 Kent's Com. 5th ed. 480; Weston *v.* Downes, 1 Douglas, 23; Towers *v.* Barrett, 1 T. R. 133; Payne *v.* Whale, 7 East, 274; King *v.* Boston, 7 East, 479; Cormack *v.* Gillis, cited *Ibid.* 480; Whitney *v.* Allaire, 4 Denio, 554. *Vide*, as to cases in Alabama, *ante*, 307, note, and also *supra*.

† Camp *v.* Pulver, 5 Denio, 48.

‡ Johnson *v.* Johnson, 2 La. Ann. R. 67. The whole subject of warranties is governed in that State by a provision of the Code, art. 2482, which applies also to evictions, and the buyer is entitled to recover:—

1. "The restitution of the price;

2. "That of the fruits or revenues, when he is obliged to return them to the owner who has evicted him;

3. "All the costs occasioned either by the suit in warranty on the part of the buyer, or by that brought by the original plaintiff.

4. "In fine, the damages, where he has suffered any, besides the price that he has paid." But what are the damages? See Tear *v.* Williams, 2 La. Ann. R. 868.

‖ Stewart *v.* Sowles, 3 La. Ann. R. 464. See also, Peterson *v.* Burn, 3 La. Ann. R. 655.

[1] In an action for a fraudulent representation as to the age of a female slave, it is not an element of the damage that she might have borne several children if she had been as young as represented. This is too remote and uncertain. Whitson *v.* Grey, 3 Head (Tenn.), 441.

[2] The law of Louisiana imposes on the seller the obligation of warranting the thing sold, against its hidden defects, which are those which could not be discovered by simple inspection: and the purchaser may retain the thing sold, and have an action for the reduction of the price by reason of the difference in value between the thing as warranted and as it was in fact. But such a part of the price only as will indemnify the vendee for the difference between the value of the thing as warranted and the thing actually sold, together with the expenses incurred on the thing after deducting its fruits, can be recovered. Bulkley *v.* Honold, 19 How. 390.

tions which we have considered in this chapter. Even the masterly treatises of Pothier, and the profound commentary of his favorite author, Molinæus or Dumoulin, on this subject, are rather to be referred to for the purpose of philosophical speculation than as authorities for our guidance.* The total diversity of our forms of action, together with the far greater arbitrary discretion exercised in the matter of damages by the civil law and those systems which adhere to its teaching, render its authors on this subject of comparatively little value to us.

The following is one of many instances put by Molinæus: *Venditor fundi vel domûs, recepto pretio fuit primum in morâ tradendi: unde damnatus ad fructus vel mercedes moræ, et in id quod extrinsecùs emptoris ob eam moram interfuit, quod probatam fuit ascendere ad ducenta, quæ solvit, re traditâ, sed postèa evincitur, et emptor multo magis extrinsecùs damnificatur: utrum in æstimatione, et interesse eviction isdebeant in duplo computari illa ducenta ob præteritam moram non tradendi soluta?* § 90. Here, beyond the direct loss sustained by the delay, *extrinsic damage* is allowed.

The arbitrary discretion of the tribunal which has cognizance of the cause, is clearly stated by him in the following language: *Ut si inter mercatores et negotiatores frumentum certo die et loco: puta, tali portu promissum sit, quo tempore et loco prævidebant contrahentes creditoris interesse, et eum alioquin damna passurum, et tamen debitor per moram, vel culpam etiam circa dolum malum fefellit. Ipsa enim æquitas et communis commerciorum utilitas, et fides hoc casu exigit, non solùm æstimationem quanti plurimi si qua sit, sed etiam extrinsecum interesse (verumtamen propinquum et efficax prestari) quod etiam jura apertè volunt, dum hoc casu faciunt actionem arbitrariam, ut videlicet detur judici judicaturo arbitrium et potestas, non solùm, super principali et æstimatione quanti plurimi, quæ videtur pars rei, sed etiam super adjudicatione, et taxatione hujus interesse.* § 97. [298]

A large portion of this treatise is occupied with the subject of eviction, of which, as applied to real estate, I have already spoken. The phrase is also used by the civil law where the title to personal property fails; and here we shall see that the limit of recovery is not, as in regard to land, the price paid, but

* Pothier, Contract de Vente, part ii. ch. i. art. 5, § 79, *et seq.* and sect. 2, art. viii. § 150, *et seq.*

Pothier's "Contract of Sale," translated by L. S. Cushing. Pothier allows the buyer the expense of the contract, the fees paid to the head landlord, expense of journeys to see the property, wagoners sent to fetch it, §§ 69 and 70; and the rise in price of the article, even where there has been a subsequent fall, is expressly given by § 76.

the value of the article at the time of sale. Molinæus thus discusses the case of eviction of a slave, who, after being long serviceable to the purchaser, is finally taken from him in advanced age, by title paramount; and he well holds that the price would not be the just measure of damage against the seller in such a case. *Tum cùm non venderetur res soli nec perpetuò durabilis, sed quæ ultra certum tempus vivere, et usui esse non posset, certum est non esse actum, nec cogitatum, ut frui, te habere liceret perpetuò, sed solùm ad tempus vitæ, quod verisimiliter prævisum et æstimatum fuit, et ad verisimilem durationem majus vel minus definitum pretium. Igitur hoc casu pretium conventum non est pretium perpetuæ durationis, et fruitionis vitæ verisimiliter expensæ, et appreciatæ. Cum ergo toto ferè tempore vitæ prævisæ fruitus sit emptor, nec per evictionem absit nisi modicum, et ferè inutile tempus, non potest totum pretium repetere, cùm intus habeat totum ferè commodum et fructum prævisæ fruitionis et usus.* § 127.*

[299] Huberus, another very eminent master of the modern civil law, after defining damages according to the civil law, to be nothing other than the profit lost, or the injury sustained, *æstimatio damni illati et lucri cessantis*, declares

* I have gone over Dumoulin's Treatise, De eo quod Interest (Caroli Molinæi Opera Omnia, Parisiis, 1681, vol. 3, p. 423), but without finding much of practical value.

It is a commentary on the code, De Sententiis quæ pro eo quod interest proferuntur; Cod. lib. vii. tit. xlvii. The leading clause in which is, *Sensimus itaque in omnibus casibus qui certam habent quantitatem vel naturam, velut in venditionibus et locationibus et omnibus contractibus, hoc quod interest dupli quantitatem minime excedere.*

A great portion of this treatise is now entirely valueless. Thus, no small part of it is occupied with laborious discussions of the true definition of the term *interest—interesse extrinsecum, interesse communis, interesse conventum et non conventum*, § 16; and a variety of questions growing out of the terms of the law commented on; as *quid sit illud simplum ad quod interesse singulare refertur et duplatur; qui sint casus certi et qui incerti.* § 20.

No small portion of it is devoted to refuting other glossators and discutants of similar questions, thus: *Ex quibus apparet Curt. aliorum scriptum neglectim, et perfunctoria transcurrise, et novam hanc opinionem ex capite proprio fabricasse*, § 28; and again, *Jacobus autem Renal, in suo confusaneo de his tractatib. jactat se novam opinionem affere sed inani prolixæ ineptæ verbositatis fumo, nihil enim prorsus novi adfert, sed post multam inanem elocutionem in Bart. et communem opinionem sese revolvit, et nihil addit nisi quod confusionem auget.* § 29.

It contains, also, much discussion on the subject of evictions, of the *stipulatio duplæ*, and the remote damages due in case of negligence. It is curious throughout, replete with the learning of that age, and with a vigor and subtlety which would do credit to any age, but of little practical utility to us.

No one can fail, in turning to the treatises of the great masters of the civil law, to perceive how much they are benefited by the superior harmony and logic of their system. Unembarrassed by any conflict of legal and equitable jurisdictions, unperplexed by forms of action, relieved from a great portion of our distinctions between real and personal property, and thus emancipated from a multitude of futile technicalities which have no bearing whatever on the rights of parties, their discussions have a clearness, an order, and a scientific precision, that it is in vain to hope for under our incongruous system.

But on the other hand we are not without compensation. We search in vain in the pages of these writers for the accurate practical teaching of our law; and we sadly miss the sharp analysis of actually occurring cases, which gives so much interest and value to the great body of our jurisprudence, making it, instead of a mere repository of theoretical discussions, a faithful portraiture of the actual wants, interests and passions of mankind.

the subject to be controlled by these three rules: *First*, that taken from the Code, which we have elsewhere considered, that in regard to things certain, the compensation shall not exceed the *double*. *Second*, that the direct and not the remote results are to be accounted for, subject, however, to the provision that, in cases of fraud, all damage sustained is to be made good; and *Third*, that in estimating injury, the general opinion, or in regard to things vendible the market value, and not the particular estimate of the injured party, is to govern. But it is doing injustice to the clear brevity of the original to attempt a translation.—I. *In casibus certis, ubi de speciebus vel quantitatibus definitis agitur, non potest excedere duplum: l. un. C. de Sent. quæ pro eo quod int.* II. *Lucrum oportet circa rem ipsam consistat, in eâque sit radicatum, ut DD. loquuntur, non foris advenians aut fortuitum: l.* 21, § 3, *de act. empt. Detrimenta tamen omnia præstantur si dolus intervenerit; aliter quanti minoris: l.* 13, *pr. d. t. de ac. empt., l.* 19, § 1, *locati.* III. *Lucri et damni ratio ex judicio communi, non affectione peculiari initur; nam hæc in phantasia hominum consistit, cujus æstimatio nulla est: l.* 33, *ad L. Aquil.**

He then proceeds to illustrate these rules. A party who had let a certain pottery to another was unable to [300] perform his agreement. The hirer proved that he could have made in a year (the term is not stated) a thousand florins, and recovered that amount. But, says the author, he should only have had judgment for 300 florins, because the annual rent of the farm was 150 florins: *Quod erat simplum, et contractus locationis est certus, id est certæ quantitatis; tales autem duplum egredi non possunt: quæ regula*, exclaims Huberus, *incredibile est quam vulgo ignota visa est!* †

In illustration of the second rule, he states this case: Hypolytus ab Arssen had purchased certain turf pits, with an agreement that the seller should give him the right of way through a certain ditch, requisite to remove his turf. After the sale, however, the purchaser found that the seller had intentionally (*per dolum*) left a strip of earth between him and the ditch, so that he could not use it. The plaintiff proved that at the time of the obstruction he could daily make forty florins; but that afterwards prices had fallen to twenty florins, at which he had been obliged to sell his turf. *Condemnatus est venditor in id quod emptoris interesset. Cum ad taxationem ejus quod interest preventum esset*, the plaintiff claimed this sum, namely, the price at forty florins, which greatly exceeded twice the purchase

* Huber. Præl. Jur. i. 405, § 17. † Vol. iii, p. 88.

money of the whole land. But for the defense it was contended, 1. That the alleged price of turf was extraordinary. 2. The injury was not sufficiently direct, for the plaintiff might have gone round through the land of other parties, or he could have thrown a bridge over the obstacle, and thus transported his turf. 3. That the buyer had an offer of 32 florins, which he had refused; and that consequently the seller was not liable, unless perhaps for the expense of the bridge that the buyer might have made, and the transportation of the turf over it. Huberus thus answers these arguments: 1. The price was the common one, and at all events the objection was inadmissible in a case like this of fraud. *Præterea per dolum hic prætextus excludebatur.* 2. The objection came too late, because the seller was already condemned to respond in damages. As to the bridge, it was not to be required that this idea should have suggested itself to the buyer, nor was he bound to resort to such an expedient in case of fraud. 3. The buyer was [301] not bound to receive 32 florins for his turf at a time when he could sell them for 40. But the cause was decided on the basis of the offer of 32 florins; and Huberus seems to deplore the arbitrary control exercised by the courts over the subject of compensation. *Quanquam juris igitur rationes, pro triumphante* (the plaintiff) *militaire viderentur, tamen ut est hujus rei praxis valde lubrica et tantum non arbitraria, factum est ut venditor vix ultra quam obtulerat sit condemnatus.*"* It might be curious, if our space permitted, to compare the decision here made with what it would be in a similar case, say a conveyance with a covenant of right of way, according to our jurisprudence.

Among the more recent writers on the modern civil law, we find the same absence of any definite rule, of which I have already complained. Domat says,† the seller who fails to deliver must pay the damages caused by his default, according to the circumstances of the case. Thus, he who contracts to deliver any article of merchandise, the price of which rises at the time and place fixed for delivery, must pay the actual value at

* Huberus, Præl. Juris. vol. iii. pp. 88, 89, §§ 30 to 35.

† Contrat de Vente, Loix Civiles, liv. 1, tit. 2, sec. 2, § 27. Le vendeur qui est en demeure de delivrer, doit les dommages et intérêts qu'aura causés le retardement selon l'état des choses et les circonstances. . . . Ainsi celui qui devoit delivrer à un certain jour, dans un certain lieu, du bled, du vin, et d'autres denrées donc le prix se trouve augmenté au jour et au lieu où la délivrance devoit être faite, doit à l'acheteur la valeur presente du jour et du lieu, pour le profit qu'il aurait fait en les y revendant, ou pour le perte qu'il souffre si pour son usage il est obligé d'en acheter d'autres à ce prix qui excède celui de la vente. Troplong, in his masterly treatise *De la Vente,* complains of the looseness of Domat on the subject of the measure of damages; but the difficulty appears to me rather to be in the system than in the author.

such time and place, as well on account of the profit that the purchaser would have made by reselling them there, as on account of the loss that he sustains, by being obliged to purchase other articles at a price exceeding that of his bargain. So, he says that the purchaser would be entitled to his expenses actually incurred on coming to receive the article which was to have been delivered, but that remote and unforeseen consequences are not to be taken into consideration. Thus, for instance, if, the seller failing to deliver the commodity at the time and place fixed on, the purchaser has been made unable to transport them to another place, where he could sell [302] them at an advance; or, if, by reason of the non-delivery of the article, he has been obliged to send off his workmen, and to stop some work of which the cessation causes him considerable injury,—the seller will not be considered liable, neither for the profit lost nor the injury sustained; for these consequences are not to be imputed to the default of delivery, but result from the arrangements of a higher power, and accidental circumstances which no one can control.*

* Cont. de Vente, liv. i, tit. 2, sec. 2, § 18: Dans le même cas la dépense qu'aurait faite l'acheteur, pour venir recevoir et pour transporter les grains achetés, et les autres suites immédiates qu'on doit naturellement attendre du retardement. Mais on ne doit pas étendre les dommages et intérêts aux suites plus eloignées et imprévues, qui sont plutôt un effet extraordinaire de quelque évènement et de quelque conjoncture qué fait naitre l'ordre divin, que du retardement de la délivrance. Ainsi, par exemple, si le vendeur ne délivrant pas au jour et au lieu des grains qu'il a vendus, l'acheteur a manqué, par le défaut de la délivrance, de faire un transport et un commerce de ces grains dans un autre lieu où il aurait pu les vendre encore plus chèr que dans le lieu où délivrance devoit être faite; ou si, faute d'avoir ces grains, il a été obligé de renvoyer des ouvriers, et de faire cesser un ouvrage dont l'interruption lui cause un dommage considérable,—le vendeur ne sera tenu, ni de ce gain manqué ni de ce dommage incouru, qui ne sent pas tant des suites qu'on puisse imputer au retardement de la délivrance, que des effets de l'ordre divin, et des cas fortuits dont personne ne doit répondre.

CHAPTER XI.

THE MEASURE OF DAMAGES IN ACTIONS GROWING OUT OF THE CONTRACT OF PRINCIPAL AND SURETY.

Various Contracts of Suretyship.—Rights resulting from Implied Promise.—Express Promise to do a Particular Act.—Express Promise to indemnify and save harmless.—As a General Rule, the Surety cannot make any Claim against his Principal until he has actually paid the Debt.—Exception where the Party contracts to do a Particular Thing.—The Measure of Damages as affected by the Mode of Payment: when made in Land or Property other than Money; when in Securities.—What Expenses or Costs the Surety can recover against the Principal.—Measure of Damages as between Surety and Co-surety; as between Lessee and Sub-lessee.

CONTRACT OF PRINCIPAL AND SURETY.—The contract of suretyship is one of very frequent occurrence, arising in some cases by implication of law, as between the parties to negotiable paper, or debtors and their bail; in others it is created by express agreements of guarantee. These again sometimes take the form of indemnities and contracts to save harmless, and at others assume the more binding shape of express contracts to do the particular thing in question; in which last case, indeed, the peculiar relation of principal and surety often ceases to exist.*[1]

The questions that ordinarily present themselves, as between the principal debtor and the party who has assumed for him the obligations of a surety, relate to the circumstances which entitle the latter to call for repayment of any sum he may have been obliged to pay for him; the mode of that payment; and the collateral expenses, legal or otherwise, of which he can demand reimbursement.

* "In ancient times," said Buller, J., in Toussaint *v.* Martinant, 2 T. R. 100, "no action could be maintained *at law*, where a surety had paid the debt of his principal. Now, why does the law raise such a promise? because there is no security given by the party. But if the party choose to take a security, there is no occasion for the law to raise a promise."

[1] In an action on an indemnity bond, if the plaintiff states no special damage in his complaint, he is confined in his recovery to such only as arise from the breach, and then such only as are proximate and the fair, legal, and natural result of the act complained of. Hallock *v.* Belcher, 42 Barb. 199.

These questions sometimes arise in actions by sure- [304]
ties against their principals, sometimes in suits against the sureties themselves; and though the law generally tends to favor the surety, still, so far as the construction of the contract is concerned, no difference is made as to the manner in which the case is presented.

There is another class of cases of a mixed character, where actions are brought against sureties for sheriffs, constables, or other public officers. As these cases involve as well the duty of the principal as the contract of the surety, we shall defer their consideration till we come to examine actions against public officers.* [1] We shall for the present confine ourselves to the liabilities of principal and surety as arising out of private contract.

Let us first bear in mind the clear distinction that exists between two classes of cases, falling under the general head. "It is the distinction between an affirmative covenant for a specific thing, and one of indemnity against damage by reason of the non-performance of the thing specified. The object of both may be to save the covenantee from damages, but their legal consequences are essentially different." †

PAYMENT OF DEBT USUALLY NECESSARY TO SURETY'S ACTION. —In conformity to the rule which we have had occasion to notice, that actual loss must precede or create a right of action, it is a general rule that a surety for the payment of money can-

* *Post*, ch. xxi.

† Gilbert *v.* Wiman, 1 Comstock, 550.

[1] The sheriff is entitled to recover on a bond of indemnity given to him the full amount of a judgment recovered against him, whether he be solvent and actually liable to pay it or not. White *v.* Fratt, 13 Cal. 521.

In New Hampshire, in a suit by a sheriff on a bond given by sureties of his deputy, conditioned to indemnify him against all loss, damages and costs, on account of the acts and neglects of the deputy, he is entitled to receive, as damages, in addition to the sums paid by him or his sureties on his official bond to the county to satisfy judgments recovered against him for the default of the deputy, and interest thereon, all such reasonable expenses as were incurred by him in and about the defense of the suits in which the judgments were rendered, including counsel fees and a reasonable compensation for his personal services; and in the suit on the bond the same expenses and compensation for services, beyond the taxable costs, but not the costs or expenses incurred in a suit upon his official bond, brought to enforce payment of such judgment; and upon a judgment in favor of the sheriff for the penalty of the bond, execution will be awarded as well for the damages that may have accrued subsequent to the commencement of the suit upon the bond, as for those prior thereto. Holt *v.* Holcombe, 32 N. H. R. 185.

So in New York, in an action by a sheriff against the sureties of his deputy to recover damages for the neglect of the deputy to levy on execution, in consequence of which, the execution creditor has recovered a judgment against the sheriff, the reasonable expenses of the sheriff in defending the suit against himself, are recoverable as a part of his damages. Westervelt *v.* Smith, 2 Duer, 449.

As to the proper measure of damages in an action on a bond given to indemnify a sheriff for sale of property on execution, see Crump *v.* Ficklin, 1 Patt. & H. 201.

not call on his principal until he has paid the debt.[1] So it was early held by Lord Mansfield, in regard to a surety in a bond; "till damnified," said his Lordship, "which he could not be till he had been called upon and had paid, he could not bring an action." * And so it has been held in New York, where the surety had been sued and charged in execution, that not having paid the debt, and having no promise to indemnify him, he could not recover against his principal.† For this a technical reason also exists; the only action that can be maintained in such case is assumpsit for money paid, which, of course will not lie until money or its equivalent is paid.

COVENANTS TO INDEMNIFY.—Where however, the surety holds an express promise to indemnify and save him harmless, there he can maintain an action without having paid the debt; and we shall presently examine the extent of compensa-
[305] tion allowed for the injury he alleges himself to have sustained. ‡[2] But where the plaintiff holds not merely an agreement to indemnify and save him harmless against the consequences of the default of the other, but an express promise to pay a debt, or to do some particular act, then the position of the parties entirely changes; the relation of principal and surety disappears, and it has been held, that the failure to perform the act agreed on gives the plaintiff a right of action, even before he has suffered any direct damage himself; and so it has also been decided as a rule of pleading.[3]

* Taylor *v.* Mills, Cowp. 525; Paul *v.* Jones, 1 T. R. 599; Powell *v.* Smith, 8 J. R. 249; Rodman *v.* Hedden, 10 Wend. 498.

† Powell *v.* Smith, 8 J. R. 249.

‡ Rodman *v.* Hedden, 10 Wend. 498. The bail of the deputy sheriff are not liable unless the sheriff has been damnified or made legally liable in consequence of the dereliction of the deputy. Hughes *v.* Smith, 5 Johns. 168; Rowe *v.* Richardson, 5 Barb. S. C. R. 385.

[1] So in Michigan. Thompson *v.* Richards, 14 Mich. 172; Hall *v.* Nash, 10 Mich. 303; Butler *v.* Ladue, 12 Mich. 173.

[2] On a covenant to indemnify against all damages, costs, and expenses, by reason of a demand, the surety is not liable for a premium or bonus which the party is compelled to pay to raise the amount necessary to meet the demand. Law *v.* Archer, 2 Kern. 277. See Scott v. Tyler, 14 Barb. 202; Lathrop *v.* Atwood, 21 Conn. 117; Hallock *v.* Belcher, 42 Barb. 199.

[3] And in such case it seems the measure of damages is the amount of debts provided for in the agreement. Ham *v.* Hill, 29 Mo. (8 Jones) 275. The rule above given, and criticised below (see p. 306, *et seq.*), was rigidly maintained by the Supreme Court of the United States in a late case. Wicker *v.* Hoppock, 6 Wallace, 94. In that case the defendant agreed that if the plaintiff would prosecute a claim against a third party and obtain judgment and levy on the property, he the defendant, "would bid it off for whatever the judgment and costs might be." This he did not do, and the property was knocked down to the plaintiff for a nominal sum. Suit was then brought for the breach of the agreement, and the court held the defendant liable for the full amount of the judgment, with interest and costs. This ruling the Supreme Court affirmed, after a full consideration, notwithstanding the fact that the plaintiff would apparently by this decision be able to make use of the two judgments, and thus might recover more than the amount of his claim. See argument of plaintiff in error, p. 95.

Where the defendant agrees to discharge the plaintiff from any bond or other particular thing, there the defendant having agreed to do a particular act, cannot plead *non damnificatus*; but where the condition is to discharge the plaintiff *from damage* by reason of any particular thing, or to *indemnify and save harmless*, there the damage must be shown, and consequently *non damnificatus* is a good plea.*[1] So in New York, where the plaintiff as lessee of a term of years had assigned it to the defendant, who executed a covenant to pay the rent to the head landlord, it was insisted on the part of the defendant, that the plaintiff could only recover nominal damages, unless he showed that he paid the rent; but the court said, "The covenant is express and positive that the defendant will pay the rent; and it would be against all reason and justice to say that the plaintiff shall himself pay and advance the money before his right of action against the defendant to recover it arises;" and the rent was held to be the measure of damages.†[2]

* Cutler *v.* Southern, 1 Saund. 116, note 1; Holmes *v.* Rhodes, 1 Bos. & Pul. 638; Hodgson *v.* Bell, 7 T. R. 97; Port *v.* Jackson, 17 J. R. 239; s. c. affirmed in Error, *Ibid.* 479; Thomas *v.* Allen, 1 Hill, 145. These two last cases overrule that of Douglass *v.* Clarke, 14 J. R. 177.

† Port *v.* Jackson, 17 J. R. 239; s. c. in Error, *Ibid.* 479. See Toussaint *v.* Martinant, 2 T. R. 100; Martin *v.* Court, 2 T. R. 640; Hodgson *v.* Bell, 7 T. R. 97; Atkinson *v.* Coatsworth, 8 Mod. 33.

[1] Redfield *v.* Haight, 27 Conn. 31. If the instrument be a contract of indemnity merely, there must, to maintain the action, be absolute damage before it is brought. If it be a guaranty, the action lies when the thing guaranteed against is done, whether there be actual damage or not. But in the latter case the instrument will be strictly construed, and in the case of a guaranty against the plaintiff's debts, the defendant was held not liable for the costs to which the plaintiff had been subjected, but might have avoided by paying the debts himself. *Ibid.*

[2] The following late case in the English Exchequer appears to us to carry the measure of redress in this class of cases to an extreme, if not exceptional extent. On principle, it can be sustained only, we think, with extreme deference, on the ground that contracts made without fraud must be maintained; and not only as giving the plaintiff compensation for a loss he had not sustained, but doing this contrary to the real intent of the parties in executing the contract, appears to us to present a case where relief might have been obtained in equity.

One Jennings had bequeathed to the children of his granddaughter, a Mrs. Button, on her death, a legacy of £400, to be paid at the age of twenty-one to the survivors who reached that age, and the testator devised part of his estate charged with the legacy, in moieties to his two daughters; and the plaintiff as heir at law to one of the daughters, who had then died, effected a partition of the estate with the other daughter, each covenanting with the other to pay half the legacy. The plaintiff subsequently sold his part to the defendant subject to the payment by the defendant of one moiety of the legacy to W. H. Parker, the only surviving child of Mrs. Button, who was dead, on his attaining the age of twenty-one, or to his personal representatives in case of his death under age, and the defendant covenanted with the plaintiff to pay such moiety, and indemnify the plaintiff against all liability on account of it. Parker died under twenty-one, and his administrator claimed a moiety of the legacy, which the plaintiff, claiming it himself, notified the defendant not to pay. A bill having been filed by Parker's administrator to compel the payment of the legacy to him by the plaintiff, it was, on the ground that the legacy was no longer a charge on his estate, dismissed with costs, though the plaintiff had to pay some costs as between attorney and client. The plaintiff having brought an action on the covenant alleging as breaches the non-payment of the moiety to Parker's personal representatives and the non-indemnity of the plaintiff, whereby

So again in the same State, if one, by bond, guarantees that a third party shall pay a certain sum of money by a given day, on demand, the plaintiff must assign the non-payment of [306] the money by the third party as a breach of the condition of the bond sued on, but he is not bound to give any further evidence of the extent of his damages, the instrument itself fixing the amount he is entitled to recover; and it was so held against the defendant, who insisted that, in the absence of such evidence, the plaintiff could only recover nominal damages.*[1]

And a similar decision has been recently made in the English Exchequer.† The defendant was indebted to H. D. and G. B. in the sum of £400, secured by a promissory note made by the defendant, and by the plaintiff as the defendant's surety; and thereupon the defendant covenanted that he *would pay H. D. and G. B.* the sum of £400, on or before the thirteenth of August then next; breach, non-payment by the day. On the trial it appeared that the plaintiff had been notified that he would be held liable on the note; but the note was not paid, and the defendant insisted that the plaintiff was only entitled to nominal damages. The Lord Chief Baron Abinger overruled the objection; and the plaintiff had a verdict for the note and interest. On showing cause why there should not be a new trial, this was held right. Alderson, B., said, "To what extent has the plaintiff been injured by the defendant's default? Certainly to the amount of the money that the defendant ought to have paid according to his covenant;" and he likened it to an action of trover for title deeds.‡[2]

But I am obliged to say that these decisions appear to me somewhat to conflict with the important and fundamental

* Mann *v.* Eckford's Ex'rs, 15 Wend. 502; *Ex parte* Negus, 7 Wend. 499.

† Loosemore *v.* Radford, 9 Mees. & Wels. 657.

‡ Upon the analogy of these decisions the case is probably to be upheld which I have elsewhere cited, where it was decided that in an action brought on a covenant to discharge an existing incumbrance, the plaintiff was entitled to recover the full amount of the incumbrance, though nothing had been paid. Lethbridge *v.* Mytton, 2 B. & Ald. 772; *ante*, 188.

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the plaintiff incurred costs, it was held by all the judges that the plaintiff was entitled to not merely nominal damages, but to the full indemnity, including the £200 and the costs paid by the plaintiff. Hodgson *v.* Wood, 2 Hurl. & Colt. Exch. 649; s. c. 33 Law R. (N. S.) Exch. 76.

[1] Where the defendant had engaged "to pay and satisfy the mortgage together with all interest and costs thereon accrued, accruing, and to accrue, and in every respect" save the plaintiff harmless, the value of the land sold in consequence of the breach of this engagement was held the measure of the plaintiff's damages. Atherton *v.* Williams, 19 Ind. 105.

[2] The same rule has been recently applied by the New York Commission of Appeals to the breach by a lessee of an absolute covenant to pay taxes or assessments on the demised premises. Rector, &c. of Trinity Church, *v.* Higgins, 48 N. Y. 532.

rule which has already been stated, that actual compensation will not be given for merely probable loss.*[1] Nor is the argument that the party having bound himself to do a particular act, must therefore be held liable in the full amount, of greater weight.[2] There is a multitude of contracts of the same character, to which no such doctrine is applied. If, instead of a contract to pay a certain sum of money, the agreement be to do any other particular act, an inquiry is indispensable to ascertain how far the party plaintiff has been damnified by the nonfeasance. It is, perhaps, no great stretch of reasoning to say that the damages arising from the non-payment of money should be measured by the sum itself. Still, a doubt may often arise whether the *party who holds the agreement* has been injured to that extent; and this is well pointed out by a very accurate judge, in the case last cited. Parke, B., said, "The defendant may, perhaps, have an *equity*, that the money he may pay to the plaintiff shall be applied in discharge of his debt; but, *at law*, the plaintiff is entitled to be placed in the same situation, under this agreement, as if he had paid the money to the payees of the bill." This remark of a very acute judge states the evil, but suggests no remedy. The law is thus carried into execution unattended by the equity [307]

* *Ante*, 43 and 241.

[1] In a late English case it appeared that the plaintiffs lent the defendant £600 on the security of an indenture by which two policies on the defendant's life were charged with the loan. In the indenture the defendant covenanted to pay the premiums on the policies, which would become void unless they should be annually paid. The defendant paid the first premium only, and the plaintiffs sued him on his covenant for non-payment of three years' premiums. Held, as it did not appear the plaintiffs had sustained any loss, they were entitled to nominal damages only. The National Assurance and Investment Association *v.* Best, 2 H. & N. (Exch.) 605.

[2] This and the preceding remark are disapproved by Leonard, C. in delivering the opinion of the New York Commission of Appeals in the case of the Rector, &c. *v.* Higgins, 48 N. Y. 532 (*supra*). The learned Commissioner further observes that "parties have the just right to make all lawful contracts guarding their rights and securing performance of their intentions, including that of contravening the rule of actual compensation for actual loss; and when expressed in apt and suitable language, it would be flagrant wrong if courts of justice should assume to disregard it, in favor of some technical rule framed for other and wholly different circumstances." Perhaps, however, it may be proper to say that the author's observations are directed to the question of the *measure* of the recovery simply, in case of the breach of a contract to do a particular act, or make a specified payment; and that a criticism implying that he denies that parties, if they choose and if they distinctly so express themselves, may make or should rightfully be at liberty to make a "lawful" contract, providing for a compensation exceeding the loss sustained, is hardly justified by the language of the text. (See *post*, 313.) The principle contended against, by the author, was very strictly adhered to in a late case in Connecticut, against bail. A judgment had been recovered against a husband and wife in an action of slander for words spoken by her, and on execution no goods were found, and the husband having been taken upon it, was subsequently discharged as a poor debtor, and the wife escaped from the jurisdiction. It was held that although she had no estate, separate or otherwise, the bail was liable for the amount of the original judgment, with interest from the time of *non est* on the execution, besides the cost of the execution. Hall *v.* White, 27 Conn. 488.

which should temper it. It is one of many instances illustrating the inconvenience and serious hardships that often flow from the separation of the jurisdictions. Either the plaintiff should only be allowed to recover for actual loss; or if the court proceed upon the idea of compelling the defendant specifically to perform his promise, it should carry the engagement into full execution, by applying the proceeds of the judgment where they belong. This a court of law possesses no power to do; and as it is incompetent to do complete justice, it should confine its remedies exclusively to those cases where actual injury appeals for redress.

COMPENSATION SHOULD BE FOR ACTUAL LOSS ONLY.—So long as the original division line between the common law and equity is preserved, any rule by which actual damages are given where no actual loss is sustained, has, in truth, no other effect than to engraft on the courts of law a species of specific performance, irregular and illegitimate; and which neither their forms of procedure, nor the general arrangement of their system, enable them to exercise without great danger of injustice and abuse. The rule should be considered cardinal and absolute, that actual compensation shall only be given for actual loss.[1]

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[1] See Willson *v.* McEvoy, 25 Cal. 169, where the cases are reviewed, and the language of the text is approved.

And where the plaintiffs had sold the defendants three-sixteenths of a steamboat, the rest of which was owned by third parties, taking from the defendants an agreement to indemnify them against "all liability or loss" on account of debts of the boat, it was held, in an action brought by the plaintiffs to recover the amount of a judgment against them for a debt of the boat, that they could not recover more than three-sixteenths of it until they had shown that they could not compel the other part owners, because of insolvency or for some other good cause, to contribute their proportion. Ewing *v.* Reilly, 34 Mo. 113.

But where one of a firm, having on its dissolution undertaken to collect its outstanding claims, gave his bond to pay all demands against it, and save the other partner and his sureties and indorsers on account of said firm harmless, it was held that the obligee could recover on the bond the amount of the partnership debts existing due and unpaid, and that the creditors of the firm were entitled to the benefit of the covenant. Devol *v.* McIntosh, 23 Ind. 529. See also, Ham *v.* Hill, 29 Mo. 275, and Wilson *v.* Stillwell, 9 Ohio St. 457, where the same rule was adopted. In the latter case the union of the equity and law jurisdictions under the Ohio code was considered to meet the objections of the text to such a recovery, the force of which is fully acknowledged.

The plaintiff entered into a partnership with A & B, on condition that they should furnish security as to the state of the firm. The defendant covenanted with the plaintiff that the amount due the old firm should not be less than a sum specified, and that the debts of the firm should not exceed a certain sum. It appearing that the debts exceeded the amount specified, but also that less than that amount had been paid on account of the liabilities of the old firm, it was held that the defendant's covenant was a contract of indemnity only, but that the plaintiff was entitled to recover as damages the actual loss which he had sustained by reason of the defendant's breach of covenant; and that the amount of such damage was purely a question for the jury. Walker *v.* Broadhurst, 22 Eng. L. & E. 587; s. c. 8 Exch. 889.

In a covenant between A & B, it was stipulated that A should pay all costs and damages caused by neglect or default on his part in relation to the terms of the covenant. In an action brought by B for breach of the covenant, no evidence being given of any actual damage

It appears upon the whole, settled, that if the engagement be collateral, or more properly speaking indirect, whether only implied in law, or whether it be an undertaking to indemnify and save harmless against the consequences of the default, there damage to be recovered must be proved. And so it is held, whether the action be by the surety against the principal, or by the creditor against the surety. In a case at Nisi [308] Prius before Lord Ellenborough, on a bond conditioned to indemnify the plaintiff against a bond given by him to a third party, though it did not appear that he had paid it, his Lordship said that he did not see any measure of damages except the penalty of the bond; and the jury so found.* But this is not the result of the more recent authorities of the courts in this country. In an early case, the question "whether on an escape the bail to the liberties became liable for the whole penalty, or for the damages sustained by the sheriff by reason of the escape?" was raised in New York, but not decided.† But it was soon after said that neither the sheriff nor his assignee could recover without showing injury sustained, and that consequently, recapture after the escape, or voluntary return, was an answer to a suit against the sureties for the liberties.‡[1]

The subject has been involved in some doubt by various decisions, which have confounded the right of action with the measure of damages, and both these questions again with that of the evidence necessary to prove the claim. Thus it has been sometimes held that the record of judgment against the surety is conclusive evidence against his principal, and fixes the amount of recovery. So in an action by the sheriff against the sureties in a bond to the jail liberties, it was held that the sheriff, having given notice to the defendants of the escape suit against himself, and they having thereupon assisted in its defense, the record of the recovery in that suit was conclusive evidence that the plaintiff had been damnified to the extent of the judgment.‖ So again, in an action by overseers of the poor on an order of

* Wood *v.* Wade, 2 Starkie, 166.
† Jansen *v.* Hilton, 10 J. R. 549.
‡ Barry *v.* Mandall, 10 J. R. 563.
‖ Kipp *v.* Brigham, 6 J. R. 158.

sustained by him, but only evidence as to the value of the properties intended to be conveyed, it was held that he was entitled to damages equivalent to the benefit he might have lost, or to the loss he might have sustained by the non-peformance of the covenant. Crommelin *v.* Marquis of Donegal, 3 Irish Law R. (2d series) 434.

[1] In an action by a sheriff against a surety in an indemnity bond given on an attachment, he is entitled to recover the whole amount of costs paid by him in the successful defense of an action brought against him by a claimant of the goods attached, and not merely a proportionate share, though other creditors who did not indemnify received the surplus proceeds of the goods attached, after satisfying the indemnifying creditors. Chamberlain *v.* Beller, 18 N. Y. 115.

bastardy to recover against the putative father the weekly sum directed to be paid for the maintenance of the child, the order was held to be *primâ facie* evidence of the demand, and that it rested with the defendant to show himself exonerated from the payment, in order to avoid the recovery.*

On this subject a few observations may be permitted.
[309] A judgment against the surety may, upon the ground of privity, be proper evidence against the principal, and *vice versâ;* but it is manifest that the record can only be evidence of the facts which it declares, and that payment is not one of these. The judgment, though perhaps conclusive evidence of the debt being incurred, is no proof whatever that that debt has been paid, or that it ever will be.[1]

New York Decisions.—In a case in New York, this erroneous view of the subject was carried to a great length; and it is desirable carefully to notice the decision, and those by which it has been since overruled; for unless we adhere strictly to the principle that actual compensation shall only be awarded for actual loss, we are without any guide whatever in this branch of the law. Suit was brought † by the overseers of the poor against the sureties in a bond given by the father of an illegitimate child, before its birth, to save harmless and indemnify the town against all expenses by reason of the child. After the birth, an order was made by two justices, according to the statute, fixing the amount of the defendant's liability. It was insisted that this order was competent evidence against the defendant, and that the town was not bound to show the actual expenditure of the sum claimed; and it was so held by the Court of Errors. Jones, C., said:—

"It was urged as the general rule, applicable to contracts of indemnity, that the party who is to be indemnified cannot maintain an action on the contract against the indemnifier until he has been damnified. But that rule does not necessarily, and in all cases, require the actual payment of the damages or expenses incurred to enable the party to sue for and recover the indemnity. When the obligation is to indemnify against damages or expenses, and the

* Wallsworth *v.* Mead, 9 J. R. 367. "A judgment against the person to be indemnified, if fairly obtained, especially if obtained on notice to the warrantor, is admissible in a suit against him on his contract of indemnity." Clark *v.* Carrington, 7 Cranch, 308, 322. "When one is responsible by force of law, or by contract, for the faithful performance of the duty of another, a judgment against that other for a failure in the performance of such duty, if not collusive, is *prima facie* evidence in a suit against the party so responsible for the other." City of Lowell *v.* Parker, 10 Met. 309. See, also, Head *v.* Lodge, 20 Pick. 53; Train *v.* Gold, 5 Pick. 308; Foxcroft *v.* Nevens, 4 Greenl. 72; Hayes *v.* Seaver, 7 Greenl. 237.

† Rockfeller *v.* Donnelly, 8 Cowen, 623 and 639.

[1] See Lyon *v.* Northrup, 17 Iowa, 314.

obligee has become absolutely bound and liable to pay the expense or damage incurred by the charge, and his demand against his obligor upon the bond of indemnity, by reason of the charge against himself, is reduced to a certainty, it would surely be just and reasonable, and would violate no principle of law, to permit him to enforce his own demand against his obligor in [310] the first instance, and before he satisfies the charge against himself. It is an operation which avoids circuity, and essentially subserves the purposes of justice and equity, by enabling him who is entitled to the indemnity to obtain the means to satisfy the charge he has incurred from the party who ought to bear it, and thereby save himself the necessity of an advance and payment out of his own funds and estate, which might be inconvenient, and perhaps involve him in serious embarrassments." * . . .

"If there had been no adjudication against the father, assessing the amount he should pay for the indemnification of the plaintiffs, and there had been no admission in pleading of the amount demanded, other evidence might have been necessary to enable the jury to assess the damages; but the plaintiffs might in such case have shown that the father had, with the consent and concurrence of his sureties, agreed to pay a weekly or monthly sum for the maintenance of the child, and on the principle of the case of Hays *v.* Bryant, † have recovered that sum for their indemnity against the charge; or, as I apprehend, it would have been sufficient for them to show what sum was reasonably necessary for the support of the child during the time it had been chargeable to them; and for that sum, if the child was shown to have been provided for by their procurement, the jury would have been warranted in giving their verdict. Other cases might be put: the town, for example, may have an establishment upheld by a common fund, or supplied by the contributions of the inhabitants in money or provisions, for the maintenance and support of those who are chargeable to it, and where provision is made for illegitimate children as well as paupers; or the infant may be left with the mother by the overseers of the poor, under some arrangement with her for a reasonable allowance for its support; or expenses may be incurred for its maintenance, which, from want of means, or from forbearance or other causes, remain unpaid. In none of these supposed cases, each of which may occur and is within the scope of probability, would there be an expenditure or actual payment of money; and could it be pretended that in any one of them the overseer of the poor would be disabled, by that cause, from recovering a reasonable and just compensation for the maintenance of the child? The measure of damages might, in some of these cases, be attended with difficulties, which might sometimes be insuperable; but the right of the plaintiffs to compensation for the use of those who might have a claim upon them for the maintenance of the child, and thus enabling them to satisfy the charge, would be undeniable, and the difficulty of the remedy alone would obstruct it. In the present case the overseers of the poor, to obviate all difficulties on that point, have had the precaution to obtain the further relief provided by the act, in an order of bastardy, by which the weekly contribution of the reputed father to

* Page 648. † 1 H. Bl. 253.

the overseers for the support of the child, is judicially and conclusively settled and determined. This adjudication was in evidence, and, in my judgment, it was conclusive upon both the father and his sureties, as the rule of damages in the action on the bond." *

[311] It will be observed that here the covenant was merely to indemnify and save harmless, and did not reach to the extent of a promise to do the thing in the first place. It is to be noticed, also, that the whole scope of this reasoning is opposed to the general rule that actual compensation will only be given for actual loss, and cannot be supported but on the idea that a court of law is to assume the powers of a court of equity, and compel an imperfect kind of specific performance. If this doctrine were maintained, covenantors against incumbrances would be compelled to pay before the incumbrance was discharged; covenantors for quiet enjoyment would be obliged to pay before eviction; and all parties agreeing to do a specific thing, would be mulcted in the sum equivalent to performance, without any proof whatever that the other party had been injured, or that his position was such that he could be.

The doctrine of this case is, however, far from being recognized as law. In a subsequent case, in the same State, on a bond "to save harmless and indemnify against all damages, costs, and charges, to which the plaintiff's intestate might be subjected, or *become liable for*," it was said by the Supreme Court, "There is no doubt as to the general proposition that in order to recover on a *mere bond of indemnity*, actual damage must be shown; if the indemnity be against the payment of money, the plaintiff must, in general, prove actual payment, or that which the law considers equivalent to actual payment; but if the indemnity be not only against actual damage or expense, but also against *any liability* for damages or expenses, then the party need not wait till he has actually paid such damages, but his right of action is complete when he becomes legally liable for them." And on the ground that the bond, before the court, was against *liability*, the plaintiff was allowed to recover.† [1]

In a recent case on an agreement to indemnify and save

* The same point was again decided in the People *v.* Corbett, 8 Wend. 520. But in Churchill *v.* Hunt, 3 Denio, 321, these decisions are said to rest entirely on the spirit and intent of the statute, "giving these bonds an effect which they would not have at common law;" and it is there said to be for the same reason that in a claim against the sheriff on bonds for the jail liberties, it is unnecessary to prove damage. Kip *v.* Brigham, 7 J. R. 168.

† Chace *v.* Hinman, 8 Wend. 452; *Ex parte* Negus, 7 Wend. 499; and Webb *v.* Pond, 19 Wend. 423.

[1] So in McGee *v.* Roen, 4 Ab. N. Y. P. R. 8.

harmless against a certain demand, a judgment having been recovered on the claim in question against the plaintiff, but nothing having been paid thereon, the case of Rockfeller *v.* Donnelly was pronounced "a very questionable" one; [312] and judgment was given for the defendant, the court saying, "This is not an agreement to indemnify against liability, but it is the common case of an agreement to indemnify against the claim or demand of a third person; and before the plaintiff can recover, he must show that he has been damnified; the mere fact that the demand has changed its form by having passed into a judgment, is not enough." *

In a still more recent case where a bond was given "to save harmless and indemnify the plaintiffs *against their liability* as makers of a certain note, and *to pay or cause to be paid* the said note, it was held that the plaintiffs, though they had not paid the note, and were insolvent, were entitled to recover its amount, under the absolute terms of the covenant; but that the plaintiffs could not recover the costs of a suit against them on the note; as to these costs, the bond was declared purely to be an agreement to indemnify; and the learned Judge (Beardsley) proceeded to say, "Notwithstanding what is said in the case of Chace *v.* Hinman (8 Wend. 452), I must say that I am not aware of any distinction at common law between an indemnity against damage and one against liability, which warrants a recovery on the latter on simply showing the fact of liability. In both, as I think, there must be evidence of actual damage, by the payment of money or otherwise." † Again, on a bond "to save harmless," it was said, "Here is no absolute agreement to pay, and no agreement to keep the party clear from liability, but merely to indemnify;" and it was held, that in order to recover, damage, and that involuntarily sustained, must be shown. It was intimated, however, that "perhaps after a suit commenced, and notice given to the obligor, and neglect by him to defend, the obligee would be warranted in putting a stop to the costs." ‡ In a recent case in New York, the whole subject was considered in the Court of Appeals. The covenant was, that the plaintiff should not sustain any damage or molestation by reason of any liability incurred by his deputy. Judgment had been recovered against the plaintiff, but not paid; and it was held that he was not entitled to recover. ‖ And the [313]

* Aberdeen *v.* Blackman, 6 Hill, 324.
† Churchill *v.* Hunt, 3 Denio, 321.
‡ Crippen *v.* Thompson, 6 Barb. S. C. R. 532.
‖ Gilbert *v.* Wiman, 1 Comstock, 550.

decision of Churchill *v.* Hunt, has been approved of, and its principle affirmed, in the State of New Jersey. * [1]

These decisions replace this branch of the law on its proper basis, and declare the salutary principle, that actual compensation can only be given for positive loss, unless it is evident that the parties have stipulated for a more extensive remuneration. Where the agreement is to pay a specific sum of money, or that a third party shall do it, then the suit becomes a suit in the nature of one for specific performance; the measure of damage is fixed by the mention of the sum, and the only doubt can be whether the plaintiff is the proper party to receive it. Where the agreement is to indemnify against liability, the suit is also in the nature of one for specific performance. Liability is a very different thing from payment; and I submit that the literal object of the covenant is not attained unless the plaintiff may rest on showing mere proof of *liability*, and is relieved from the obligation of proving *damage*. The only way to relieve the plaintiff from being liable to be made to pay the debt, is for the law to see to its extinguishment.† [2]

What is Payment.—Having arrived at the general rule,

* Jeffers *v.* Johnson, 1 Zabriskie, 73. In Ohio, see Ohio Life Ins. and Trust Co. *v.* Reeder, 18 Ohio, 47.

† See in Virginia, a suit by a sheriff on an indemnity bond against damages on levying an execution upon certain specified property. Dabney *v.* Catlett, 12 Leigh, 383 and 684. See in the same State, a suit on an indemnity against injury to a mill-dam. Chapman *v.* Ross, 12 Leigh, 565.

In Vermont, if one promise to indemnify another for all damage, etc., which he shall incur in giving up to the promisor a certain horse, and in bringing a suit against the vendor thereof for fraudulently selling a horse belonging to another, if he fail therein,—if the suit is brought, and the plaintiff defeated, the record of the judgment is competent evidence in a suit against the promisor founded on the promise, so far as to show the bringing and failure of the action; and that, though notice of the bringing of the suit was given to the defendant. But the amount of damages depends on the title to the horse; and as to this the judgment is not evidence. Lincoln *v.* Blanchard, 17 Verm. 464.

[1] So in an action on a promissory note or other instrument given as an indemnity by a principal to his surety, the measure of damages is the amount paid by the surety at any time before trial, and unless he has made an actual payment he can recover nominal damages only. Osgood *v.* Osgood, 39 N. H. 209; Child *v.* Eureka Powder Works, 44 N. H. 354; Little *v.* Little, 13 Pick. 426; Cushing *v.* Gore, 15 Mass. 69.

[2] In the case of Spark *v.* Heslop, 28 L. J. R. (N. S.) Q. B. 197, the defendant, in a letter to the plaintiff requesting him to pay to a banking company for his account a bill of exchange for £400, drawn by one Henderson on and accepted by one Hutchinson, and indorsed by the defendant, and also requesting him to bring an action against Hutchinson for the recovery of the amount and interest, added the following engagement: "And I hereby agree to be answerable to you for the due payment of the amount of the said bill and interest which you may pay to the said banking company, and for all costs, damages, and expenses which you may *sustain* by reason of such payment and the trying of the said action against the said John Hutchinson, and in any manner relating thereto, you giving me credit for all money you may receive from the said John Hutchinson in such action." The plaintiff having brought the action against Hutchinson unsuccessfully, the court distinguished this undertaking from the case of an indemnity, and between "sustaining" costs, damages, and expenses, and paying them. They held that the plaintiff sustained damage when the liability was incurred, and that he could recover the costs he was liable for to his own attorney, although he had not paid them, as well as those of the defendant in the other suit which he had paid.

that the surety cannot proceed against his principal debtor until he has paid the debt, it still remains to be seen what in judgment of law is considered as payment. The suit of the surety against the principal is at common law an action of assumpsit, sometimes special, but frequently on the common counts for money paid for the defendant's use; and [314] we now proceed to determine what proofs will satisfy the allegation of payment.*

It will be perceived at once that this inquiry involves various questions, some of a technical character, and springing from the form of the action, others relating to the substantial rights of the parties. Is the payment of *money* in all cases necessary? Can the surety, by giving his bond or note in payment of the original debt, raise a claim against the principal? Will the transfer of land, whether by mortgage or deed, be treated as payment? and if so, at what value shall it be computed? These, and similar inquiries, are often complicated and perplexing.

The rule appears to be well settled in this country, though far from being clear in England, that the giving by the surety of his negotiable promissory note, which is received not collaterally, but as actual payment of the original debt, will be held to be payment as against the principal debtor, and that the surety may at once proceed against him for the amount of his note; in other words, the note is treated as money. While on the other hand, it is also held that the giving a bond will not have the like effect, and that, until the payment of the bond, the surety has no claim against his principal.

It is also well settled, that an absolute conveyance of the land, by the surety, will be sufficient to raise a claim on his behalf against the principal to its full value, and that it will be treated as money paid for the use of the original debtor. An examination of the decisions will best elucidate these rules.

In an early case in the King's Bench,† an application was made to discharge the defendant from custody on filing com-

* "It is an equitable principle of very general application," says Mr. Chancellor Walworth, in Hunt *v.* Amidon, 4 Hill, 349, "that where one person is in the situation of a mere surety for another, whether he became so by actual contract, or by operation of law, if he is compelled to pay the debt which the other in equity and justice ought to have paid, he is entitled to relief against the other, who was in fact the principal debtor. And when courts of law, a long time since, fell in love with a part of the jurisdiction of the court of chancery, and substituted the equitable remedy of an action of assumpsit on the common money counts for the more dilatory and expensive proceeding of a bill in equity, in certain cases, they permitted the person thus standing in the situation of surety, who had been compelled to pay money for the principal debtor, to recover it back again from the person who ought to have paid it, in the equitable action as for money paid, laid out, and expended, for his use and benefit."

† Taylor *v.* Higgins, 3 East, 169.

[315] mon bail; and it appeared that the defendant being indebted to one Creswell, the plaintiff Taylor had given Creswell *a bond* and warrant of attorney, and paid him £7 or £8 of costs; that this security was accepted as payment and satisfaction of the debt; and it was contended that this was the same as if the debt had been paid in money. But Lord Ellenborough said, "There is no pretense for considering the giving this new security as so much *money paid* for the defendant's use;" and the rule to discharge the defendant from custody was made absolute.*

On the authority of this case the same point has been decided in New York.† The plaintiffs being accommodation indorsers for the defendant, had on being sued, executed to the holders of the accommodation paper, on the 15th April, 1807, two bonds, one payable in eighteen months, and the other in two years, which bonds had not been paid. The plaintiffs, subsequently, were discharged under the insolvent act. The judge charged that the two bonds amounted in law to the payment of the notes, but the jury found a verdict for the defendants. On the motion for a new trial, the court said, "The question is whether giving a bond, in discharge of the liability of the plaintiffs, is to be considered as a payment in money. . . . An obligation to pay is not the same thing as actual payment. A bond has no analogy to cash. . . . The technical rule operates with perfect justice in this case; for the bond has not, and never will be paid, as the plaintiffs have since been discharged under the insolvent act; and if the money now demanded was to be recovered, their estate would receive it without ever having given an equivalent." The motion for a new trial was denied.

The rule laid down in this case appears to be the same where a mortgage is given. So where an accommodation indorser gave a mortgage to secure his debt, and subsequently released the equity of redemption, and made a conveyance of the land, the case of Cumming *v.* Hackley was cited with approbation; and it was held that though the conveyance gave a right of action, the mortgage furnished no basis of claim.‡

[316] Payment by Note.—A different rule has been adopted, as I have already said, where the payment, if such it can

* No attention appears to have been paid to the payment of the costs. This case was sustained in Maxwell *v.* Jameson, 2 B. & Ald. 51, noticed more fully hereafter.

† Cumming *et al. v.* Hackley, 8 Johns. R. 202.

‡ Ainslie *v.* Wilson, 7 Cow. 662.

be called, is made by giving a note. Where * the plaintiff became security for the defendant's subscription to a brewer's benefit club, the club called on the plaintiff, and he gave his note for the amount of the subscription. On the trial of the cause, it being an action of assumpsit for money paid, and the objection being taken that the giving a note was no payment, Lord Kenyon held, "That the club having consented to take the note from the plaintiffs, it was as payment to them of the money due by the defendant; and so the action was maintainable." It is added, that at the next term a new trial was moved for; but the court agreeing with his Lordship, the rule was refused.

This authority was much shaken by a subsequent case.† It was an action for contribution. The plaintiffs and defendants united in a promissory note to Batson & Co.; Maxwell took up the note, by giving his own bond to Batson & Co. for the amount. No money was paid. On this state of facts, Maxwell sued Jameson in *assumpsit for money paid.* Bayley, J., said, "The plaintiff in this case has paid no money. It is said, indeed, that he has given what was equivalent to it, and that it ought to be considered, for this purpose, as money; and so it was held in Barclay *et al. v.* Gooch. But in Taylor *v.* Higgins the court, having the former case before them, held that the action for money could not be maintained." . . . . "Then, as the authorities differ, it becomes necessary to look to the reason of the thing. *No money has yet come out of the plaintiff's pocket, and non constat that any will;* for if he recover from the defendant in the present action, still it is possible he may never pay it over to Batson & Co. The period of time at which his remedy against the defendant shall commence has not yet arrived. If hereafter he is compelled to pay the money due upon the bond, he may then have his remedy against Jameson for the contribution." Abbott, J., said, "That even supposing, what might be doubtful, that the plaintiff had entirely relieved the defendant from the demand [317] which Batson & Co. had against him, still the case of Taylor *v.* Higgins is conclusive." Holroyd, J., said, "In order to support this action, the debt must have been extinguished, either by an actual or virtual payment of money by the plaintiff to the defendant's use. There has clearly been no actual pay-

* Barclay *et al. v.* Gooch, 2 Esp. N. P. Cases, 571. This case was referred to by the court, in Taylor *v.* Higgins (3 East, 169), already cited; but Lord Ellenborough did not commit himself to the correctness of the decision. "*Supposing*, even," he says, "the case of the note of hand or bill of exchange, as the current representative of money, to have been rightly decided, still," etc.

† Maxwell *v.* Jameson, 2 B. & Ald. 51.

ment; and in order to have made the giving of the bond operate as a virtual payment, the defendant must be shown to have been a party to the transaction, which was not the case."

These cases leave the rule in England in a very unsettled state. In this country, however, the original decision of Barclay *v.* Gooch has been followed, both in New York and Massachusetts. In a case already cited,* the case of Barclay *v.* Gooch was referred to by the Supreme Court of New York, with a qualified approbation. "There are some cases," they say, "in which the giving negotiable paper has been held equivalent to the payment of money; and there may be some reason for this distinction (*i. e.*, between bonds and notes), for otherwise a party may be obliged to pay a debt twice, if the paper should pass into the hands of an innocent indorsee."

The precise point came up subsequently for adjudication in an action of assumpsit for money paid.† The plaintiff became surety for the defendants in a promissory note to one Vanderlyn, on which judgment was recovered. The plaintiff thereupon gave his negotiable note for the amount of the judgment. This had been accepted by Vanderlyn in full satisfaction, but it remained unpaid. The judge having charged in favor of the plaintiff's right to recover, and a verdict being obtained, a motion was made for a new trial. But the court, after approving the decision in Cumming *v.* Hackley, as to a bond, said,—

"There are cases in which negotiable paper has been held equivalent to the payment of money, to which it is in some measure analogous, as when the note has been negotiated, and is in the hands of an innocent indorsee. He of course would be protected; and unless it was considered as a payment of the original debt, the drawer might be made to pay twice. So when the note has been accepted and paid in satisfaction of the debt. The note in this case has not been negotiated; but has been accepted and received by the party in whose favor the judgment was obtained, in satisfaction of the debt, which is
[318] sufficient to authorize this recovery. . . . . The defendant has received the full benefit, the debt has been satisfied; and as to him, it is the same as if so much money had been paid for him." ‡

In a recent case,‖ which came up on error from the New York Common Pleas, Hedden, the plaintiff below, by way of accommodation for Rodman, indorsed a note on the 30th of August, 1819, for $118, payable in 60 days. In July, 1820, a judgment was obtained against Hedden, as indorser, by one Jacot; in October, 1820, Hedden paid $20 on account of this

* Cumming *v.* Hackley, 8 J. R. 202.
† Witherby *v.* Mann *et al* 11 J. R. 518.
‡ See also Beardsley *v.* Root, 11 J. R. 464.
‖ Rodman *v.* Hedden, 10 Wend. 498.

judgment; on the 26th of May, 1821, $100 more, and gave his note for $28 10, which was accepted by Jacot in full payment and satisfaction of the judgment. The note for $28 10 was paid by Hedden on the 28th of July, 1821, previous to which (on the 25th of July, 1821), Rodman had left the State of New York, and did not return till 1830, when the suit was brought. The note for $28 10 was thus given and accepted in satisfaction *before* the defendant Rodman left the State, but not paid till *after* his departure. The defendant set up the statute of limitations, insisting that the plaintiff's cause of action accrued when the original notes made by Rodman with Hedden's indorsement came to maturity, and that, as the defendant was then in the State, the statute had attached, and the claim was consequently barred. This defense was unsuccessful in the Common Pleas, and the plaintiff had a verdict and judgment; to reverse which, error was brought. After argument, it was said,—

"If the giving the note for $28 10, under the circumstances of this case, can be considered as so much money paid by Hedden for Rodman, then the whole cause of action was complete on the 26th of May, 1821, when the note was given, which was two months before Rodman left the State. The statute having, in that event, commenced running before Rodman's departure, as to the whole cause of action, and more than six years having elapsed before the commencement of this suit, the whole cause of action is barred by the statute." And after citing the cases we have already considered: "We understand from the testimony, that the note was not only given by Hedden, but was also actually received in full satisfaction and discharge of the judgment. It was, therefore, upon the authority of the preceding cases, equivalent to money paid for the use of Rodman from the moment of its delivery; and this having been two months before Rodman left the State, the whole of the plaintiff's cause of action was then complete; and the judge should have charged the jury [319] that, upon the issue of the statute of limitations, the defendant was entitled to their verdict."

And the judgment was reversed.* So where agreements had been given by the defendants as principals, to pay or save harmless, and the plaintiffs as sureties, after verdict, had given their negotiable note for the debts and costs, it was held that the verdict was evidence against the principals, though without notice, and that the negotiable note given and accepted in full satisfac-

* This is a hard case, and evinces a determination to carry the rule to its greatest extent. And it is to be noticed that the judgment was reversed on a ground that by the report does not appear to have been taken at all at the trial. The defendant there insisted that the plaintiff's cause of action accrued when the original notes set forth in the declaration came to maturity; *i. e.*, Nov. 1819, and April, 1820. The court, however, disregarding this line of defense, decided that the cause of action accrued on the acceptance of the note by Jacot, *i. e.*, 26th of May, 1821, which point does not appear to have been raised below.

tion and discharge, was equivalent to the payment of cash; the court adding, "So it would now probably be holden of a note not negotiable." *

The rule appears to be the same in Massachusetts. Where a promissory note was made at the request of the defendant by a third party, payable to the plaintiff, and indorsed by him, and discounted at a bank for the use and benefit of the defendant, the plaintiff paid the note to the bank by giving a new note made by himself and indorsed by another party. The English and New York cases were reviewed, and it was held that the giving the new note was equivalent to a payment of the first, and would support an action for money paid. †

So again it has been held there,‡ that a surety who gives his own note for the debt of the principal, which is accepted as full payment by the creditor, and the principal discharged, may treat the note as money paid, and maintain an action of assumpsit thereon.

To Constitute Payment a Note must be Accepted as Such. —It is to be borne in mind, however, in all these cases, that it is essential that the note should be given and accepted by the creditor, as full payment and in complete satisfaction. [320] This has been repeatedly decided. So where an action of covenant was brought ‖ by plaintiffs, who had sold the defendants certain coal mines, for which they covenanted to pay a sum certain in instalments, the defendants pleaded payment of part, and a bill of exchange given for *payment and in satisfaction* of the residue on which judgment had been recovered. To this plea the plaintiff demurred; and it was held bad, because it was not averred that *the bill was accepted in satisfaction, nor that it had produced it;* that, not having been accepted as satisfaction for the debt, the bill could only operate as a collateral security, and that therefore the plaintiff might resort to his original remedy on the covenant; and, said Le Blanc, J., "The giving of another security, which in itself would not operate as an extinguishment of the original one, cannot operate as such by being pursued to judgment, unless it produce the fruit of a judgment." The principle of this case has been repeatedly recognized in New York,¶ where it is held, "that a note is not

* Lee *v.* Clark, 1 Hill, 56.
† Cornwall *v.* Gould, 4 Pick. 444.
‡ Doolittle *v.* Dwight, 2 Met. 561.
‖ Drake *v.* Mitchell *et al.* 3 East, 251.
¶ Witherby *v.* Mann *et al.* 11 J. R. 518; Tobey *v.* Barber, 5 J. R. 68, and Johnson *v.* Weed *et al.* 9 J. R. 310.

payment of a precedent debt, unless there is an express agreement to receive it as payment." *

In a recent case in New York,† the doctrine that negotiable notes are to be considered as money, has been restricted to cases where the notes have been parted with to *bonâ fide* holders for value. The plaintiff, Reed, bought of the defendants a thrashing-machine, and gave three negotiable notes of $200 each for the purchase money. The machine proving worthless, the plaintiff brought an action for *money paid* against [321] the defendants. A verdict was obtained, but it was set aside and a new trial granted. The court, by Savage, C. J. saying:

"Had the notes in question been given to a third person in payment and discharge of a debt due by the defendants to such third person, then the case would have come within previous decisions. But I cannot find that the giving a note has ever been considered, as between maker and payee, the payment of money by the former to the latter. In my judgment, the mere giving a note cannot be considered payment of the very money for which such note is given as security, so as to justify a recovery of it by the maker against the payee."

In a more recent action, in the same State, where the facts hypothetically put by the court in the case last cited, were actually presented, the notes having been transferred to a *bonâ fide* holder for value, the plaintiff was held entitled to recover as for money paid and received.‡

I am constrained to say, upon a review of these authorities, that the English rule, as settled by the case of Maxwell *v.* Jameson, appears to me to be the sounder one, and more in accordance with the cardinal principle upon which I have already often insisted, that actual compensation shall only be recovered for actual loss. There is no foundation whatever for any distinction between a note and a bond; the question turns, or should turn, on the fact of the amount of money actually paid by the surety to relieve his principal. It is no answer to

* In Massachusetts, it would seem that, in some cases, this express agreement is inferred from the mere fact of giving a negotiable note.

The giving a negotiable note for a debt in a single contract, raises a legal presumption that the note was received in payment, and will operate as a discharge of the single contract, unless the presumption be controlled by evidence of a contrary intent. Thacher *v.* Dinsmore, 5 Mass. 209; Maneely *v.* M'Gee, 6 Mass. 143; Huse *v.* Alexander, 2 Met. 157. So also, in that State it is held, in an action by the indorsee against the maker of a negotiable note, indorsed when overdue, a negotiable note made to the defendant by the payee, intended as a payment of the note, may be shown in defence as a set-off. Holland *v.* Makepeace, 8 Mass. 418; Sargent *v.* Southgate, 5 Pick. 312. "A negotiable promissory note, by the common law of this State, is holden to be a discharge of a single contract on which it was founded." Emerson *v.* Prov. H. M. Co. 12 Mass. 237.

† Reed *v.* Van Ostrand, 1 Wend. 424.

‡ Colville *v.* Besley, 2 Denio, 139.

say that the note is treated as money by the original creditor. Relief to the principal obtained by the mere solicitations of the surety would certainly be considered no ground of action; how does his promise strengthen the claim? The question is not whether the principal is extricated from his embarrassment, but whether the plaintiff (the surety) has suffered any loss. It could certainly never be tolerated that a notorious and desperate insolvent, as in the case of Cumming *v.* Hackley, should by any arrangement with the creditor put money in this way in his own pocket; and an inquiry into the probable payment of the note seems essential, even on the ground that it is in any case to be treated as payment. This, however, raises a new issue completely foreign to the original controversy. It seems to me on the whole, the only safe rule to declare in all [322] cases, that a plaintiff shall not ask a court of justice for redress until he has suffered some actual positive injury; that the mere apprehension of loss shall in no case be sufficient to entitle him to actual compensation.*

* It is proper, however, to notice that the American rule, as applicable to negotiable paper—*i. e.* that when given by a surety or secondary debtor, and accepted by the creditor in full satisfaction of his demand, it gives at once a right of action against the principal debtor—is also the rule of the civil law.

La caution, says Pothier, in his *Traité des Obligations*, part ii, ch. 6, section 7, art. 1, §§ 1 & 2, ed. of 1781, vol. 1, 212, a recours contre le débiteur principal après qu'elle a payé.—Il y a même des cas auxquels la caution a action contre le débiteur principal, même *avant qu'elle ait payé;* and again, Il n'importe que le paiement ait été une paiment réel, ou une compensation, ou *une novation*. This term, *novation*, is thus defined by Crivelli:—de *novatio*, convention nouvelle. On appelle de ce nom, en termes de droit, le changement d'un contrat en une autre, et par lequel il est derogué au premier. Dictionnaire du Droit Civil, *in voc.* All the cases which we have just examined in the text, where bonds or notes were given to extinguish prior obligations, would, according to the civil or French law, be novations. En tous ces cas, continues Pothier, la caution a droit de demander que le débiteur principal la rembourse, soit de la somme qu'elle a payée, soit de celle qu'elle a compensée, soit de *celle qu'elle s'est obligée de payer* pour éteindre l'obligation du principal débiteur.

The French Code also recognizes the right of the security to proceed against the debtor before payment, and carefully defines the cases in which it is to be exercised. The provisions are as follows:—

Art. 2028. La caution qui a payé a son recours contre le débiteur principal, soit que le cautionnement ait été donné au su ou à l'insu débiteur. Art. 2032. La caution même avant d'avoir payé put agir contre le débiteur pour être par lui indemnisée.

1. Lorsqu'elle est poursuivie en justice pour le paiement.

2. Lorsque le débiteur a fait faillite, ou est en déconfiture.

3. Lorsque le débiteur s'est obligé de lui rapporter sa décharge dans un certain temps.

4. Lorsque la dette est devenue exigible par l'echéance du terme sous lequel elle avoit été contractée.

5. Au bout de dix années, lorsque l'obligation principale n'a point de terme fixe d'echéance, à moins que l'obligation principale, telle qu'une tutèle, ne soit de nature à pouvoir être étiente avant un temps déterminé.

It is to be borne in mind, however, that the courts of France follow the course of the civil law, and that there is no division of jurisdictions.

The remuneration of *cautions* under the French Code is not confined to the mere money paid. 2028. La caution a aussi recours pour les dommages et intérêts, s'il a lieu.

L'engagement des débiteurs envers leurs cautions n'est pas compris, says Toullier, sous la régle (1153); car ce n'est pas de l'argent que les débiteurs doivent à leur cautions; ils doivent les indemniser des dommages qu'elles pourront suffrir de la part du créancier qui n'est pas payé, comme s'il fait saisir leurs biens. Ainsi, l'indemnité que le débiteur doit à sa caution l'oblige, sans qu'il

PAYMENT IN LAND OR GOODS.—It remains to be seen how far the conveyance or transfer of land [or other [323] property in discharge of a pecuniary liability] furnishes the surety an action against his principal.

In an action of assumpsit for money paid,* the defendant on the 12th of April, 1817, obtained from the plaintiffs their indorsement on two notes, each for $2,059 35. The notes were indorsed to John B. Murray & Son, then again indorsed over, and paid by the subsequent indorser. The plaintiffs executed to the Murrays a mortgage on four lots (subject to a previous mortgage for $1,770), as a security for the indorsements, and subsequently released the equity of redemption to the Murrays, who received the release as payment of $1,200 on the plaintiffs' indorsement, and discharged them from all further liability as indorsers. Evidence was taken as to the value of the lots, and the jury found for the plaintiffs $804 45. On a motion for a new trial, it was contended that the conveyance of land would not sustain an action for money paid; but the court, after deciding that under Cumming *v.* Hackley,† and Taylor *v.* Higgins,‡ the mortgage was no payment, used this language, as to the release of the equity of redemption: "We have no doubt as the conveyance of the land was received in discharge of a money debt due from the plaintiff, it is in judgment of law to be considered the same thing as if the plaintiff had actually paid money. The Murrays received it as money, or an equivalent for money. They had the right of electing. To the defendant it was immaterial whether the payment was made in one way or the other." And a new trial was denied. This case, however, leaves the question open as to the rate at which land under such circumstances is to be taken. The court say, "There is some question whether the equity of redemption, taken subject to the previous mortgage, was equal in value to the $1,200. The jury found $804 45 only; and, from the evidence, we think they were warranted in finding that amount." This would seem to imply that the actual and not agreed value of the land is to be the guide. Nor does the question appear to have been raised how far the maker and principal debtor, Wilson, the defendant, was benefited by this transaction. The court say, that on the conveyance of the land at the agreed [324]

soit besoin de stipulation aux dommages et intérêts qui resulteraient de la saisse et vente des biens de la caution. Toullier, vol. 6, 280, *des Contrats.*

This would not be so with us, as I have already had occasion to say, unless the surety held a contract to indemnify and save him harmless. In the case of a suretyship arising by implication, or without a contract to indemnify, the recovery is limited strictly to the money paid for the use of the principal.

* Ainslie *v.* Wilson, 7 Cow. 662.

† 8 J. R. 202.

‡ 3 East, 169.

valuation of $1,200, and the release of the plaintiff, Ainslie, "the remainder due on the notes constituted a valid claim in favor of the Murrays, against Wilson, the maker." But is it clear that the claim of the Murrays as against Wilson was good for *only* the remainder? If the Murrays had sued Wilson on the note, what, as between them, would have been the measure of damages? Could, in such an action, Wilson have had the benefit of the valuation of the land at $1,200 to which he was not privy? As between the Murrays and Wilson, was the land satisfaction for anything more than it was actually worth? What if it had been foreclosed under the first mortgage, and no surplus realized, would Wilson have still had the benefit of the $1,200 agreement?

In a subsequent case,* where the plaintiff, an accommodation maker, had paid the defendant's debt, after judgment recovered for $401 61, by a conveyance of land for a consideration expressed in the deed of $548 31, it was held, after affirming the main point decided in the last case, that the defendant was at liberty to reduce the amount of the recovery by showing that the land conveyed in satisfaction of the judgment was not of value equal to the amount of the note and interest; and this evidence having been excluded at the circuit, a new trial was ordered.

The same doctrine has been declared in Massachusetts. So under a plea of payment in an action of debt on judgment, the defendant is not confined to evidence of payment in money, but he may show that a chattel or deed of land was given and received in satisfaction of the judgment. He must, however, prove that the thing received was of the full value of the debt, or that it was agreed to be received as such.†

But taking possession of a mortgaged estate for the purpose of foreclosure, does not operate as a payment of the mortgage money; for the land still remains only a security for the [325] money.‡

Having thus examined the rules requiring the surety to pay before he proceeds against his principal, and also dis-

* Bonney *v.* Seeley, 2 Wend. 481.

† Howe *v.* Mackay, 5 Pick. 44; and the same rule was laid down in President of Newburyport Bank *v.* Stone, 13 Pick. 420.

‡ West *v.* Chamberlin, 8 Pick. 336. In Pennsylvania, the decisions on the subject which we have been considering in this chapter, appear conflicting. In Pigou *v.* French, 1 Wash. C. C. R. 278, Mr. Justice Washington held that a surety cannot recover the amount for which he has become liable, without showing actual payment before action brought. But where the defendant, having guaranteed to keep the plaintiff clear of back interest, failed to do so, it was held that the plaintiff was damnified from the moment judgment was obtained against him, and might sue on the agreement. Gardner *v.* Grove, 10 S. & R. 137. In another case, however, the court told the jury they were at liberty to find for the whole amount of the plaintiff's liability, but *recommended* them to find only for the amount actually paid. Bauer *v.* Roth, 4 Rawle, 83.

cussed the questions that present themselves as to the mode of payment, we have now to examine those cases where the surety is obliged to pay under compulsion of law, or where by reason of his engagement, he is put to indirect or consequential loss.

CONSEQUENTIAL DAMAGE TO SURETY.—Where the surety is compelled by suit to pay the debt for which his principal is previously liable, or where a party holding an indemnity against a claim is obliged by legal proceedings to pay the demand in the first instance, it has been frequently decided that he can recover against the principal or indemnitor, not only the amount which he has been obliged to pay, but also his costs incurred in defending the action.

A party who makes, accepts, or indorses an accommodation note or bill for the accommodation of a party thereto, is regarded as a surety, and can charge such party with the costs of a suit for the collection of the note which he may have been compelled to pay.* So it has been held, as between the accommodation acceptor of a bill and the drawer; † the accommodation indorser of a promissory note, and the maker; ‡ as between the indorser of a note compelled to pay, and a party who had agreed to indemnify him on his indorsements. ‖

LIABILITY FOR COSTS.—We have already had occasion to consider this question in regard to warranties; ¶[1] and it would seem that the liability for costs should depend on the grounds of the original litigation, and the notice given [326] to the party sought to be charged with the costs. It would certainly be inequitable that a party should be obliged to defray the expense of a controversy, either unnecessary in itself, or which he might not have chosen to incur. "No person," says Lord Chief Justice Denman,** "has a right to inflame his own account against another, by incurring additional expense in the unrighteous resistance to an action which he cannot defend." In this case, the defendant, as lessee of a certain house, had

* Baker *v.* Martin, Adm'r, &c., 3 Barb. S. C. R. 634.

† Jones *v.* Brooke, 4 Taunt. 464.

‡ Hubbly *v.* Brown, 16 J. R. 70. But an indorser of a regular bill of exchange who has been sued by the indorsee, is not entitled to recover from the acceptor the costs incurred in such action. There is no privity between them. Dawson *v.* Morgan, 9 Barn. & Cres. 618; King *v.* Phillips, Peters' C. C. 350. Nor is the maker liable to pay the indorser his costs if he is sued. "The mere fact of drawing the note does not imply a promise to save the payee harmless from all costs and charges that he may be subjected to as indorser." Simpson *v.* Griffin, 9 J. R. 131.

‖ Mott *v.* Hicks, 1 Cowen, 513.

¶ *Ante*, 292.

** Short *v.* Kalloway, 11 Ad. & Ell. 28.

[1] *Ante*, 78, note 1.

covenanted with his lessor, to put and keep the premises in repair, under penalty of forfeiture, and in his assignment to the plaintiff had covenanted that all the covenants had been performed. The covenants had not been performed; the lease had become voidable; and the plaintiff having sub-assigned the lease to one Clark, with a covenant similar to that which he had received from the defendant, was sued by him (Clark), and obliged to pay £120 to settle the demand, together with £119 costs incurred in the defence; and it was held, for the above reason, that these costs could not be recovered over against the defendant. The principle of this decision has been repeatedly affirmed in cases where it has been held that it is not necessary for the surety to stand suit in order to charge his principal. So in New York, where the defendant gave the plaintiff a promise to indemnify him against an act which proved to be trespass, and the plaintiff being sued for the trespass gave a cognovit, it was held that it satisfactorily appearing that the cognovit was not for too much, he was entitled to recover the amount of the judgment.* [1]

So in Pennsylvania, it has been held that a surety is not bound to subject himself to costs by waiting till the creditor brings suit; but he may consult his own safety, provided it does not involve a wanton sacrifice of the interests of his principal.† So, again, in the same State, it is held that a surety cannot claim reimbursement for expenses unnecessarily incurred.‡ This is in analogy also with the sound rule which we have heretofore noticed in regard to real estate—that the vendor who holds a warranty may surrender to a paramount [327] title, thereby only assuming the burden of proof that he did not surrender without just cause.‖ And a very similar decision has recently been had in England:¶ it was an action on the case, for running down a ship, in consequence of which the plaintiffs were obliged to accept the aid of salvors, and were compelled to pay a large sum of money, and certain costs in addition thereto. It appeared that the plaintiffs, after a negotiation with the salvors, who demanded £150, had tendered

* Stone *v.* Hooker, 9 Cow. 154.

† Craig *v.* Craig, 5 Rawle, 91.

‡ Wynn *v.* Brooke, 5 Rawle, 106.

‖ So, in Massachusetts, it has been said on the subject of eviction, "There is no necessity for the party holding a covenant of warranty to involve himself in a lawsuit to defend himself against a title which he is satisfied must ultimately prevail. But he consents at his own peril. If the title to which he has yielded be not good, he must abide the loss; and in a suit against his warrantor, the burden of proof will be on the plaintiff." Parson, C. J. in Hamilton *v.* Cutts, 4 Mass. 352, 353; *ante*, 158.

¶ Tindall *v.* Bell, 11 Mees. & Wels. 228.

[1] If the surety in any way extinguishes or pays the debt of the principal, he may recover of the latter both debt and costs, as money paid. Hulett *v.* Soullard, 26 Vt. 295.

£20, and by a decision of the admiralty, were finally obliged to pay £45 damages, and £124 costs. The plaintiffs had a verdict for £45, with liberty to move to increase it by the amount of costs. It was held that it should have been left with the jury to say what a reasonable man would do under similar circumstances; and if the litigation were found to be prudently incurred, then the costs should be allowed; and Parke, B., said, "The parties were in the same situation as if the defendants had entered into a contract with the plaintiffs, not to do the wrong complained of. That is not a contract of indemnity."

NOTICE.—But if the suit be brought against the surety, and there appear good reason to resist the claim, then the further question arises as to notice. Its effect has been thus stated, "The purpose of giving notice is, not in order to give a ground of action; but if a demand be made, which the person indemnifying is bound to pay, and notice be given to him, and he refuse to defend the action, in consequence of which the person to be indemnified is obliged to pay the demand, that is equivalent to a judgment, and estops the other party from saying that the defendant in the first action was not bound to pay the money." And in this case it was held that notice was not essential, and that the plaintiff could recover his costs though no notice had been given.*

Its operation has been still more clearly defined by Lord Chief Justice Tenterden, in an action on a breach of the covenant of title: "The only effect of want of notice in such a case as this is to let in the defendants to show that the [328] plaintiff has no claim in respect of the alleged loss, or not to the amount alleged; that he made an improvident bargain, and that the defendant might have obtained better terms, if the opportunity had been given him." This was said in a case where the plaintiff had been obliged after suit to settle with a party claiming under title paramount; and the court said, "As to the costs," incurred by the plaintiff in defending the action, "the plaintiff here had a right to an indemnity; and he is not indemnified unless he receive the amount of the costs paid by him to his attorney."† It may, therefore, be said that notice in these cases is not necessary; if given, however, and the defendant neither endeavors to arrest the litigation, nor undertakes to direct it, he will be made responsible for its result; while, on

* Per Buller, J., in Duffield *v.* Scott, 3 T. R. 374.

† Smith *v.* Compton, 3 B. & Adol. 407. Dumoulin considers the question of notice at length, and its effect on the expenses, both in the case when notice is given, and when not given; and when given pending the suit; and as to the motives for not giving: §§ 150–153.

the other hand, the only effect of not giving it, is to throw on the plaintiff the burden of showing that the first suit, the costs of which he claims, was not improperly contested.*

This view of the matter has been very fully stated by Mr. Justice Story, on the Massachusetts Circuit, and applied to the subject of reinsurance;† and the Supreme Court of the United States has declared, that a judgment against the person to be indemnified, if fairly obtained, especially if obtained on notice to the warrantor, is admissible, in a suit against him on his contract of indemnity;‡ and the law has been similarly declared in New Hampshire, on a suit upon an execution bond.‖

To these general rules an exception was taken by Lord Chancellor Hardwicke as to extents. In an early case, where extent was taken out against a surety to the crown, and after contesting it some time, he paid the claim, and prosecuted his
[329] principal for the amount paid by him, including his expenses, it was insisted that, the debt being a just one, and improperly disputed, the principal should not be charged with the expense of the litigation; but Lord Hardwicke said, "I know of no such distinction;" and then taking notice that an extent is both an action and an execution, and that the surety could not be supposed prepared to pay the claim immediately, he allowed the demand.¶ But the general rule seems well and clearly established, that the principal shall not be subjected to the expense of unnecessary litigation; how the fact is to be arrived at, and on whom the burden of proof, will, as has been said, frequently turn on the question of notice. Where bail employed a third party to find the principal debtor, and then, refusing to pay the expenses of the person so employed, was sued and compelled to pay his bill with costs, it was held in a suit against the principal debtor, that the bail could recover the sum paid, but not the costs; Lord Ellenborough at Nisi Prius saying, "As for the costs of the action which the plaintiff took defence to unadvisedly, he should have either defended that action if the demand was unfounded, or paid the money if it could be legally claimed; but having defended that action without foundation, he cannot charge the defendant with the costs incurred in such an improvident defence."**

* Mr. Chitty says, "In cases of guarantee, a notice of the claim and action of the creditor against the surety should always be given to the principal, with an intimation (if there be clearly no defence) that the action will be settled unless the party forthwith desire that it be defended; and that he will be looked to for indemnity." Chitty on Contracts, 400; on Guaranties and Indemnities, *in notis*.

† N. Y. State Marine Ins. Co. *v.* Protection Insurance Co. 1 Story, 458, *post*, 331

‡ Clark *v.* Carrington, 7 Cranch, 308, 322.

‖ French *v.* Parish, 14 N. H. R. 496.

¶ *Ex parte* Marshall, 1 Atk. 262.

** Fisher *v.* Fallows, 5 Esp. 171. No action will lie by bail for his trouble or loss of time in taking a journey to become bail, because he does not undertake the journey as

In a case at Nisi Prius, where the plaintiff, an auctioneer, was employed by the defendant to sell an estate, and the title proved defective, the purchaser brought suit against the auctioneer for his deposit; the auctioneer gave notice to the defendant, who refused to defend the suit. The auctioneer then paid the deposit, with the purchaser's costs and his own, and brought suit against the defendant, claiming these costs and the excise duty on the sale. The action was assumpsit for money paid, with the usual money counts, but Lord Ellenborough held, that as to the costs, "there should have been a special count, inasmuch as the right to these costs by the plaintiff was not so apparent. The plaintiff might have defended the [330] action of his own wrong, and without any authority from the defendant. If he had done so, he would not be entitled to call upon his principal to pay the costs, as they were incurred without his consent;" and, on the ground that the declaration should have been special, the costs were refused.* And in a subsequent case, Lord Tenterden decided, that the accommodation acceptor of a bill, who pays it to a *bonâ fide* holder after action brought, cannot recover the costs of such suit against a person who, having had the bill delivered to him for a purpose which was satisfied, had improperly indorsed the bill to the holder.† And where the defendant misapplied the plaintiff's accommodation acceptance, and contrary to his duty indorsed it over for value to a third person, who sued the plaintiff and recovered, it was decided by the English Common Pleas that he could not recover the costs of that action against the defendant.‡

In a case on a guarantee to indemnify the plaintiff against the expense of a commission of bankruptcy, the messenger had sued the plaintiff for his bill of six pounds. The plaintiff defended the suit, and claimed sixty pounds costs paid to the messenger in his suit, and also his own costs; but the claim was denied, Lord Tenterden saying, "I think the defendant is not liable for the costs beyond the writ; a man has no right, merely because he has an indemnity, to defend an action, and put the person guaranteeing to useless expense." ‖ But, on the other hand, where debt was brought by the plaintiff, as sheriff, against

such, or labor as a person employed by the defendant, but he does it as a friend, and to do him kindness. Reason *v.* Wirdnam, 1 Car. & P. 434.

* Spurrier *v.* Elderton, 5 Esp. 1.

† Roach *v.* Thompson, 1 Moo. & M. 487; s. c. 4 Car. & P. 194; *ante*, 248.

‡ Bleaden *v.* Charles, 7 Bing. 246. The claim to costs was abandoned on the argument. The point was not decided. See this case commented on in Asprey *v.* Levy, 16 M. & W. 851.

‖ Gillett *v.* Rippon, 1 Moo. & Mal. 406. It is suggested in this case, by Gurney, of counsel for plaintiff, that "notice was given to the defendant, and he might have paid or stopped the action;" but nothing is said of any notice in the statement of the case, which was at Nisi Prius. See Freeman's Bank *v.* Rollins, 13 Maine, 202.

the defendants, on a bond given to the plaintiff as surety to the jail liberties for a debtor in execution, it appeared that the sheriff had given notice to the defendants, and that they assisted in the defence of the suit; it was held in New York that the costs of the suit against the plaintiff were properly re-
[331] coverable against the defendants.* The general principles which we have been here considering, have been applied by Mr. Justice Story to the subject of reinsurance; and it has been held that the party reinsured is entitled to recover a full indemnity for the entire loss sustained by him, and also for the costs and expenses which he has reasonably and necessarily incurred in order to protect himself and entitle him to a recovery over against the reassurer.[1] The contestation of the suit, however, must be just and reasonable; the expenses must be fairly and reasonably incurred; the conduct of the assurers must be *bonâ fide*, and in the exercise of a sound discretion; and as to notice, the learned judge proceeded to say,—

"It is precisely in this view that the consideration of notice of the suit becomes most important, even if it be not (as I am not prepared to say that it is) indispensable. If notice of a suit threatened or pending upon the original policy, be given to the reassurers, they have a fair opportunity to exercise an election, whether to contest or admit the claim. It is their duty to act upon such notice, when given, within a reasonable time. If they do not disapprove of the contestation of the suit, or authorize the party reassured to compromise or settle it, they must be deemed to require that it should be carried on; and then, by just implication, they are held to indemnify the party reassured against the costs and expenses necessarily and reasonably incurred in defending the suit. If they decline to interfere at all, or are silent, they have no right afterwards to insist that the costs and expenses of the suit ought not to be borne by them, as they are exclusively under such circumstances incurred for the benefit of the reassurers, and are indispensable for the protection of the party reassured."

In this case the reassurers were held liable to pay one-half the costs and counsel fees incurred by the assured in the defence of the original suit.†

The French law peremptorily requires notice, if the surety desires to charge the debtor with his expenses. Its language is clear: "The surety who has paid, has recourse against the principal debtor, whether he entered into the contract of suretyship with or without the knowledge of the debtor. And he shall

* Kip *v.* Brigham, 7 J. R. 168.

† N. Y. State Marine Ins. Co. *v.* Protection Ins. Co. 1 Story, 458.

[1] See the New York Central Insurance Company *v.* The National Protection Insurance Company, 20 Barb. (N. Y.) 468.

recover the principal, interest, and expenses; but the surety shall recover only such expenses as are incurred after the principal debtor is notified of the suit against the surety; and the surety shall also recover damages in a proper case.* [1]

Co-Sureties.—We have now to consider the relative [332] rights and liabilities of co-sureties. The right of action of the surety against the co-surety, or his representatives, arises when the surety pays, and not before.† And in these cases the surety is entitled to recover against the co-surety, or if more than one, against any of them, his aliquot portion of the sum paid. It is not necessary in such case to prove the insolvency either of the principal or of any of the co-sureties. But, on the other hand, the fact of the insolvency of the sureties will not increase the recovery against those who are solvent.‡

But where a surety sues a co-surety for contribution for money paid by the plaintiff on account of the principal, it has been held in Alabama, that the defendant may show that the surety suing for contribution was indebted to the principal in a larger amount than he was compelled as surety to pay for the principal, and thus defeat the claim for contribution. ‖ [2]

The question has been examined as to the right of the co-surety to be reimbursed for a proportion of any costs paid by him. In a case at Nisi Prius between co-sureties for a tax collector, it appeared the plaintiff had been sued on the principal's default, and judgment had been recovered, and the plaintiff claimed, besides half the verdict against him, half the costs of

* "La caution qui a payé, a son recours contre le débiteur principal, soit que le cautionnement ait été donné au su ou à l'insu du débiteur. Ce recours a lieu tant pour le principal, que pour les intérêts et les frais; néanmoins la caution n'a de recours que pour les frais par elle faits depuis qu'elle a dénoncé au débiteur principal les poursuites dirigées contre elle. Elle a aussi recours pour les dommages et intérêts, s'il y a lieu. Code Civil, art. 2028.

† Wood *v.* Leland, 1 Met. 387.

‡ Cowell *v.* Edwards, 2 Bos. & Pull. 268.

‖ Bezzell, Adm'r, *v.* White, 13 Ala. (N.S.) 422.

[1] Damages on bonds of indemnity are assessed up to the trial. Spear *v.* Stacy, 26 Vt. 61.

[2] In an action by sureties against a co-surety for contribution, where the debt was paid by a transfer of land, the Supreme Court of Indiana lately said, "The price at which the lands were received in payment would, we think, ordinarily constitute the proper rule. If they were taken on a compromise of a doubtful claim, or from parties of doubtful solvency, at a price greatly above their value, perhaps the amount on which contribution by a co-surety would be estimated, would be their actual value. The lands were the plaintiffs', and without regard to their cost they were clearly entitled to the increase in their value, or the legitimate profits made by their purchase, not exceeding, however, the amount paid by them on the debt for which the defendant was liable." Jones *v.* Bradford, 25 Ind. 305. As between the two, we should suppose the lands must be taken at the value at which they were received in payment of the debt. The measure of the damages of the surety who has paid the debt is his co-surety's proportion of the amount so paid, and if it were paid in something else than money, then the same proportion of the amount of money for which the thing transferred was accepted by the creditor.

both parties in the original suit. But Lord Chief Justice Tenterden held at Nisi Prius, that the defendant was only liable for half the verdict.* No question was made either as to notice, or the necessity of the suit, nor, would it seem, could any such question properly arise between co-sureties.

But in a more recent case, in the Exchequer, where the plaintiff and defendant had executed, as co-sureties, a warrant of attorney given as a collateral security for a sum of money advanced on mortgage to the principal, and on default being made by the principal, judgment was entered upon the [333] warrant of attorney, and execution issued against the plaintiff, it was held that he was entitled to recover from the defendant, as his co-surety, a moiety of the costs of such execution, Parke, B., saying, "They are costs incurred in a proceeding to recover a debt for which, on default of the principal, both the sureties were jointly liable; and the plaintiff having paid the whole costs, I see no reason why the defendant should not pay his proportion.†

The same principles which we have been considering, are applied to claims made against sureties; so it has been said, that if one becomes surety for a debtor, the creditor cannot recover from the surety the costs of a fruitless suit against the debtor unless he give notice of his intention to sue.‡

It is perfectly well settled in regard to sureties, in suits against them by the principal creditor, that if there has been no fraud, the apparent inadequacy of the consideration will not exonerate them; and that in case of non-payment by the debtor they become liable for the whole debt, no matter how great the apparent insufficiency of the remuneration they receive. ‖[1]

Costs as Between Lessee and Sub-Lessee.—A question has arisen on covenants in leases, as between lessee and sub-lessee, which goes to illustrate the general subject which we are now

* Knight *v.* Hughes, 3 Car. & P. 467; s. c. M. & M. 247.

† Kemp *v.* Finden, 12 Mees. & Wels. 421. A distinction may, perhaps, be taken between costs incurred in a suit, and upon entering up judgment on a warrant of attorney; otherwise these decisions are inconsistent, and if so, I should consider the former the more correct in principle; for, as between the indorser and maker of a note, there is no contract to save harmless, and each surety should stand ready to pay the debt.

‡ Baker *v.* Garratt, 3 Bing. 56, per Best, C. J. This was an action against the sheriff for taking insufficient sureties on a replevin bond.

‖ Oakley *v.* Boorman, 21 Wend. 588.

[1] But the courts will go behind the contract of a surety for the payment of the whole amount secured to be paid by a note, and limit his liability to the amount actually paid, with interest. Cobb *v.* Titus, 10 N. Y. 198.

considering. Elizabeth Coppock demised certain premises to the plaintiff with covenant to repair by lessee; the plaintiff demised the premises to one Finch, for a portion of his own term, with covenant to repair and leave in repair, by lessee. Finch assigned to the defendant, who broke the covenant, by leaving them out of repair at the end of the term. By reason of this, the plaintiff was obliged to pay Elizabeth Coppock, the chief lessor, £10 damages and £100 costs of both sides in the suit brought on the covenant. On the question whether the costs were recoverable by the lessee, against the sub-lessee, the Court of King's Bench held they were, saying, "If the plaintiff could not recover those damages and costs against the defendant, he would be without redress for an injury sus- [334] tained through the neglect of the defendant, and not in consequence of his own default." *

Here it will be seen that there was no covenant to indemnify by the sub-lessee; and on this ground the decision which I have just stated has been overruled by the English Exchequer. Price made a lease to Penley of certain premises, with covenant that he, Penley, would repair. Penley underlet to Watts, also with covenant to repair; but the covenants were dissimilar. Price sued the plaintiff for breach of covenant to repair, in the original lease. The dilapidations proved were £57 10*s.*; in addition to which the plaintiff's costs amounted to £36, and the defendant's to £40. These costs were claimed against Watts. The judge who tried the cause held, that as there was no covenant to indemnify, the defendants in this suit were not liable to costs; and the plaintiffs were allowed to recover only the amount of £57 10*s.*, with leave to move to increase it by the amount of costs, £76. On showing cause, this was held right, and Parke, B., said, "If the plaintiffs had desired to be secured against these costs, they might have made themselves safe by taking a covenant of indemnity against any breach of covenant in the original lease; and then they might have recovered these costs." And after stating that the covenants were dissimilar, he said, "Under the defendant's contract the amount of damages is the damage necessarily sustained by the breach of their own covenant; *i. e.* the amount necessary to put the premises in the same state and repair in which the defendants ought to have kept them. If the plaintiffs have expended more, that is their own fault, for which the defendants are not liable." †

* Neale *v.* Wyllie, 3 B. & Cr. 533.

† Penley *v.* Watts, 7 Mees. & Welsby, 601. Walker *v.* Hatton, 10 Mees. & Welsby, 249, affirms this case, and again overrules the case of Neale *v.* Wyllie.

We have already considered the general rule by which the surety is denied any remuneration for the remote or indirect consequences of the principal's default.*[1]

* *Ante*, ch. iii.

[1] See as to the damages on statutory bonds and undertakings, *post*, 550, note.

CHAPTER XII.

RULE OF DAMAGES AS BETWEEN PRINCIPAL AND AGENT.

Liability of Agents for Nominal Damages.—The Measure of Remuneration is a Question of Law, whether the Common Law Forms of Assumpsit or Case be employed.—The Agent is charged with the Amount of the Loss, if he has been guilty of Negligence, whether the Loss be the Direct Consequence of his Neglect or not.—Cases examined.—The Agent may show that no Loss has resulted.—Liablity of Principal to Agent.—Sub-Agents.

DAMAGES IN THESE CASES NOT CONTROLLED BY FORM OF ACTION.—The class of cases which we next proceed to consider, presents some difficulty in regard to the arrangement of the subject, inasmuch as it is impossible in considering it, to adhere closely to any line of division drawn from the forms of action. Demands made by principals against their agents may be either said to arise from the breach of the agent's contract, or from the violation of his duty, and the actions of assumpsit or case can be indifferently used; in the one instance the proceeding being *ex contractu*, and in the other *ex delicto*. But inasmuch as the amount of damages, in the absence of any circumstance of fraud or other species of aggravation, is in either form of action a question of law under the control of the court, I shall consider this branch of our subject, as well as that springing from the liability of common carriers, under the general head of contracts.

In regard to the contract of agency, there is a very interesting class of cases growing out of the liability of the principal for the act of the agent. The maxim of the civil law, *Qui facit per alium facit per se*, and the rule resulting therefrom of *Respondeat superior*, have been adopted in our law to an extent making the principal in many cases responsible for the negligence or want of skill of the party employed by him.[1] There is also a large class of exceptions, where the person though employed by another still carries on a separate and independent calling,

[1] Where an agent without his principal's authority borrows money and invests it in property, the principals, by afterwards appropriating and selling the property for their own benefit, will be held to have ratified the act; and the measure of their liability is the amount borrowed, and not that realized from the sale. Watson *v.* Bigelow, 47 Mo. 413.

[336] recognized by common usage;* but these cases rather regard the right of action than the measure of compensation; and so contenting myself with having called the reader's attention to the subject, we turn to that of the rule of damages as between principal and agent where a clear cause of action exists.

It will also be observed that the questions embraced under the head which we are now considering, are very closely connected with another very large class of cases growing out of the relations of master and servant. But to this, more particular attention will be drawn hereafter.

The Law Fixes the Measure.—In some of the early cases growing out of the contract of agency it seems to have been held, with that disregard of any fixed rule which we have had occasion elsewhere to notice, that the jury had an unlimited control over the amount of compensation; thus, in an action against an attorney for negligence, "the jury were told they might find what damages they pleased."† But, according to the more precise and much safer view of the subject now uniformly taken in all cases of tort, where no aggravation is proved, the law fixes the measure of damages; and more especially is this true in those cases which we are now considering, where the action, though it may be shaped so as to be technically, and in form, an action of tort, is in reality in all cases founded on a contract either express or implied.‡

We shall have elsewhere to consider the rule in regard to sheriffs and other public officers, who, in some points of view, are regarded as agents of the party employing them. At present, our subject is the rule of damages where mere private agents have neglected or disobeyed the express or implied instructions of their principal.

The law is perfectly clear, that wherever an agent violates his obligation to his principal, whether by exceeding his authority, by misconduct or omission, and any damage results to his principal, he is responsible for such injurious consequence, and bound to make indemnity.‖ [1]

* Laugher *v.* Pointer, 5 B. & Cres. 547; Quarman *v.* Burnett, 6 Mees. & W. 499; Rapson *v.* Cubitt, 9 Mees. & W. 710; Milligan *v.* Wedge, 12 Ad. & Ell. 737; Martin *v.* Temperley, 4 Q. B. 298. In North Carolina, Wiswall *v.* Brinson, 10 Ired. 554. See the subject well discussed by Mullett, J., in Blake *v.* Ferris, 1 Selden, 59.

† Russell *v.* Palmer, 2 Wils. 325.

‡ Bank of Orange *v.* Brown, 3 Wend. 158.

‖ Story on Agency, ch. viii.

[1] In an action for the price of goods sold by a factor, a verdict for the highest market price is proper, in the absence of proof of the price actually obtained. Clark *v.* Miller, 4 Wend. 628.

NOMINAL DAMAGES.—We have already seen,* that [337] wherever an engagement is broken, or an obligation violated, the law, in the absence of the proof of actual injury, infers nominal damage to have resulted from it. In regard to agents, however, language has been used from which it might be supposed that this class of cases formed an exception to the general rule, and that unless positive loss were shown to have resulted from the agent's illegal act, no recovery whatever could be had. Thus says Mr. Justice Story, "There must be a real loss or actual damage, and not merely a probable or possible one." And again: "It is a good defence, or rather excuse, that the misconduct of the agent has been followed by no loss or damage whatever to the principal; for then the rule applies, that though it is a wrong it is without any damage; and to maintain an action, both must concur, for *damnum absque injuriâ* and *injuria absque damno*, are equally objections to any recovery."† I submit, however, that this language has probably been used with reference rather to the compensation than to the right of action; that no distinction can be taken in this respect between the breach of an agent's engagements and that of any other contract; and that if the inference of nominal damage from any illegal act is correct and logical, it should apply uniformly to all transactions embraced within the wide domains of the law.‡ [1]

Assuming, then, that in the absence of proof of positive loss, nominal damage will be inferred, we have to consider those cases where actual injury results, and where, as I have said, the agent is bound to make it good. In applying this rule we shall find the distinction taken, to which we have already frequently alluded, between proximate and remote damage. The loss for which remuneration is sought, need not be directly caused by the act done or omitted. It will be sufficient if it is a natural or a necessary consequence; but remote or merely possible consequences are excluded from consideration. This principle will be best illustrated by the cases which have been decided. But it may be stated as a general rule, that in all cases [338] of agency, whether the agent be one of private selection or *virtute officii*, whether factor or sheriff, the omission or misconduct of the agent in regard to the matter with which he is

* *Ante*, ch. ii.

† Story on Agency, §§ 222 and 236. See this case cited in Blot *v.* Boiceau, 3 Comstock, 78.

‡ And so it has been decided in New Hampshire; Frothingham *v.* Everton, 12 N. H. R. 239. So, also, in Blot *v.* Boiceau, 3 Comstock, 78.

[1] See, however, *post*, 511 (former marginal page, 517), notes.

charged or intrusted, renders him liable to the principal in damages; and where he has been appointed to obtain or receive any given sum of money, or security therefor, and it appears that he was guilty of misconduct, and that the money or security was not obtained, these two facts will, in the absence of other proof, be treated as cause and effect. The negligence will be held to be the cause of the loss, and the sum of money in question or the security therefor, will be *primâ facie* the measure of damages sustained by the principal.[1] Evidence, however, that such is not the case, that the negligence was not and could not have been the cause of the loss, or that the real damage is less, will throw the burden of proof back upon the plaintiff, and compel him to show the damage he has actually sustained by the neglect of the agent.

The damage, as I have heretofore had occasion to say,* must be proximately caused by the act or omission of the agent, but it need not be the direct result of it. Thus, says Mr. J. Story, "If an agent knowingly deposit goods in an improper place, and a fire accidentally ensue, by which they are destroyed, he would be responsible for the loss;" and so the Master of the Rolls said, speaking of trustees, "If the loss had happened by fire, lightning, or any other accident, that would not be an excuse for them if guilty of previous negligence."† In these cases, though the loss is not the immediate consequence of the negligence, but of the fire, still it may be truly said that it would not have occurred except from such negligence.‡ So if an agent, in procuring a policy of insurance, should so negligently execute his duty, as that the risk (for example, a peril of the seas by which a loss was caused) should not be included, although the loss was directly owing to the peril of the seas, still it was proximately owing to the negligence of the agent, [339] and the principal may accordingly recover.

Insurance Brokers.—These questions very frequently arise between merchants and insurance brokers or factors. So in a case‖ where the defendants, in taking out a policy for the plaintiffs, had omitted "a liberty to touch at the Canary Islands," and having touched there, and being captured, the underwriters refused to pay on the ground of deviation, Lord Ellenborough held, that the plaintiffs were entitled to recover

* *Ante*, ch. iii.

† Story on Agency, § 218; Caffrey *v.* Darley, 6 Vesey, 488, 495.

‡ See Williams *v.* Littlefield, 12 Wend. 362.

‖ Mallough *v.* Barber, 4 Camp. 150.

[1] See this passage commented on in Charles *v.* Altin, 15 C. B. 46.

a verdict for the sum insured, deducting the premiums. Again, in a case* where the defendant, in effecting a policy, had departed from his instructions, and the vessel being lost, the underwriters, in consequence of the agent's neglect, were not liable; two of the underwriters for £200 having paid the loss, and a third for the same sum having become bankrupt, Gibbs, C. J., held that the plaintiff was entitled to recover the amount directed to be insured, less the £400 paid, and the £200 subscribed by the bankrupt underwriter; and the plaintiff accordingly took a verdict for the balance.†

In a case in New York, where premiums had been paid at Savannah to an agent of underwriters doing business at New York, and a bill was filed against the company to compel the execution of a policy, Mr. Senator Colden said, "Suppose an action had been brought against the Savannah agent for not sending the premium to New York in due time, can there be a doubt that the appellant would have recovered in a court of law, and that the measure of damages would have been the amount which was to have been insured, and for which the premium was paid?" ‡

Again, if an agent who is bound to procure insurance for his principal, neglects to procure any, and a loss occurs to his principal from a peril ordinarily insured against, the agent will be bound to pay the principal the full amount of the loss occasioned by his negligence.

In a case on the Pennsylvania circuit,‖ the late learned Mr. Justice Washington charged—

"That in case a merchant is in the habit of effecting insurance for his [340] correspondents, and is directed to make an insurance, and neglects to do so, he is himself answerable for the losses as an insurer, and entitled to a premium as such. That the amount of loss for which an underwriter who had subscribed the policy would have been answerable is the only measure of damages against him. If he can excuse himself for not having effected the insurance, he is answerable for nothing; if he cannot excuse himself, he is answerable for the whole."

And it appears that, on exception to the charge, this judgment was affirmed in the Supreme Court of the United States.

The same point was laid down in another case, by the same able judge,¶ still more broadly: "The law is clear, that if a

* Park *v.* Hammond, 4 Campb. 344.

† See this case, 6 Taunt. 495, where a new trial was refused, but nothing was said as to the measure of damages.

‡ Perkins *v.* Washington Ins. Co. 4 Cowen, 645 and 664.

‖ Morris *v.* Summerl, 2 Wash. C. C. R. 203 (1808).

¶ De Tastett *v.* Crousillat, 2 Wash. C. C. R. 132.

foreign merchant who is in the habit of insuring for his correspondent here, receives an order for making an insurance, and neglects to do so, or does so differently from his orders, or in an insufficient manner, he is answerable not for damages merely, but as if he were himself the underwriter; and he is of course entitled to the premium."

BANKERS.—If a bank receive a note for collection in another State, and neither collects it nor gives the owner notice of non-payment, nor returns it till barred by the statute of limitations, and there be no evidence of the insolvency of the maker, the measure of damages is the amount of the note less the charges for collection.*

It has been settled in New York, that on a deposit of the bill of exchange with a banker for collection in another State where it was payable, the banker was liable to the holder for any neglect or omission of duty, in respect of such collection on the part of his agent or the notary employed by him in the foreign State; †[1] and on the authority of this case it has also been decided that where a person undertakes the collection of a bond

* Wingate *v.* Mechanics' Bank, 10 Barr, 104.

† Allen *v.* Merchants' Bank, 22 Wend. 215.

[1] The same doctrine was re-asserted in The Montgomery County Bank *v.* The Albany City Bank, 3 Seld. (N. Y.) 459, reversing s. c. 8 Barb. 396; and again in The Commercial Bank of Pennsylvania *v.* The Union Bank of New York, 1 Kern. (11 N. Y.) 203. In the latter case the Bank of Wilmington was the owner of a bill of exchange payable at sight, at Troy, and indorsed and transmitted it to the Commercial Bank of Pennsylvania, under an arrangement by which the latter collected and retained the proceeds of paper thus remitted to it, and with the same redeemed the circulating notes of, and paid drafts drawn by the Bank of Wilmington. The Commercial Bank indorsed and transmitted the bill to the Union Bank of New York, its correspondent in New York, for collection, and the same was by the latter sent to the Troy City Bank for the same purpose. Held, that the Commercial Bank of Pennsylvania could recover of the Union Bank of New York, the amount of the bill, if collected by the Troy City Bank, or if the same were lost by the omission of the latter to charge the drawer and indorser. See also, the same case in the court below, reported 19 Barb. 391.

In an action against bankers for omitting to present a note for payment, and to charge the indorser, the amount of the note is *prima facie* the rule of damages, but the defendants can show in mitigation that the indorser was insolvent, or not worth property enough to enable the amount to be collected by process on a judgment, and, if the plaintiff sustained no actual damage, reduce the recovery to a nominal amount. Allen *v.* Suydam, 20 Wend. 321; reversing s. c. 17 W. 368. And if the indorser is shown to be wholly insolvent, it is said by the Supreme Court of New York that the defendants are entitled to a verdict. The plaintiffs are entitled to so much damages as they appear to have sustained with reference to the amount of the indorser's property. Bridge *v.* Mason, 45 Barb. 37. (But with great deference it may, perhaps, be questioned whether nominal damages ought not in such a case to be allowed, notwithstanding the insolvency of the indorser. A banker's neglect to present the note received by him for collection imports a breach of duty, since on no other ground could a recovery be had for its non-presentment. And if there be a fault in not presenting the note, the law, we think, implies that some damages are sustained by the holder, although proof of the maker's destitution of means would reduce them to a nominal amount. See Blot *v.* Boiceau, 3 Comst. 78.)

In a class of actions brought against officers, not to establish a right, but merely to recover compensation for a loss or injury, it has been held, however, that pecuniary damage must be proved to *some* extent, and that if there be no actual damage whatever, the action cannot be maintained. See *post*, 511, *in notis*.

and mortgage, and covenants in express terms "*to take proper means* to collect the mortgage," he is responsible for the default of the solicitor employed by him, and the amount of the bond and mortgage is the *primâ facie* measure of damages.*

FACTORS AND OTHER AGENTS.—In a case in the English Common Pleas,† the question was carefully considered by a very able court. The plaintiff put lime on board the [341] defendant's barge, to be carried from Medway to London; the barge deviated; while out of her course a tempest ensued, in consequence of which the sea communicated with the lime, and by reason of this the barge took fire; the master then, for the safety of himself and crew, ran her on shore; and the result was, that both the vessel and cargo were lost. It was insisted for the defendants that the deviation was not a sufficiently proximate cause of the loss of the lime to entitle the plaintiff to recover. But a verdict having been given for the plaintiff, on a motion for a new trial, Tindal, C. J., in delivering the opinion of the court, said, "We think the real answer to the objection is, that no wrong-doer shall be allowed to qualify or apportion his own wrong, and that as a loss has actually happened while his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action, the bare possibility of a loss if his wrongful act had never been done. It might admit of a different construction if he could show, not only that the same loss *might* have happened, but that it *must* have happened, if the act complained of had not been done; but there is no evidence to that extent in the present case." And this reasoning is adopted by Mr. Justice Story in his work on Agency.‡

In Pennsylvania, where a party in London consigned goods to a correspondent in Philadelphia, to be delivered to a third party, only in case of his paying the amount or giving satisfactory security, and the agent delivered the goods without requiring either payment or security,—it was held that the agent had thereby made himself liable[1] for the full amount of the

* Hoard *v.* Garner, 3 Sandf. 179.
† Davis *v.* Garrett, 6 Bing. 716 (1830).
‡ Chapter viii, § 218. See, to s. p., Parker *v.* James, 4 Camp. 112.

[1] See American Express Co. *v.* Dunlevy (Supreme Court of Indiana), 3 Am. Law Reg. (N. S.) 266. So in a late case in the English Common Pleas, where agents, notwithstanding what the jury found were instructions not to part with certain goods consigned to them until they had received their price, caused the goods on their arrival in London to be transhipped on board a vessel named by them, taking the mate's receipt in their own names, and the vessel sailed to Melbourne with the goods on board without the vendee paying for them, the agents were held liable, and the value of the goods was the measure of the plaintiff's damages. The Stearine Kaarsen Fabrick Gonda Co. *v.* Heintzmann, 17 C. B. (N. S.) 56.

original debt, with a reasonable compensation for the delay of payment.*[1]

Such, too, is the language of all the most eminent authors of our law. "In this," to use the clear language of Mr. Sergeant Marshall,† "as in all other cases where a man, either by an express or implied undertaking, engages to do an act for another, and has either wholly neglected to do it, or does it improperly or unskilfully, an action on the case will lie against him to recover a satisfaction for the loss or damage resulting from his negligence, carelessness, or want of skill." [342] In an action against a broker for negligence or unskilfulness in effecting an insurance, "the plaintiff," says the same author,‡ "is entitled to recover the same amount as he might have recovered against the underwriters had the policy been properly effected." "And so," says Mr. Phillips,‖ "the agent puts himself in the place of the underwriters, and must pay the loss, or the part of it for which the underwriter is not liable, but for which he would have been liable had the policy been made according to the instructions, or in such manner as the principal had a right to expect and require."¶

The same principle was applied in an action of assumpsit,** where the defendants had been employed as factors to settle with underwriters as for a total loss. The defendants adjusted the loss at 20 per cent., and canceled the policy; and the court said, "If the defendants, as agents or factors of the plaintiffs, have, through mistake or design, disobeyed their instructions, they are undoubtedly responsible, and are to be considered as substituted for the insurers. This was a point conceded on the argument;" and a motion for a new trial on the ground of excessive damages was denied.

Limits of Compensation.—But the plaintiff can only have judgment for the same sum which in point of law he might have recovered on the policy, and not for any amount which the indulgence or liberality of the underwriters might possibly have

* Walker *v.* Smith, 4 Dall. 389.
† On Insurance, book i, ch. viii, § 2, 297.
‡ Vol. 1, 300, b. 1, ch. viii, § 2.
‖ On insurance, vol. 2, 566, ch. 22.
¶ Delaney *v.* Stoddart, 1 T. R. 22; Wilkinson *v.* Coverdale, 1 Esp. 75; Wallace *v.* Tellfair, cited 1 Esp. 76; Thorne *v.* Deas, 4 J. R. 84; Miner *v.* Tagert, 3 Bin. 204; De Tastett *v.* Crousillat, 2 Wash. C. C. R. 132; Harding *v.* Carter, 1 Park on Insurance, 5.
** Rundle *v.* Moore, 3 J. C. 36.

[1] In an action against a factor in a foreign country for his breach of contract in refusing to deliver there on demand, certain notes and evidences of debt, the measure of damages is the sum of money in the currency of the place where the suit is brought, which most nearly approximates to what he would be entitled to recover in the country where the injury was sustained. Nickerson *v.* Soesman, 98 Mass 364

induced them to pay. So,* where the plaintiff had requested insurance to be effected at Liverpool on certain slaves, and the defendant had neglected it, it was contended that though the plaintiff could not have recovered the value of the slaves in an action against the underwriters, yet that in point of [343] fact these slaves were frequently the subject of insurance at Liverpool, where the loss was always paid by the underwriters without disputing the question; and that consequently the plaintiff might recover the value of them in this action, because by means of the defendant's negligence the plaintiff had sustained the loss. "But the court were clearly of opinion that the slaves were not the subject of insurance, and that the plaintiff could not recover in this action more than he could have recovered *in an action* against the underwriters." † "And so," says Mr. Justice Story,‡ "there must be a real loss or actual damage, and not merely a probable or possible one." So, if the ship deviate, or the voyage or insurance be illegal, or the principal had no interest, or the voyage as described in the order would not have covered the risk,—in all such cases the agent will not be responsible.

Nor will the plaintiff in such an action be allowed the costs of an unsuccessful suit against the underwriters, unless such action was necessary, or brought by the direction of the agent. So,‖ where the plaintiff had been nonsuited in an action against the underwriters, on the ground of concealment of material information, and in the suit against his agent, claimed to include the costs of the action on the policy, Lord Eldon said, that there was no necessity to bring that action to entitle the plaintiff to recover in the aforesaid case, and as it did not appear that the action on the policy was brought by the desire or with the concurrence of the present defendant, he ought not to be charged with the costs of it; and this is in analogy to the rule, as we have seen it laid down between principal and surety.

ACTUAL LOSS THE CRITERION.—But assuming that the principal is entitled to demand of the defaulting agent remuneration for his loss, the embarrassing question constantly recurs; what is the limit of the compensation that he seeks? The general rule undoubtedly is, in this as in all other cases of contract, that the damage actually sustained is the criterion of remunera-

* Webster *v.* De Tastett, 7 T. R. 157.
† See also, Fomin *v.* Oswell, 3 Camp. 357.
‡ Agency, § 222.
‖ Seller *v.* Work, Marsh. on Ins. 243, 5th Eng. ed. part i, ch. viii.

tion. So in the State of Alabama, where an agent was instructed not to sell cotton for less than 14 cents a pound, it was held that a disregard of these orders did not authorize the princi-
[344] pal to recover up to the limit he had set, but that the criterion was the price at which other cotton of that quality had been sold during the season.* [1] So, too, when the plaintiff had instructed the defendant not to sell a horse for less than $500, and the orders were disobeyed, it was nevertheless held that, notwithstanding the instructions, the plaintiff could only recover the actual value of the animal.†

But I confess the reasoning of these cases appears to me doubtful. Where an agent accepts a consignment with limits of sale, and by selling contrary to orders puts it out of his power to return the goods, or the price understood and fixed on beforehand, it seems the least he is legally bound to do is to pay the value at which the owner had previously appraised them.[2]

In a case in the King's Bench,‡ the plaintiffs who had shipped certain goods on board the *Mary Stevens*, to be carried from Liverpool to Trieste, brought their action against the owners of the ship, on the ground that the vessel had deviated, and having subsequently been captured, the plaintiffs had thus lost the benefit of a policy of insurance. The

* Austill *v.* Crawford, 7 Ala. 335.
† Ainsworth *v.* Partillo, 13 Ala. (N. S.) 460; and see, to same point, Blot *v.* Boiceau, 3 Comst. 78.
‡ Parker *v.* James, 4 Camp. 112 (1814).

[1] In a similar case in Massachusetts, where the action was against factors for the breach of an agreement not to sell tobacco at less than forty cents a pound, but to hold it subject to the plaintiff's orders till they should sell it at that price, the plaintiff was allowed to recover for the loss sustained, by a failure to obey his orders, an amount not exceeding forty cents a pound, or the market value at the time when the return of the tobacco was demanded. The increase of market value up to forty cents a pound before the demand, was an item of damage. This ruling was sustained. In delivering the opinion of the court, Mr. J. Foster uses the following language: "We do not find it necessary to decide what rule of damages is absolutely correct. It has sometimes been said that the highest market price before action brought is the standard; at others, that the highest value before the trial may be awarded. It is safe to say that the factor is at least liable for the highest market value of the goods within a reasonable time after the sale in violation of his instructions. Maynard *v.* Pease, 99 Mass. 555.

[2] Where a consignee was instructed, unless he could obtain 22*s.* a barrel for a cargo of flour on its arrival, to hold it until a newly enacted tariff should "have produced its results," but sold it prematurely and in violation of the instructions, as was found by the jury to whom the question of violation was submitted at the trial, it was held by the Superior Court of the city of New York that in computing the damages to be recovered, if any, by the consignor, the jury were to determine the time when the flour might reasonably and prudently have been sold, and having done so, the consignee was to be charged with the amount. His advances and expenses were to be credited him with interest, and the balance with interest from the time the sale might have properly been made, the plaintiff was entitled to recover. The judgment was reversed by the Court of Appeals (21 N. Y. 386) on the ground that the factors had been vested with a discretion which they had rightfully exercised, and did not violate their instructions. The rule of damages was therefore not considered on the appeal. Millbank *v.* Dennistoun, 1 Bosw. 246.

cost price of the goods, with the shipping charges, amounted to £4,411 13*s.* 9*d.* The plaintiffs had paid for premium of insurance, £720 16*s.* 6*d.* The defendants had paid the plaintiffs the sum of £4,411 13*s.* 9*d.*, but refused to pay the £720 16*s.* 6*d.* And Lord Ellenborough said that the premiums were not recoverable.

"The plaintiffs," said the learned judge, "were entitled to recover the value of their goods on board the ship at the time she was captured by means of the deviation. They had actually received the cost price, together with the shipping charges. I have no evidence before me that the goods were worth more. The case is silent as to the profits of the adventure. Had there been no insurance, I could not have said, without proof, that the goods were worth more than the cost price and shipping charges, and I cannot say that, by the mere act of insurance, the value of the goods is enhanced by the amount of the premiums."

This decision may with great deference be questioned. Here the plaintiffs had actually disbursed the sum of £720, which became of no value to them by the act of [345] the defendant; and it would seem that the burden of proof should have been thrown on the defendant, obliging him to prove that the disbursement in question could have been of no service to the plaintiffs.[1]

AGENTS FAILING TO SHIP GOODS AS DIRECTED ARE LIABLE FOR THEIR VALUE AT THE PORT OF DESTINATION.—A case in the Supreme Court of the United States* exhibits another species of injury inflicted by an agent on a principal. Cunningham & Co., of Boston, owners of the *Halcyon*, sent her from Havana to the defendants below, Bell, De Yough & Co., with directions to invest of the freight (which was about 4,600 petsos), 2,200 petsos in marble tiles, and the balance in wrapping-paper, to be shipped by the same vessel to Havana. The defendants disobeyed the directions, and invested the whole in wrapping-paper. The tiles would have made a considerable profit; the paper made a heavy loss. Trial and verdict for the plaintiff; exception and writ of error. The plaintiffs in error (the defendants below), insisted that Cunningham & Co. were

* Bell *v.* Cunningham, 3 Peters, 59 (1830).

[1] But may not this decision be maintained on the ground that the amount paid furnished a complete indemnity as far as could be ascertained? Had the policy not been avoided, this was all that could have been recovered on it, as the insurers would have been entitled to the premium. So, on the other hand, if the voyage had been completed without the occurrence of a loss within the policy, the insured would not have been compensated for the payment of the premium.

entitled to no more than the value of the money at Leghorn, which ought to have been invested in tiles, and not its value in Havana; or, in other words, that the value of 2,200 petsos at Leghorn, with interest, and not the value of the tiles at Havana, ought to be given. But the court overruled this, saying, "that it would be tantamount to a declaration that the breach of contract consisted in the *non payment* of two thousand two hundred petsos, not in the *failure to invest that sum* in tiles. Speculative damages dependent on possible successive schemes, ought never to be given; but positive and direct loss, resulting plainly and immediately from the breach of orders, may be taken into the estimate. Thus, in this case, an estimate of possible profit to be derived from investments at the Havana of the money arising from the sale of the tiles, taking into view a distinct operation, would have been to transcend the proper limits which a jury ought to respect; but the actual value of the tiles themselves at the Havana affords a reasonable standard for the estimate of damages. *[1]

[346] So in Louisiana, an agent failing to ship goods, which he was directed by the principal to do, is liable for the actual value of the goods at the port of destination.† It is proper to notice that this allowance of the value which the goods would have had at the place intended for the sale amounts to an allowance of profits, on the principles which we have heretofore had occasion to consider.‡[2]

In New York, the rule that has been stated was early applied to a case of considerable magnitude,‖ and carried even to a greater extent. Le Guen being owner of a large quantity of cotton and indigo, employed the defendants, Gouverneur & Kemble, to sell it for him. They sold it to Gomez, Lopez &

* This case will be found reported at Nisi Prius, 5 Mason, 161, where Story, J., told the jury, in very general terms, that they were at liberty to compensate the plaintiffs for the actual loss sustained in consequence of the defendant's default, but were not at liberty to give vindictive damages.

† Ryder *v.* Thayer, 3 La. Ann. R. 149. In this case exemplary damages were claimed; but the court said, "In case of a breach of contract, whether by the negligence or fraud of a party, no other sum can be allowed as damages than that which fully indemnifies the creditor."

‡ *Vide* ch. iii, p. 69, *et seq.*

‖ Le Guen *v.* Gouverneur & Kemble, 1 J. Cases, 436 (1800).

[1] So Farwell *v.* Price, 30 Mo. 587.

[2] Where a principal consigns property to his factor with instructions to sell it *upon its arrival*, the latter is bound to follow the instructions, and sell for the price it will command; and if he do not, he will become liable for the damage his principal may sustain in case of a fall in the market. Evans *v.* Root, 3 Seld. (7 N. Y.) 186.

When a factor intrusted with goods for sale on commission, pledges them for advances made to him, and gives the pledgee authority to sell them to reimburse himself, the rule of damages to which the principal is entitled is the difference between the value of the goods at the time of the conversion and their proceeds when sold by the pledgee. Kelly *v.* Smith, 1 Blatchf. C. C. R. 290.

Livera for $122,415 36, for which the purchasers gave their promissory notes, payable in a year. The cargo was to be shipped to France; and it was stipulated by a written contract, that the proceeds of the property in France should be first applied towards payment of the purchase money, and further, that Gouverneur & Kemble might have it at their option to receive the whole or any part of the cotton at any port where the vessel carrying the property might discharge in Europe. The plaintiff, Le Guen, made repeated applications to the defendants to make election to receive the purchase money out of the proceeds of the cargo in Europe, and to give an authority by which the plaintiff might receive the surplus thereof, after the defendants had retained a sufficient sum to indemnify them for all their advances and responsibilities on account of the plaintiff. This the defendants refused to do; and for this violation of their duty as agents, the plaintiff brought an action, charging them with the price agreed to be paid for the property by Gomez & Co. Benson, J., in delivering the opinion of the Supreme Court, said (p. 466):—

"The remaining question is as to the rule by which the jury have assessed the damages, and which from the record appears to have been the amount agreed on by the contract as the price of the cotton and indigo. I have already mentioned such of the rights of the factor as can have any relation to [347] the question between the present parties. I now briefly state his duty generally to be, that he is to follow the orders of his principal; and for a breach of these orders he is to answer in damages to his principal; if the breach is merely partial, and as to certain parcels or particulars only, he shall not be held to answer further than as to such parcels or particulars; but if the breach is such as to involve the whole of the property intrusted to him, he shall then be held to answer for the value of the whole of the property, and as such value was, at the time the breach of orders took place; and if the property consisted in credits, to answer to the amount of the credits; and the principal may from that moment abandon to him the whole of the property."

The real question decided as to the measure of damages, appears still more fully from the points taken on the argument of the writ of error which was brought upon this judgment. It appears by these points that the defendants insisted that they should have been allowed to show that the plaintiff, Le Guen, had in reality sustained no loss, that the property had sold at a ruinous sacrifice, and that they should have been permitted to prove what the proceeds of the cargo in Europe really were. For that purpose they say a witness who was in Europe and superintended the sales had attended the trial. The plaintiff, on the other side, contended that no inquiry should have been

allowed as to the actual damage. And the Court of Errors affirmed the judgment of the Supreme Court.[1]

THE AGENT MAY SHOW THE LOSS WOULD HAVE OCCURRED NOTWITHSTANDING HIS FAULT.—This case is, however, as to the measure of damages, substantially overruled by a very recent case, which I now proceed to examine. And it seems at length to be well settled, that if orders have been disobeyed, and injury results, the loss shall *primâ facie* be ascribed to the disobedience of orders, and that in the absence of conflicting proof, the *primâ facie* evidence shall be deemed conclusive; that the plaintiff can only recover such damage as it appears from the evidence certain or probable that he has actually sustained; and that the agent always is to be at liberty to show that if the order had been obeyed, the same damage would have resulted, or that the real loss is much less than the plaintiff's claim.*

[348] In an action on the case for negligence † in omitting, within a reasonable time, to present a draft for acceptance, the liability of the defendants was admitted. The judge of the Superior Court, where the cause was tried, charged "that the court and jury, having no knowledge of what the amount of damages was, except from the proof of the amount of the draft, the jury would find the verdict for the plaintiffs for the draft and for the interest thereon." A verdict having been found for the plaintiffs, the Supreme Court, after reciting the part of the charge in question, said: "Certainly, if there were anything appearing in mitigation it should have been put to the jury. The difficulty lies in discovering any real ground; the jury must have been left to decide by the merest conjecture. The case seems to have been *primâ facie* one of simple total loss, by the fault of the defendants below." But the Court of Errors reversed this judgment, on the ground that the amount of actual damages sustained should have been left to the jury.‡ The chancellor said:

"Where there is a reasonable probability that the bill would have been ac-

* It is true that Lansing, J., said that "the refusal of Gouverneur & Kemble to authorize Le Guen to receive such surplus was a violation of their trust, which amounts to full evidence of an intent *to convert the whole to their own use* regardless of the interests or instructions of their principals." This assimilates the case to an action of trover. But this ought not to alter the rule of damages, if to be governed by the consideration of compensation for injury actually done. If, on the other hand, the case showed fraud or malice, then a much larger discretion should have been left to the jury.

† Suydam *v.* Allen, 20 Wend. 321.

‡ Mr. Senator Verplanck delivered a very able dissenting opinion, as to the rule of damages.

[1] For the whole amount of the purchase money.

cepted and paid, if the agent had done his duty; or where, by the negligence of the agent, the liability of the drawer or indorser, who was apparently able to pay the bill, has been discharged, so that the owner of the bill cannot legally recover against such drawer or indorser, I admit, the agent by whose negligence the loss has occurred is, *prima facie*, liable for the whole amount thereof with interest, as damages, unless he is able to satisfy the court and jury that the whole amount of the bill has not been actually lost to the owner in consequence of such negligence. The case under consideration, however, is one of a very different description. Here it is perfectly evident, from the testimony of one of the drawees, that the draft would not have been accepted at any time after it was received by the Allens for collection; as the drawees had received express directions from the drawer not to accept, nor would they have accepted it even without such a prohibition, unless they had previously been advised so to do by the drawer. The fact also, that the drawer's credit was not good at the time this draft was received for collection, he having suffered his note to Boyd & Suydam to lie under protest for some time, and the express directions given by him to the drawers not to accept this draft, rendered it highly improbable that he would have paid the draft himself to save his credit if it had been sent back protested at an earlier day. From the facts of the case, therefore, I think there was no ground for supposing that the owners had sustained any actual damage from the mistake of the Allens in not sending on the bill [349] for acceptance immediately after they received it for collection in New York; or that their chance of obtaining payment from the drawer was materially impaired by the delay of the protest for a few days. Under the circumstances of this case, therefore, I think the jury should have been instructed that, upon the evidence, the plaintiffs were only entitled to nominal damages, or at least, they should have been told to find only such damages as they should, from the evidence, believe it probable the plaintiffs might have sustained by the delay in presenting the draft for acceptance immediately; for I do not see how it is possible for any one to believe, or even to suppose it probable, from this evidence, that the whole amount of this draft was in fact lost to the plaintiffs below, by the delay of the Allens in presenting it to the drawees, and giving notice of the dishonor thereof immediately to the drawer, who never intended that it should be accepted and paid."*

In a case in Pennsylvania where the principal sued the agent for neglect, the neglect complained of was in regard to the liability of the defendant for a debt of one Young, which he had failed to collect and secure. The plaintiff insisted that the defendant had by his neglect made himself liable for the whole amount of the debt. The defendant, on the other hand, contended that the plaintiff was bound to prove his actual loss, and that he could recover no more. But the Supreme Court of

* See this case commented on and explained, as to the liability of banks for negligence in such cases, in the Bank of Orleans, *v.* Smith, 3 Hill, 560. See also, Hoard *v.* Garner, 3 Sandf. S. C. R. 179, and *ante*, 357.

Pennsylvania held that the burden lay on the defendant, as to the actual loss; and, no such proof being given, that the defendant had made himself liable to the plaintiff for the full value of the goods placed in the hands of Young, or at least for the amount of money produced by the sales made of them.* In this decision, the court recognized as a general rule, however, that for an agent's omission to keep the principal regularly informed of the agent's transactions and the state of the interests intrusted to him, the measure of damages is to be proportioned to the actual loss sustained; with the exception, where the information transmitted is such as to induce the principal, in the adaptation of his operations to his means, to rely on an outstanding debt as a fund on which he may confidently draw, that in such case the agent makes the debt his own.

INTEREST.—In Massachusetts, it has been held, that [350] an agent who unreasonably neglects to inform his principal of the receipt of money, is liable for interest, although he acted in good faith.†

SALES BELOW LIMIT.—In New Hampshire, where goods are consigned‡ to a commission merchant or factory for sale, and the factory sells at a price below the limit without notice, it has been held that the consignor may recover damages, or may have the amount of the damages allowed in a suit brought by the factory to recover his advances. The measure of damages in such a case is the amount of injury sustained by the sale contrary to the orders of the principal. If no actual loss appeared to have been sustained in consequence of the wrongful act, the principal will be entitled only to nominal damages. And in accordance with this case it has been held in New York, where a factor sold contrary to his principal's orders, and below his limits, that he could discharge himself from liability by showing that the articles in question could not be made to bring more than the sum which they produced, or in other words that the goods were never worth more than they actually sold for.‖

In Louisiana, where wine was consigned by a New York house to the defendant, a New Orleans agent, to sell at a limited price, the defendant, after keeping it a long time on

* Brown *v.* Arrott, 6 Watts & Serg. 402; s. c. 6 Wharton, 9; Harvey *v.* Turner, 4 Rawle, 229; In Massachusetts, see Amory *v.* Hamilton, 17 Mass. 103.

† Dodge *v.* Perkins, 9 Pick. 368; Clark *v.* Moody, 17 Mass. 145, 149.

‡ Frothingham *v.* Everton, 12 N. H. R. 239.

‖ Blot *v.* Boiceau, 3 Comstock R. 78; s. c. 1 Sandf. S. C. R. 111; and *vide ante*, p. 344.

hand, reshipped it, without further directions, to the plaintiffs at New York; who received it, but under protest, and wrote to the defendant that they abandoned the property, and held it merely as belonging to the defendant, and subject to his order. It was afterwards sold by them at auction in New York, but at a price below the first limit, and they then sued the defendant for the damages resulting from the disobedience of their orders, insisting that they were entitled to recover the full value of the wine. But the Supreme Court of Louisiana held that the measure of damages ought to be the value of the wine at the highest market price in New Orleans, at any time before the suit brought, adding thereto the freight to New York, and deducting therefrom the value of the wine at New York, where the plaintiffs resold it.*

Sales against Orders.—In an action brought by [351] principal against factor, for selling cotton contrary to orders, it appeared that it was sold on the third of June, and the plaintiff insisted it should not have been sold before the twenty-third of August. The Supreme Court of the United States said, "Supposing the sale made by the defendants on the third of June to have been tortious and in violation of orders, the plaintiff had his election, either to claim damages for the value of the cotton on that day, as a case of tortious conversion, or for the value of the cotton the twenty-third of August following, when the letter of the plaintiff of the twenty-third of July was received, which authorized a sale. If the price of cotton on that day was higher than at any intermediate period, he was entitled to the benefit thereof. If, on the other hand, the price was lower, he could not justly be said to be damnified to any extent beyond what he would lose by the difference of the price of cotton on the third of June, and the price on the twenty-third of August."[1]

Liability of Principals to Agents.—We turn now to the claims of agents against their principals;[2] or of servants against

* Nelson *v.* Morgan, 2 Martin, L. R. 257.

[1] See the discussion of the rule of damages in trover, and in the case of the breach of executory contracts for the purchase of goods where the price has been paid for in advance, *post*, 481, note.

[2] Brokers.—Where a broker is employed, and no special compensation is agreed on, the customary rate of brokerage is the proper rule of value for his services. But if one not a broker is employed to negotiate for the purchase of property, he is entitled to the reasonable worth of his services, which may be more or less than the usual brokerage. See Erben *v.* Lorillard, 2 Keyes (N. Y.) 567.

Where the plaintiffs, who were brokers, having been ordered to buy stock, did so, paid

their masters, for we have already observed that the contracts of agency and of service are nearly allied. We have heretofore * considered the question how far the principal is liable to pay his servant or other agent, who is engaged for a specific time, and without sufficient reason quits the employment. But the question often arises to what extent the principal is liable when on the other hand he discharges the agent without legal excuse. In a recent English case,† the plaintiff was employed as clerk, to do the business of shipping agent at Southampton, under a contract of hiring for two years, at £150 for the first year, £160 for the second year, and also 50 per cent. on the gross profits. The defendant, alleging disobedience of orders and misappropriation of moneys, discharged him. The jury found these issues against the defendant and gave the plaintiff a verdict of twelve months' salary and twelve months' share of profits. One year's salary, within a trifling sum, appears to have been paid. A motion was made to set aside the verdict on the ground that the damages were excessive, but it was denied. Wilde, C. J., said, "With respect to the amount of damages, it was for the jury to say what amount of com-
[352] pensation the plaintiff was entitled to for the defendant's breach of contract." And Maule, J., said, "There is no ground for saying that the damages were miscomputed. It must be borne in mind that embezzlement was imputed to the plaintiff." The result at which the verdict arrived seems not open to observation. But the language of the court appears by no means equally free from objection. Why, in a case of this kind of simple contract, is it for the jury to fix without control the defendant's liability? and what has a charge of embezzlement set up in the plea, to do with the quantum of damages? If in a case of this description there is no rule of damages, it would seem to be difficult to declare one in any; and if an unfounded defence is to have the effect of turning an action of contract into one of tort, and to give the uncontrolled discretion of the subject to the jury, the principles which govern the measure of damages will in all cases be in great risk of being lost sight of. That there is a rule in cases of this kind, seems not to me to be doubtful; and it is, that the plaintiff has a right to recover the stipulated wages for the full time, subject

* *Ante*, 215, *et seq.*

† Smith *v.* Thompson, 8 C. B. 44.

for it, taking the certificate in their own name; offered to transfer it, and demanded of their principal payment, which he did not make, and the stock declined in value, it was held that they could recover the price paid by them, and not merely the difference between that price and the market value on the day of their demand. Giddings *v.* Sears, 103 Mass. 311.

to the defendant's right to recoup whatever the plaintiff might during the period have reasonably earned.[1]

So, again, where it was agreed between the plaintiff and the defendant that in case of a vacancy occurring in the command of a certain East India vessel the plaintiff should be appointed for two voyages, it was held that the jury *might* give damages for what the plaintiff could have earned on both the voyages, and that they were not limited to one.* Here, too, I apprehend that the jury were *bound* to give their verdict for both the voyages, subject, of course, to the right to recoupment.[2]

* Richardson *v.* Mellish, 2 Bing. 229.

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[1] In an action by a domestic servant for wages, evidence was given tending to show that the plaintiff had been dismissed from the defendant's residence in the country between eleven and twelve o'clock at night, and was left all night in the space between the hall door and the outer gate. The plaint contained a count for wrongful dismissal, with an averment of special damage. The jury under this count found for the plaintiff with £20 damages, ten shillings of which only were for wages due, and £19 10s. were for the injury suffered by the defendant from the circumstances of the dismissal. The defendant having moved to reduce the verdict to ten shillings, the court granted the motion, holding that under the pleadings she was entitled only to the wages due her by the contract of hire, and "could not recover as special damage in respect to any matters save such as would not have happened to her had the contract been fulfilled by payment of those moneys at the time of her dismissal." Mr. Baron Deasy, however, inquired of the plaintiff's counsel whether they could not frame a count upon the implied duty of a master to his servant that would meet such a case. Breen *v.* Cooper, 3 Ir. C. L. 621.

If the decision in this case was right, we think the severity of the rules of pleading in the Irish common law courts might be advantageously relaxed.

The plaintiff shipped as a seaman at a certain monthly rate of wages for a commercial voyage, not to exceed twelve months, to Rio and elsewhere, and to end by his being brought back to some port in the United Kingdom, or on the continent of Europe between Elbe and Brest. On arriving at Rio the defendant proposed to employ his vessel as a ship of war in the service of the Peruvian government. The plaintiff thereupon refused to proceed any further with the voyage, on the ground that it was illegal and exposed him to risks not contemplated by his contract, left the ship, and went on shore. There he was arrested by the Peruvian authorities as a deserter and committed to prison, where he remained some days. On coming out he found that the ship had sailed, taking his clothes and other articles which he had left on board. In an action for damages for the breach of contract the jury found a verdict for the plaintiff, and assessed the damages for the breach under three heads, namely: First, £12 10s. for loss of wages under the contract; second, £20 for loss of clothes; third, £30 for general damages for the imprisonment and otherwise by reason of the defendant's breach. *Held*, that the damages under the second and third heads were too remote. Burton *v.* Pinkerton, 17 L. T. (N. S.) 15; 2 L. R. Exch. 340; 36 L. J. Exch. 137.

See Wolf *v.* Studebaker, 65 Penn. St. 459; Chamberlain *v.* Morgan, 68 Penn. St. 168; Kirk *v.* Hartman, 68 Penn. St. 97; King *v.* Steiren, 14 Penn. 99; Ream *v.* Watkins, 27 Mo. (6 Jones) 516; Hartland *v.* The General Exchange Bank (limited), 14 L. T. R. (N. S.) 863 (N. P.). See *ante*, 212.

[2] In actions for wages brought against the employer by the servant or employee discharged without cause before the end of the contract of service, "a compensation is intended to be allowed," says Mr. Justice Story, "which shall be a complete indemnity for the illegal discharge, and this is ordinarily measured by the loss of time and the expenses incurred by the party." Emerson *v.* Howland, 1 Mason C. C. R. 45–53. See Hunt *v.* Colburn, Sprague's decisions (Adm.) 215. The recovery should be for the difference between the sum he should have received under the contract and that which he has or it is shown might have received elsewhere, the object being to compensate him for his loss of wages as far as it might not have been prevented wholly or in part by his own want of due diligence. His readiness to perform and prevention by his employer are not necessarily equivalent, as regards the question of damages, to actual performance. Whitaker *v.* Sandifer, 1 Duvall (Ky.), 261;

PRINCIPAL LIABLE FOR AGENT'S LOSS, AND EXPENSE INNOCENTLY SUSTAINED.—It has been very justly decided in Massa-

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Wright *v.* Faulkner, 1 Ala. Select Cases, 231; Fowler *v.* Armour, 24 Ala. 194 (*ante*, 224, note 1); Williams *v.* Anderson, 9 Minn. 50. He has no right to insist on employment in the same business or at the same price. If that business is not to be had, he is bound to engage in another, and if need be, at a less price. Perry *v.* Simpson Waterproof Co. 37 Conn. 520. The same rule of recovery has been applied to the case of a ship carpenter who had engaged for the voyage, where the shipping master failed to give him timely notice of the departure of the ship, which sailed without him. Maguire *v.* Woodside, 2 Hilt. 59. The plaintiff may consider the contract as rescinded, and recover on a *quantum meruit*, what his services were worth for the time he worked, deducting what he had received. Clarke *v.* Manchester, 51 N. H. 594. There is some disparity in the decisions in the case of the servant's failure to obtain employment, as to whether the burden of proof lies on him or the employer to explain it; and in Mississippi it is held that the servant, to recover for the time during which he was out of employment, must show due diligence in the endeavor to procure a situation. But the general rule is the other way. Benker *v.* Knickerbocker Life Ins. Co. 24 Wisc. 630; Thompson *v.* Wood, 1 Hilt. (N. Y.) 93. And in Minnesota, the Supreme Court of that State, while acquiescing in the doctrine that the employee's claim must be reduced by the amount which it was proved he had earned or might have earned elsewhere, as too well settled to be disturbed, remarked that it failed "to see on what sound principle a man was to be punished in this manner" for a failure in the performance of the abstract duty not to be idle, "or why the employer should be relieved from the consequences of a wilful breach of contract because the employee has committed a breach of a moral obligation." Williams *v.* Anderson, 9 Minn. 50. And to entitle the defendant to reduce the recovery on the ground that the plaintiff had earned money in another employment, it must also be shown that if he had not been discharged, he could not have earned it without violating his duty under his contract. Jaffray *v.* King, 34 Md. 317. But although, in actions of this sort, the burden of proof to show that plaintiff's failure to obtain employment is thrown on the defendant, the plaintiff is held to *active* diligence in procuring it, and he cannot recover so far as his loss might have been prevented by such diligence. Polk *v.* Daly, N. Y. Com. Pleas, March, 1873.

In accordance with the rule already stated (*ante*, 215), the servant who has not served the whole time of the contract of service cannot recover unless sooner discharged. Givhan *v.* Dailey, 4 Ala. 336; Miller *v.* Goddard, 34 Maine, 102; Badgley *v.* Heald, 4 Gilman (Ill.), 64. In Connecticut, however, a less strict rule obtains. Ryan *v.* Dayton, 25 Conn. 188. So in New Hampshire, the action is maintainable in such a case on the principles of a *quantum meruit*, provided it be brought after the expiration of the term. Hartwell *v.* Jewet, 9 N. H. 249. And as it is the actual loss and not prospective damage which is recoverable in these actions, the Supreme Court of Wisconsin, in a case where a clerk engaged at a salary of $2,000 a year for five years was discharged without cause at the end of the first year, and brought his action without waiting for the end of the term, held that he could recover damages measured by the contract down to the day of the trial only, with such deductions as were proper on the principles already stated. Gordon *v.* Brewster, 7 Wis. 355. In the Nisi Prius case of Hartland *v.* The General Exchange Bank, 14 L. T. R. (N. S.) 863 (*supra*), however, where the plaintiff, who had been engaged as manager of a banking company for a term of three years, was wrongfully dismissed at the end of four months, and thereupon immediately brought his action for the rest of his salary, Mr. Justice Willes instructed the jury to take the salary into account, but to reduce the amount by the *probabilities* of the plaintiff having other employment during the time.

But where at the time of the wrongful discharge no services have been performed under the contract that have not been paid for, it has been lately held in several cases by the Court of Common Pleas for the city of New York (not yet reported) that no action *can* be maintained for wages *under the contract*, and that the servant's only remedy is an action for damages for breach of the contract, in which he recovers full and final satisfaction. Moody *v.* Leverich; Wolfe *v.* Goodkind; Polk *v.* Daly, N. Y. Com. Pleas, March, 1873 (*supra*). In the first cited of these cases the subject is carefully examined by Daly, C. J., who arrives at the conclusion that there "never was any foundation for the doctrine of constructive service," and that "it is now wholly repudiated." The true measure of the damages in these cases is that intimated by Erle, J., in Goodman *v.* Pocock, 15 Ad. and El. (N. S.) 582, namely—the loss sustained at the time of the dismissal. The action is one for *damages* for the wrongful dismissal, but the wages agreed may be the proper measure of these damages, less the value of the employment obtained, or which might by reasonable exertions have been obtained, by the plaintiff. The decision in the above-mentioned case of Moody *v.* Leverich is derived from a series of

chusetts, that a factor cannot recover commissions when there is a loss to a greater amount occasioned by his negligence.* But it

* Dodge *v.* Tileston, 12 Pick. 328.

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cases, some of which are elsewhere cited, and others of which relate to the nature of the remedy rather than the measure of relief, and need not be here examined. The principle that when one party to a bargain, although the time for fulfilling it on his part has not arrived, definitively renounces it by doing something inconsistent with its continuance, such renunciation may be treated as a breach by the other party, who may thereupon immediately maintain an action for the damages thereby occasioned, has long been recognized in regard to certain breaches of contract. Such are the breach of a contract to marry, committed by the defendant marrying some one else than the plaintiff; the breach of a contract to execute a lease of particular premises, by leasing them to a third party; or the breach of a contract to sell and deliver goods, by the defendant putting the goods out of his control. In the case of Hochster *v.* de la Tour, 2 E. and B. 678, this principle is extended generally to executory agreements which are broken either by one party to the agreement disenabling himself from fulfilling it, or by his notifying the other that he renounces the contract. See also the Danube and Black Sea Railway Co. *v.* Enos, 13 C. B. (N. S.) 825; Frost *v.* Knight, L. R. 7 Exch. 111, reversing L. R. 5 Exch. 322. Where the action in such cases is brought before the time for fulfilling the contract, the plaintiff is compensated not for the damage which would be occasioned by breaking it at the time when it should be fulfilled, but for such damages, estimated prospectively, as he sustains the moment it is repudiated by the defendant, taking all the circumstances of aggravation and mitigation into account.

In a case lately decided by the Supreme Court of the United States, it was contended that the rule requiring diligence in seeking employment ought to be extended to the case of a public officer wrongfully ousted from his office. But the court held that "no such rule can be applied to public offices of personal trust and confidence." United States *v.* Addison, 6 Wallace, 291.

SEAMEN.—The measure of the damages sustained by a seaman in consequence of having been wrongfully left in a foreign port is indemnity for all he has lost and suffered, and may be more or less than his wages and expenses up to the time of his or of the ship's return home. Hunt *v.* Colburn, Sprague, 215. And see Foye *v.* Dabney, *Ib.* 212; Sheffield *v.* Page, *Ib.* 285. In ascertaining such indemnity, subsequent expenses and earnings may be taken into account. Bates *v.* Seabury, Sprague, 433. By statute (2 Stat. at Large, 203, act Feb. 28, 1803, § 3; 11 Stat. at Large, 62, act Aug. 18, 1856, § 26), American seamen discharged in a foreign country are entitled to two months' extra wages. But see 5 Stat. at Large, 395, act July 20, 1840, § 5.

It was held in Missouri, in a case not very fully reported (Cunningham *v.* Steamboat Low Water, 28 Mo. 338), where a hand employed on board a steamboat at a stipulated rate of wages for a trip, was discharged and put off the boat without cause before the end of the trip, and the boat, owing to an accident to her machinery, was detained for some days beyond the regular period of her trips, that he could recover wages only for the time usually consumed in a trip, and not for that of the additional detention. This decision seems to us to admit of question, and not to be fully borne out by the case of the Elizabeth (2 Dod's Adm. 403), which is referred to as authority for it. That case decided that when a ship bound to St. Petersburg from Portsmouth and back had met with an accident, the repairs necessitated by which detained her in a northern port where she would have been blocked up by the ice and detained all the winter, the master had a right to discharge his crew, on condition of paying their passage back to England, and wages up to the time of such return. This was a reasonable and justifiable course, and furnished the crew with a full and fair indemnity, which in the other case the boat hand failed to receive. To bring the latter case within the authority or analogy of the former, the hand should have been brought or sent back to the place where he was shipped, or indemnified for the expense of getting there, and have received wages for the time required for his return.

Where the action is for an injury of which the wages lost by the employee is a consequence, the rule of indemnity in respect to them, may require a larger measure than the time of the contract. Thus where the mate of a vessel was unlawfully wounded by the master in a foreign port during a voyage for which he had shipped, and was in consequence taken on shore, detained there, and subjected to medical treatment, it was held in an action against the owners for the injury, his compensation for lost time was not restricted to the period of the contract. He was entitled to damages equivalent to the injury, which included wages for such reasonable time as was lost by his detention, and till he could return home, besides the medical and other expenses necessitated by the wound. Croucher *v.* Oakman, 3 Allen (Mass.), 185.

is well settled that if an agent, without default, incurs losses or damages in the course of transacting the business of his agency, or in following the instructions of his principal, he will be entitled to full compensation therefor.*[1] So an agent has [353] been allowed to recover the damages paid by him on a protested bill drawn for his principal's benefit.† So an agent, who was indemnified against the commission of an act which was not known at the time to be a trespass, but which proved to be such, was allowed to recover against his principal the amount of the judgment recovered against himself.‡ And it is quite immaterial in these cases, whether the agent have a promise to indemnify him or not; the law implies an agreement on the part of the principal to save him harmless.‖[2]

It has been said that if an agent abroad, as for example, a foreign factor, should, at his own risk and peril, evade the payment of foreign customs and duties, he would still be entitled to charge them against his principal, as if they had been actually paid. But the lively moral sense of Mr. Justice Story is shocked at this idea; and he justly says, that it may well be doubted whether this doctrine is sound or maintainable.¶

Where merchants here gave a written engagement to their agent at the Havana, to save them harmless from all costs, damages, and expenses which might arise in consequence of any lawsuit which then was or might be brought against them for the recovery of freight or average on the cargo of a certain ship, it was held that the agents were entitled to recover for money which they were obliged to pay in consequence of legal proceedings on an award made previous to obtaining the written engagement.**

* Story on Agency, § 339.

† Ramsay *v.* Gardner, 11 J. R. 439.

‡ Coventry *v.* Barton, 17 J. R. 142.

‖ Powell *v.* Trustees of Newburgh, 19 J. R. 284; D'Arcy *v.* Lyle, 5 Binn. 441; Stocking *v.* Sage, 1 Day, Conn. 522; Story on Agency, § 339.

¶ Story on Agency, § 443, and authorities there cited.

** Hill *v.* Packard, 5 Wend. 375. See also Rogers *v.* Kneeland, 10 Wend. 219; s. c. in Error, 13 Wend. 114. In Pennsylvania, see Tiernan *v.* Andrews, 4 Wash. C. C. R. 564, and Elliott *v.* Walker, 1 Rawle, 126.

[1] Where an agent employed for an agreed commission to sell land finds a purchaser at the stipulated price, but the principal declines to sell, and revokes the agent's authority, the law implies a contract on the part of the principal to pay what is reasonable, and it seems the measure of damages would be the whole commission. Prickett *v.* Badger, 1 C. B. (N. S.) 296. See also, as to the broker's right to full commissions from the seller, where he finds a party ready to purchase on the terms proposed, although without his default the sale is not completed. Moses *v.* Bierling, 31 N. Y. 462; Doty *v.* Miller, 43 Barb. N. Y. 529. As to actions relating to attorneys' fees, under special contracts, see Ratcliff *v.* Baird, 14 Tex. 43; Myers *v.* Crockett, *Ibid.* 257.

[2] An agent who has brought an action for his principal, in which he has made himself liable for an illegal arrest, cannot mitigate the damages by showing that he acted under instructions. Josselyn *v.* McAllister, 22 Mich. 200.

LIABILITY OF SUBAGENTS TO FACTOR.—It has been held, that where a factor employs a subagent for the purpose of carrying out the instructions of the principal, if the subagent, by neglecting the directions of the factor, commit a breach of duty for which the factor is compelled to answer the principal in damages, the factor will be entitled to recover over from the subagent the damages which he has so sustained. This is the measure of his damages. Thus,* where the plaint- [354] iff had been commissioned by Gevers & Co. to ship a quantity of *best* Porto Rico tobacco for them to Holland, the defendants were employed by the plaintiff to execute the order, but bought Porto Rico tobacco *not* of the *best* quality, and which was proved at the trial to be very bad. Gevers & Co. refused to receive it, and sued the present plaintiff. He notified the defendants to furnish a defence to the action. Gevers & Co. recovered, and it was contended in the action against the subagent, that the measure of damages was the amount recovered by Gevers & Co. in the former suit, with the costs thereof. The defendants insisted that the true measure of damages was either the difference between the relative prices of the article in the London market, or between the relative values in the market in Holland; but the court held that the measure of relief should be the damages and costs recovered in the first action against the plaintiff—the plaintiff undertaking to assign the tobacco to the defendants, or to sell it and account to the defendants for the proceeds; and this having been so held at the sittings, a rule for a new trial was refused.†[1] And on the anal-

* Mainwaring *v.* Brandon, 8 Taunt. 202 (1818).

† *Vide* Russell on Factors and Brokers, 257.[2]

[1] Where one is subjected to a lawsuit for breach of a contract made without or beyond authority by another in his name, and duly notifies the latter to defend the action, the latter is liable to the former for the expense of the litigation. See Hughes *v.* Graeme, 33 L. J. R. (N. S.) Q. B. 335; L. R. 4 Q. B. 170; White, Rec'r, *v.* Madison, 26 N. Y. 117; Collen *v.* Wright, 7 E. & B. 301; Henderson *v.* Wright, L. R. 4 Q. B. 170. (*Ante*, 294, head, p. 357, note 1.) So, on the other hand, where the principal refuses to defend a suit brought against his agent, if the agent's course in defending it is a prudent and reasonable one, the principal will be liable to him for the costs thus sustained. Broom *v.* Hall, 7 C. B. (N. S.) 503.

[2] AUCTIONEERS.—It may not be amiss to state summarily, in relation with this chapter, certain rules of damages growing out of sales at auction, although they in part as properly belong elsewhere.

If an auctioneer sell real property without sufficient authority, so that the purchaser cannot get a title, the auctioneer will be liable to pay the purchaser's expenses of investigating the title, with interest on the deposit, and also interest on the purchase money, if it have been in readiness and unproductive. See Bratt *v.* Ellis, C. B. M. & H. Terms, 45 Geo. III; Sugden on Vendors, 812, 14th ed.; 8th Am. ed. 614, app. No. 5; Jones *v.* Dyke, Cor. Macdonald, C. B.; *Ibid.* 813 (8th Am. ed. 615); *ante*, head p. 209.

Where goods sold at auction requiring to be weighed or counted before delivery, are damaged after the sale and before delivery and before being weighed or counted, the measure

ogous cases of warranties and sureties, it seems very rightly decided.

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of the vendee's damages is the actual damage without reference to the price bid. Gerard *v.* Prouty, 34 Barb. 454.

An auctioneer sued for the proceeds of goods intrusted to and sold by him as such, cannot set up title in himself either as a defence to the action or in mitigation of damages. Osgood *v.* Nichols, 5 Gray, 420.

It is often an express condition of sales at auction, both in England and the United States, that in case a purchaser fails to complete the purchase, the goods shall be resold and the loss on the resale made good by him. In Alabama, the courts in acting on the rule that the vendor's damages resulting from the purchaser's failure, are the loss actually sustained (see Girard *v.* Taggart, 5 S. & R. 19), *imply* such a condition of the sale where it is made by official persons, such as a sheriff, school commissioners, or commissioners appointed by a probate court, and hold the purchaser liable for the difference between the greater price bid at the first and the lesser obtained at the second sale, regarding such difference in the nature of "damages stipulated between the parties." Adams *v.* McMillan, 16 Ala. (O. S.) 73; School Comm'rs *v.* Aiken, 14 Ala. (O. S.) 169; Lamkin *v.* Crawford, 8 Ala. (N. S.) 153; Hutton *v.* Williams, 35 Ala. (N. S.) 503. So in Rhode Island, in an action for refusing to convey land purchased at auction, the measure of damages is the value of the land at the time of the breach of the contract, deducting the amount of the bid. Barbour *v.* Nichols, 3 R. I. 187. So in Missouri, the excess of the sum bid at an auction sale of land over that at a resale, although not conclusive, is held to furnish a good criterion of the damages. Gardner *v.* Armstrong, 31 Mo. 535. So in Pennsylvania, the price obtained at a resale of land, publicly, fairly and duly conducted, is a proper test of its market value. Ashcom *v.* Smith, 2 Penn. 211. And such, under ordinary circumstances, is doubtless the general rule.

CHAPTER XIII.

THE MEASURE OF DAMAGES IN REGARD TO COMMON CARRIERS UPON BILLS OF LADING, AND ON CONTRACTS OF AFFREIGHTMENT.

The Value of the Article at the Place of Destination fixes the Measure of Damages.—Cases Examined.—Mode of arriving at the Value.—Rule, when Suit is brought by Carrier on Breach of Agreement to furnish Freight.

THE LAW MEASURES THE DAMAGES IN ACTIONS AGAINST CARRIERS, EXCEPT FOR NEGLIGENT INJURIES TO THE PERSON.—The class of cases which we now proceed to consider, like those discussed in the last chapter, cannot be made to conform to the line that separates our forms of proceedings; as the actions against common carriers may be framed either *ex contractu* upon the breach of the engagement, or *ex delicto* upon the violation of the public duty. But we shall find that, whether the action be assumpsit on the contract, or case on the violation of duty, the measure of damages is equally a question of law, and as much under the control of the court as if the right rested in agreement merely.[1] The liabilities flowing from bills of lading,[2] which are express contracts, and can only be treated as such, will also be examined under this head. In this class, however, are by no means included those cases where carriers are sued for injuries to the person resulting from negligence. In these no recovery can be had, unless misconduct on the defendant's part is proved; and then, although there be no express malice or deliberate intent to injure, still the law, unable to fix on any

[1] In Mississippi, however, a certain distinction in the rule of damages according to the form of the action is recognized. Where the action is in contract, the attorneys' fees for bringing the suit are not recoverable from the carrier, the damages being then measured only by the value of the lost property. New Orleans, Jackson and Great Northern R. R. Co. *v.* Moore, 40 Miss. 39. But it was intimated by the court in the case cited, that if the action were in tort, the attorneys' fees might be included in the recovery, on the ground apparently that in the latter form of action such charges might be considered and allowed by the jury as exemplary damages. We have elsewhere considered the question of the allowance of such expenses as exemplary damages. *Ante*, 98. For another instance of the application of this Mississippi rule, see Miss. Central R. R. Co. *v.* Kennedy, 41 Miss. 671.

[2] In case of a shipment of goods upon which freight has been paid in advance, the usual clause in the bill of lading exempting the shipowner from loss by perils of the sea, does not conclude the shipper from recovering back the full amount of the freight advanced, when by the dangers of the sea the voyage has been broken up and the delivery of the goods prevented. Phelps *v.* Williamson, 5 Sandf. (N. Y.) 578.

precise rule of compensation, surrenders the matter to the control of the jury, subject always to the restriction that their verdict must be free from corruption, prejudice, or passion.[1]

VALUE AT PLACE OF DESTINATION OF GOODS NOT DELIVERED WITH INTEREST THE GENERAL RULE.—As a general rule, where goods are intrusted to a carrier, and they are not delivered according to the contract, the value of the goods, *with interest* thereon from the day when they should have been delivered, is the measure of damages.*[2] But the question at once [356] arises, whether that value is to be computed at the place where delivered to the carrier, or at the place of destination. We have seen it said that, in cases of illegal capture and of collision, the actual damage sustained at the time and place of the injury fixes the measure of damages;†[3] but in regard to carriers, it seems to be well settled that the analogy of this rule does not hold good, and that the measure of damages is the value of the goods at the place of destination.[4] This sometimes

* Ludwig *v.* Meyre, 5 Watts & Serg. 435; Hand *v.* Baynes, 4 Wharton, 204; Segura v. Reed, 3 La. Ann. R. 695.

† *Ante*, 69, 70, *et seq.*

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[1] See Bridgman *v.* The Steamboat Emily, 18 Iowa, 509. As to the liability of express companies, see Hersfield *v.* Adams, 19 Barb. 577.

[2] Stated exactly, the general rule in such cases is the value of the goods at the place of destination in the condition in which the carrier undertook to deliver them, at the time when they should have been delivered, less the proper charges of transportation and delivery. Sturgess *v.* Bissell, 46 N. Y. 462. See Sherman *v.* Wells, 28 Barb. 403; Spring *v.* Haskell, 4 Allen, 112; McGregor *v.* Kilgore, 6 Ohio, 358; Laurent *v.* Vaughan, 30 Vt. (1 Shaw), 90. It is the value of the goods, not their cost. N. O. Jackson and G't North R. R. Co. *v.* Moore, 40 Miss. 39, *supra*. So in the case of goods lost by an innkeeper, their value, not their cost, measures the damages. Needles *v.* Howard, 1 E. D. S. 54. The same rule applies to goods on storage with a warehouseman, which he refuses to deliver. Leonard *v.* Dunton, 51 Ill. 482. Compensation for the actual loss which is the natural and proximate consequence of the act, and excluding speculative profits and remote or indirect losses, is the fundamental principle of the rule of damages in claims of this nature. Medbury *v.* The N. Y. & Erie R. R. Co. 26 Barb. (N. Y.) 564. In an action against a railroad company for negligence in transporting plaintiff's slave, whereby he escaped from his master's service, the jury are not bound, as in cases where property has been destroyed, to give damages to the full value of the slave. O'Neall *v.* The South Carolina Railroad Company, 9 Rich. (S. C.) L. 465. As to the allowance of special damages in actions of contract against carriers, see *ante*, 76. Pursuant to the principles there considered, the mere inability to fulfill a subcontract arising out of the breach of the contract on which damages are claimed, cannot be computed in the damages, unless the defendant knew actually or constructively of the subcontract at the time when he entered into his contract with the plaintiff. Caledonian R. Co. *v.* Cole, 3 L. T. 252 (H. of L.). The expense of searching for lost baggage is not recoverable. Miss. Cent. R. R. *v.* Kennedy, 41 Miss. 671. But it is the duty of the owner or shipper of goods, as of all parties to contracts, to lessen the amount of damages sustained by the other party's default, as far as he reasonably can. (See Hamilton *v.* McPherson, 28 N. Y. 72; *ante*, p. 77; see also, Miller *v.* Mariners' Church, 7 Greenl. 51, and authorities cited p. 65, n. 2.) And in an action against a railway company, for damages to a lot of flour, it was held that the plaintiff might prove and recover as his damages the reasonable and necessary expenses of putting the flour in a saleable condition, it appearing that the expense was for the defendant's benefit. Winne *v.* The Ill. Cent. R. Co. 31 Iowa, 583.

[3] See *post*, 469, n.

[4] Whitney *v.* The Chicago and Northwestern R. Co. 27 Wisc. 327; Chapman *v.* Same, 26.

involves an inquiry into foreign markets,[1] and will generally include the profits of the adventure; but it has been rightly held that nothing less will satisfy the contract. It is the value of the article at the place of delivery, that the plaintiff, relying on the carrier, has lost; it is that value which he would have received if the contract had been performed.[2] If the goods have been transported by the carrier, he is entitled to deduct his freight;[3] but if he do not perform any part of his contract, then the difference between the value of the article at the place of shipment and at the place of delivery, furnishes the measure

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Wisc. 295; Dean *v.* Vaccaro, 2 Head (Tenn.), 488; Louis *v.* Steamboat Buckeye, 1 Handy (Superior Court of Cincinnati), 150; Gillingham *v.* Dempsey, 12 S. & R. 183; Wardon *v.* Greer, 6 Watts (Penn.), 424; Nourse *v.* Snow, 6 Greenl. 208; Sangamon & Morgan Railroad Company *v.* Henry, 14 Ill. 146; Bailey *v.* Shaw, 4 Fost. (N. H.) 297; Ringgold *v.* Haven, 1 Cal. 108; Price *v.* The Steamship Uriel, 10 La. Ann. 412; Shaw *v.* The South Carolina Railroad Company, 5 Rich. (S. C.) L. 462; Nettles *v.* The Same, 9 *Ibid.* 465. So, also, where by special contract the carrier has undertaken to deliver goods at a place beyond his own route, the same rule will be applied. Perkins *v.* Portland, Saco, and Portsmouth R. R. Co. 47 Maine 573. In Indiana, this point is left undecided. Michigan S. & N. I. R. R. Co. *v.* Caster, 13 Ind. 164. But where the goods were lost *before the carrier's ship had left port*, the Superior Court of the city of New York, after reviewing the cases, held that the measure of damages was their value at that port, not their value at the port of destination, less the cost of transportation. And where such loss occurred without negligence on the carrier's part, the plaintiff was held not entitled to recover interest on the value of the goods even after the suit was brought. Lakeman *v.* Grinnell, 5 Bosw. 625.

[1] In a case decided by Mr. Justice Story in 1844, where a box of gold coin had been shipped from New York to be carried to Mobile, and the ship was wrecked off the coast of Florida, and most of the cargo saved and taken to Key West, where salvage proceedings were instituted, but the coin was lost through the master's gross neglect, the measure of damages was held to be its value at Key West, with interest from the time when the salvage proceedings were taken. King *v.* Shepherd, 3 Story, 349.

In an action against common carriers for the value of ninety double eagles of U. S. coinage, entrusted to them as common carriers, to carry from Acapulco to Newburyport, the measure of damages was the value in legal tender notes of the coin as a commodity, at the time when and place where it should have been delivered, with interest on the amount from the date of the demand. Cushing *v.* Wells, Fargo & Co. 98 Mass.

But in an action against a hotel keeper for the loss of a bag of gold coin, it was held by the Court of Appeals of New York, modifying the judgment below (1 Lansing, 397), that the judgment should be entered in *coin*, and not in its equivalent in currency. Kellogg *v.* Sweeney, 46 N. Y. 291. It may be remarked that in this case, Peckham, J., delivering the opinion of the court, observes that he sees no reason for calling the gold coin "merchandise." It is, however, held by the Supreme Court of the United States, that gold coin, during the rebellion, was "an article of merchandise," within the meaning of the acts of July 13, 1861, and May 20, 1862 (12 Stat. at Large, 255, 404), prohibiting the taking of "goods, wares and merchandise to an insurrectionary district." Gay's Gold, 13 Wall. 358. And see The Vaughan and Telegraph, 14 Wall. 258; *post*, 469, *n.*

[2] Van Winkle *v.* The U. S. M. Steamship Co. 37 Barb. 122. And if by acts of the carrier the plaintiff is prevented from showing the value, the jury may allow the value of the best quality of such goods. Bailey *v.* Shaw, 4 Fost. (N. H.) 297.

[3] Atkisson *v.* Steamboat Castle Garden, 28 Mo. (7 Jones) 124; The Michigan Southern & N. I. R. R. Co. *v.* Caster, 13 Ind. 164; Taylor *v.* Collier, 26 Geo. 122. A carrier who receives goods from a wrong-doer, without the consent of the owner, expressed or implied, can have no right to detain them against the true owner for the payment of his freight. But when the freight is earned in good faith, under a contract of transportation made with an agent of the owner, who, according to the usages of the business, is clothed with apparent authority by his principal, then the charges for freight will constitute a valid lien on the property, although the agent, by an accidental or intentional departure from his instructions, sends the goods by a route not intended, or to the wrong place. In an action by the owner of goods against a third person to whom they had been sent by mistake, and who had paid the freight on them in good faith, he was held entitled to a deduction of the amount of the freight. Whitney *v.* Beckford, 105 Mass. 267.

of damages, deducting in this case also the freight or price of carriage.[1] If, however, another conveyance can be found by using ordinary care, the plaintiff is bound to do so; and in such case, the measure of damages will be merely the difference between the freight or price of carriage agreed on with the defendant and the sum (if greater) which the plaintiff has been obliged to pay others.[2] We shall best understand the application of these rules by an examination of the adjudged cases.[3]

[1] Rice *v.* The Ontario Steamboat Co. 56 Barb. (N. Y.) 584; Bridgman *v.* The Steamboat Emily, 18 Iowa, 509. If there be no market for such goods, at the place agreed for delivery, the Court of Queen's Bench say the jury must ascertain their value by taking the price at the place of manufacture, together with the cost of carriage, and allowing a reasonable sum for the importer's profit. O'Hanlan *v.* The Great Western R. R. Co. 34 L. J. R. (N. S.) Q. B. 154. The value must be ascertained by a money standard based on evidence. It cannot be assessed on conjecture. Fraloff *v.* The N. Y. Cent. and Hudson R. R. Co. 10 Blatch. C. C. R. 16. For the mode of determining the market value of goods, see *ante*, 278, 279.

It is now generally the law in the United States, although it is not so in England, that the receipt by a carrier of goods destined to a place beyond the terminus of his route, does not in itself imply a contract on his part to carry them beyond such terminus. Hood *v.* N. Y. & N. H. R. R. 22 Conn. 1; Elmore *v.* The Naugatuck R. R. Co. 23 *Ibid.* 457; The Naugatuck R. R. Co. *v.* The Waterbury Button Co. 24 *Ibid.* 468; Hempstead *v.* N. Y. Cent. R. R. Co. 28 Barb. (N. Y.) 485; Dillon *v.* N. Y. and Erie R. R. Co. 1 Hilt. (N. Y. C. P.) 231. In such a case the destination of the goods as regards the carrier on one of the several routes over which they are transported is the terminus of his particular route; and their value at that point, and not at their ultimate place of consignment, usually defines his responsibility. See Louis *v.* Steamboat Buckeye, 1 Handy (Superior Court of Cincinnati), 150, *supra*. But circumstances may modify this rule, and in fixing the amount reference is to be had to the ultimate destination intended for the goods.

Thus, where apples intended for the New York market, which destination was known to the carrier, were to be transported by the New York Central Railroad to the intermediate town of Albany, which was the terminus of the railroad, and there delivered to another carrier to be conveyed to New York, Albany was held to be the port of destination as regarded the railroad company, and the value there furnished the rule of damages in an action against it for injury to the apples by freezing while in its charge. But proof of their value in New York was held admissible, the court considering that the value in that city, deducting the freight thither from Albany, would be a proper rule of damages. Marshall *v.* N. Y. Cent. R. R. Co. 45 Barb. 502. See also, Harris *v.* Panama R. R. Co. 5 Bosw. 312. "In estimating the damages in cases where the article to be transported cannot be purchased at the place of destination, and the carrier who has contracted to carry it has the exclusive right of transportation by the cheapest mode," say the Supreme Court of Georgia, "the difference between the price agreed on, or usual by that mode, and the terms on which others would carry it by other modes of transportation, ought to be considered, and in this case, and all like it, it might not be improper to admit additionally, evidence of losses by the expense of hands, etc., during a *necessary* suspension of business occasioned by the default of the carrier for a period during which the plaintiff by ordinary diligence could not supply himself by other means with the article agreed to be carried." Cooper *v.* Young, 22 Geo. 269.

It is said by the Supreme Court of Georgia to be the legal presumption, in the absence of positive evidence, that a commodity is worth as much at the place of destination as at that of shipment. Rome Railroad Co. *v.* Sloan, 39 Geo. 636. And in an action against a carrier for the loss of cotton, where the plaintiff, instead of proving the latter of these values, proved the former only, it was held by that court, that the defendant, not having contradicted this evidence, could not justly complain. *Ibid.*

[2] Where the carrier's default consists in delaying the delivery of the goods till after the time stipulated by the contract, or in the absence of a stipulation as to time, in delaying it unreasonably, the rule of damages is considered, *post*, 359, *note* 3, head p. 430.

[3] In an action upon a contract of affreightment, which has been violated, the measure of damages is the value of the property at the place of shipment, with interest from that time, unless there be other damages connected with and proximate to the contract. Jackson *v.* The Julia Smith, 6 McLean's C. C. R. 484. See also, on this subject, Jackson *v.* The Julia Smith, 1 Newb. Adm. R. 61; Sanquer *v.* The London &c. Railway Company, 32 Eng. L. & E. 338. Where a carrier having instructions to deliver cotton at Norfolk to a factor who had been di-

In an action of assumpsit * against the defendants, as ship-owners, for not delivering a cargo of wheat consigned to the plaintiffs, the cargo reached the port of discharge, but was not delivered, and the price of the cargo at the time it reached its port of destination was held to be the true rule of damages. "As between the parties in this cause," said Parke, J., "the plaintiffs are entitled to be put in the same situation as they would have been if the cargo had been delivered to their order at the time when it was delivered to the wrong party; and the sum it would have fetched at that time is the amount of the loss sustained by non-performance of the defendant's [357] contract." In New York, the same rule has been laid down in an action against the master of a vessel, where the goods had been embezzled on the voyage without fraud on the part of the defendant; † and this language was held as to interest: "The question of interest depends on circumstances. The jury may give interest by way of damages, in cases in which the conduct of the master was improper. But here no bad conduct is to be imputed to him, and interest is not in every case and of course recoverable, because the amount of the loss is unliquidated, and sounds in damages to be assessed by the jury." [1]

* Brandt *v.* Bowlby, 2 Barn. & Adol. 932. also, Smith *v.* Richardson, 3 Caines, 219.
† Watkinson *v.* Laughton, 8 J. R. 213. See See also, Elliott *v.* Rossell, 10 J. R. 1.

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rected to hold it until further orders, delivered it instead to a factor at Petersburg, who having no instructions about it sold it immediately, and cotton rose rapidly and steadily after the sale, the court applied the rule of damages that governs the case of factors who sell their principals' goods without authority, and held the carrier liable for the highest price the goods would have realized at any time before the suit was brought, that having been done with reasonable diligence. Arrington *v.* Wilmington and Weldon R. R. Co. 6 Jones (N. C.) Law, 68. Where goods are injured on shipboard, the measure of damages is the difference between their value in their damaged state at the port of destination and what it would have been there if they had been delivered in good order. Such actual value should be ascertained by a public sale to the highest bidder. Henderson *v.* Ship Maid of Orleans, 12 La. Ann. 352. See Black *v.* Camden and Amboy R. R. 45 Barb. (N. Y.) 40. In such an action it is in the discretion of the jury to allow interest, but it is said to be error to instruct them to do so. *Ibid.* But see as to the allowance of interest, *post*, 357, *n.* 1. So where goods were thus damaged during transportation, and were received by consignees upon an understanding that the depreciation was to be made good to them, and they were sold at auction by the consignees, but with the assent of the master; *Held*, that for the purpose of making adjustment of the amount due from the vessel for the injury, the sum realized at the sale should be regarded as the value of the goods in their damaged state. The Columbus, 1 Abbott's Adm. R. 97; compare Jellinghaus *v.* The New York Insurance Company, 4 Sandf. (N. Y.) 18. Factors' charges cannot be allowed. Kyle *v.* The Laurens Railroad Company, 10 Rich. (S. C.) L. 382. The carrier in an action against him for injuries to the goods through his negligence, is not entitled to a deduction for so much of the loss as is covered by insurance. Merrick *v.* Brainard, 33 Barb. (N. Y.) 574.

[1] A vessel having on board a cargo of flour for transportation, capsized at her wharf before sailing, and the cargo was much damaged. The carriers might easily have communicated with the owners of the cargo, and sought instructions as to the disposal of it; but they neglected to do so, and sold the cargo upon their own authority, at auction; after which the vessel sailed, and in due time arrived at the port of delivery. *Held*, 1. That

So in another case,* where suit was brought on an agreement to carry a quantity of salt from Oswego to Queenston, the difference in value of the article at Oswego and at Queenston at the time, was held the true rule of damages. And the same rule, with the same modification as to interest, was again laid down by the same court.†

In Pennsylvania,‡ the doctrine of the State of New York has been affirmed. It was an action on the case, brought to recover damages of the defendant for refusing to transport wheat from Pittsburg to Philadelphia, according to contract. The transportation was prevented by the approaching freezing of the canal. The defendant contended that the measure of damages was the difference between the price agreed on for the freight, and that for which their carriage might have [358] been obtained by others; and the court said that this would be the rule, if the plaintiff *could* have obtained other conveyance.[1] "The plaintiff would have no right, by his own negligence or want of care, to incur a voluntary loss for the purpose of imposing it on the defendant as a penalty for the breach of contract. If, as is usually the case here, another conveyance could have been obtained for this wheat before the canal froze up, by a little extra expense and the delay of a day

* Brackett *v.* M'Nair, 14 J. R. 170.

† Amory *v.* M'Gregor, 15 J. R. 24. See also, Edminson *v.* Baxter, 4 Hayw. 114. The Superior Court of New York, in Wheelwright *v.* Beers, 2 Hall, 391, against the dissenting opinion of Oakley, J., adopted a different rule. It was an action of covenant on a charter party, by which the defendant had stipulated that the Champion should perform a voyage from New York to Omoa and back.

The vessel proved unseaworthy, put into Norfolk, where the voyage was broken up, and the plaintiff's cargo sold. It was held that the loss on the goods (*taking them at their invoice price*) resulting from the sale, was the true rule of damages, on the ground that there was no fault or fraud on the part of the defendant, and that the case showed only a breach of the implied warranty of seaworthiness.

The previous cases, as we have seen, do not go on the ground of *fault or fraud;* they turn simply on the breach of contract, and it would seem that the rule should be the same, whether the defendant agrees to transport the goods to their place of destination, or that his ship shall do it.

An early case, Smith *et al. v.* Richardson, 3 Caines' N. Y. T. R. 219, turned on a question slightly different; but it seems imperfectly reported, and it is only necessary here to refer to it.

‡ O'Conner *v.* Foster, 10 Watts, 418.

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the owners of the cargo were entitled to recover the value of the cargo at the port of delivery, deducting freight and charges, and interest on the balance. 2. That the value of the cargo should be computed by the market price at the port of delivery, at the time of the arrival of the vessel, it appearing that, except for the accident, the cargo would at that time, in the ordinary course of things, have been delivered; with a privilege, however, to the owner to claim the amount realized upon the sale of the goods at auction. The Joshua Barker, 1 Abbott's Admr. R. 215. See also, The Gold Hunter, 1 Blatchf. & H. 300, where the value of the goods at the port of destination, at the time when the goods should have been delivered, *with interest*, but allowing the carrier's charges, was held to be the measure of damages. Interest on the value which measures the damages is now, we think, uniformly added in the United States in this class of cases. Cowley *v.* Davidson, 13 Minn. 92. Woodward *v.* Illinois Central R. Co. 1 Bissell, 403. So interest is properly allowed in the value of lost luggage. Mote *v.* The Chicago and N. W. R. R. Co. 27 Iowa, 22; Fraloff *v.* The N. Y. Central and Hudson R. R. Co. 10 Blatch. C. C. R. 16.

[1] In an action for the refusal by the defendant to perform an agreement to transport corn in

or two, he would have no right to claim greater damages than would have been incurred by such extra expenses and delay." But the defendant offering no such proof, the true rule of damages was held to be, the difference between the value of the wheat in Pittsburg, with the freight added, and the market price at Philadelphia, at the time it would have arrived there if carried according to the contract.[1]

In a case on the Massachusetts circuit,* where a libel was filed in admiralty against vessel and master for not delivering a cargo at Velasco, the vessel arrived out, and the consignee refusing to receive it, the master, contrary to his duty, carried it on to New Orleans. It was held that the libellants were entitled to recover the actual value at Velasco at the time when the cargo should have been landed there, deducting all duties and charges, and the freight for the voyage, as if the cargo had been duly landed; and Mr. Justice Story said, that the rule adopted in prize cases, of an addition of ten per cent. to the price cost of the cargo, did not apply to cases like the present; that rule ordinarily supposing that the vessel has been captured before she arrived at the port of destination, and the court making the presumption of the additional value of ten per cent. in *odium spoliatoris*.[2]

In Massachusetts it was agreed by bill of lading, that [359] the net proceeds of the cargo at the port of destination should be paid to the shippers in ninety days after the return of the vessel to her home port; the ship having arrived out, the goods were sold, and the proceeds invested by the owners

* Arthur *et al. v.* The Schr. Cassius, 2 Story, 81.

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his ship, at a certain price, the plaintiff is entitled to recover for his damages the difference between the contract price and what he would be compelled to pay for the same service. And when a refusal to perform on the part of a contractor is shown, and it is proved that the price of transportation had risen before the time the ship sailed, the plaintiff is entitled to his damages, measured by the rise in the price, without proving that he had the corn ready to ship. Ogden *v.* Marshall, 4 Seld. (8 N. Y.) 340; see Grund *v.* Pendergast, 58 Barb. (N. Y.) 216.

[1] The principle of this case was reaffirmed in McGovern *v.* Lewis, 56 Penn. 231; also Fox *v.* Hayward, 4 Brewster, 32. And see Forsyth *v.* Palmer, 14 Penn. St. 96. The master of a vessel having contracted for the transportation of a cargo, the performance of the contract was interrupted while the lading of the cargo on board was going on, by the death of the master, and afterwards by the freezing up of the vessel. The owner repudiated the contract, and refused either to take on board the residue of the cargo, or to deliver up that already laden. *Held*, 1. That the shipper could recover damages for the value of the brick laden on board and withheld; for the cost of transporting the residue from his storehouse to the dock; for any injuries received by them while they lay there awaiting acceptance by the owner of the vessel; and for the difference in the shipper's disfavor, if any, between the contract price of transportation, and his actual expenses incurred in obtaining another mode of conveyance. 2. That he could not recover against the vessel for injuries received by the property after notice of the owner's refusal to complete the contract, but that the vessel was chargeable with the cost of transporting the portion of cargo left behind, to its place of destination. The Flash, 1 Abbott's Adm. R. 119.

[2] See the Gold Hunter, 1 Blatchf. & H. 300.

of the ship on their own account, in return cargo; the ship met with disaster and injured her cargo 50 per cent., but arrived at her home port; and it was held that the shippers were entitled to recover the whole net amount for which the adventure was sold in the foreign port.*

In the same State, it has been intimated that where a package is delivered to a common carrier, whose liability is unlimited by notice, though the party delivering is not obliged to state its value unless inquiry is made, yet if on inquiry a false answer be given, or any concealment or deception be practiced, the carrier will not be held responsible for the subsequent accident.† [1]

CARRIER'S DELAY.—Where the plaintiff complained not of non-delivery, but of delay of arrival,[2] and in consequence of the delay it became necessary to remove the goods to another place to sell them, it was considered that the expenses of such removal were rightly recoverable; but the question of such necessity is of course for the jury. ‡ [3]

* Wallis *v.* Cook, 10 Mass. 510; Winchester *v.* Patterson, 17 Mass. 62.

† Dwight *v.* Brewster, 1 Pick. 50; Phillips *v.* Earle, 8 Pick. 182.

‡ Black *v.* Baxendale, 1 Exch. Rep. 410.

[1] This rule is well established. And even if no inquiry be made by the carrier, nor false statement by the other party, yet if the carrier be reasonably deceived as to the nature and value of the parcel, as where valuable merchandise intended for sale is contained in a trunk delivered to him as the luggage of a traveler, he will be exonerated. Richards *v.* Westcott, 2 Bosw. 589.

[2] A word may be said here as to the converse question of the liability of the freighter, or consignee, for damages for delay of the vessel while unlading. Demurrage, in the strict sense of the term, means a sum of money due by express contract for the detention of a vessel in loading one or more days beyond the time allowed for that purpose in the charter-party. It seems that the *consignee* cannot be made liable for demurrage, where there is in the charter-party, or bill of lading, no express agreement or stipulation in respect to it, or in respect to lay days. But the *freighter* is liable to the vessel for any unnecessary detention in loading or unloading, although no express contract is made on the subject; and compensation for such detention may be recovered under the name of demurrage. Sprague *v.* West, 1 Abbott's Adm. R. 548. It was said, however, in a case in the New York Supreme Court, that although there has been no special agreement between a shipper of goods and the master of a vessel for demurrage, yet if the vessel is improperly detained an unreasonable length of time by the freighter or *consignee*, the owner of the vessel may recover damages, in the nature of demurrage, for such detention. That was, however, an action against the freighter. The damages in these cases should be limited to compensation for the time the vessel was actually detained by the consignee beyond a reasonable time for the discharge of her cargo. Clendaniel *v.* Tuckerman, 17 Barb. 184; see Wordin *v.* Bemis, 32 Conn. 268; Morse *v.* Pesant, 2 Keyes (N. Y.) 16. Such damages are measured by the day, like demurrage. *Ibid.*

[3] But, pursuant to the rule in Hadley *v.* Baxendale (9 Exch. 341), the hotel expenses of a traveler waiting for a parcel delayed by a carrier who was not informed of the purpose for which it was intended, were lately held too remote. Woodger *v.* The Great Western R. Co., 2 Law R. (C. P.) 318; see *ante*, 356, note.

The extent of a carrier's liability for delay in the transportation or delivery of goods has been a subject of much recent discussion. Where there is no injury to the goods, and they are offered to the owner after the time when, by his express or implied contract it was the carrier's duty to deliver them, the owner is not entitled to refuse to receive them with

MODE OF ESTIMATING VALUE.—We have next to inquire in

the view of holding the carrier for their full value. If he does so, he can recover, in the absence of special circumstances, an indemnity only for his actual loss. Scoville *v.* Griffith, 12 N. Y. 509. The measure of the damages is the loss from the delay, not the value of the goods (Briggs *v.* New York Cent. R. R. Co. 28 Barb. 515), provided they are not substantially changed in character, but remain fit for all ordinary uses of such property. Hackett *v.* B. C. & M. R. R. 35 N. H. 390. The carrier cannot be holden for time, nor for expenses, if they are not the natural and necessary consequence of the delay. Benson *v.* The New Jersey Railway and Transportation Co. 9 Bosw. (N. Y.) 412. In Illinois, in an action against a carrier for delay in delivering machinery, the measure of damages was held to be the value of the use of the machinery during the period of improper detention. Priestly *v.* Northern Indiana and Chicago Railroad Company, 26 Ill. 205. In this case it did not appear that the carrier was notified of the purpose for which the machinery was designed, so as to bring the case within the second branch of the rule in Hadley *v.* Baxendale (9 Exch. 341). The value of the use was allowed as a natural and direct result of the breach. *Ante*, 76, note. In a late case in the same State, the action was brought for the carrier's neglect of duty in not delivering a quantity of corn at Cairo, in that State, within a reasonable time after receiving it for transportation thither, whereby it became heated and nearly spoiled. There was no evidence to show whether the corn was or not shipped under a special contract for its sale and delivery at a certain price. It was held that if it were not so shipped, the market price at Cairo must control in assessing the damages. If it were so shipped, it was said that the contract price must govern. The latter ruling, however, may be questioned if the carrier had no notice or knowledge of the contract, and the contract price differed from the market value at Cairo. Ill. Cent. R. Co. *v.* McClellan, 54 Ill. 58. In a somewhat early case, where in consequence of the carrier's unreasonable delay in the delivery of an account of the plaintiff against a third party, it was barred by the statute of limitations, he was held liable for the amount. Favor *v.* Philbrick, 5 N. H. 357. The sum involved in this case was small, and the decision would seem to have gone on the right rather than the measure of recovery. To make it, as regards the latter point, conform to the law as now established, the carrier should have had notice beforehand of the particular necessity for punctual delivery; and we think also it should have appeared, if the point were controverted, that the debt would have been collectable but for the statute. On this question there appears to have been no evidence.

In Davis *v.* Cincinnati, Hamilton & Dayton R. R. Co. 1 Disney's Reports of the Superior Court of Cincinnati, 23 the defendant had failed to deliver in a reasonable time a boiler constructed for a steam saw-mill. The court held that the measure of damages would be compensation for the actual expense incurred, the time consumed, and trouble taken in traveling to ascertain what had become of the boiler, also the expense incurred in preparations for connecting the boiler with the fixtures and machinery of the saw-mill, with interest on the value of the property during the time of the detention.

In a case in the Court of Queen's Bench, where some regalia which were to be used in a procession by the plaintiff, and which he had hired at an expense of £20, were not delivered by the carrier in time for the procession, and the plaintiff was at an expense of £5 in looking for the goods, he was held entitled to recover the latter item, on account of unreasonable delay, but not the former, which was too remote, the carrier having had no notice of the object for which the goods were to be used. Lord Cockburn, C. J., said: "It is a reasonable doctrine not to make a carrier liable for damage sustained in consequence of goods not arriving in time, unless he had notice that time was of importance; but the person who sends his goods is entitled to expect that they shall be sent from place to place in a reasonable time." Hales *v.* London & Northwestern R. Co. 4 B. & S. 66.

But where, from the carrier's inexcusable delay, peas shipped from Canada to New York were stopped on the way by the freezing of the lakes, and would have been detained through the season, and on the carrier refusing to carry them to New York by rail, or deliver them to the plaintiff except on payment of freight, the plaintiff replevied them, and sent them to the Boston market, which was a judicious course, he was held entitled to recover the difference between the net proceeds of their sale at Boston, and their market value at New York, at the time when they should have been delivered. Laurent *v.* Vaughan, 30 Vt. (1 Shaw) 90.

The damages from the delay often consist in the loss of profits, which also is frequently an item in other claims against the carrier. As regards his liability for this loss, on the ground that at the time when he received the goods or agreed to carry them, it was or readily might have been foreseen by him as a necessary or probable result of his breach of contract, the question has been considered. *Ante*, 76. And the general question of profits is discussed elsewhere (71, *et seq.*). But the examination of the mode of determining the damages in this class of actions would be incomplete without referring to some of the principal cases where the loss of profits is claimed as a direct consequence of the carrier's default.

regard to the mode in which the value of the article shall be

So far as these profits are represented by the market value which the goods would have had at the place of destination, if delivered in time, we shall find that it is now settled in England, and generally held in the United States, that the loss of such profits must be made good.

In the case of Collard *v.* The Southeastern Railway Company, 7 H. & N. 79 (30 L. J. R. (N. S.) Exch. 393); 4 L. T. R. (N. S.) 410, in an action against the carrier for a delay in the delivery of hops intended for sale, and a further delay necessary for the purpose of restoring to a marketable condition a portion of them which had been damaged while in his custody, it was held that the plaintiff was entitled to recover the difference between the market value of the hops on the day when they were, and that on the day when they should have been, delivered, although the defendants had no notice that they were intended for sale, and not for use. The decision was placed on the ground that the plaintiff's loss from the depreciation in market value was the direct consequence of the carrier's default; and the case was distinguished from Smeed *v.* Foord, 1 Ellis & Ellis, 602 (cited *ante*, 76, note 1), because the damage was in the latter case consequential merely.

Again, in an action by a cap manufacturer for damages for the loss sustained by delay in the delivery of cloth, by which the plaintiff had lost the season for making it into caps, it was held by the English Court of Common Pleas, that although the loss of profits could not be taken into account, within the rule of Hadley *v.* Baxendale, yet the loss in the *market value* of the goods was a proper element of damages. Wilson *v.* The Lancashire & Yorkshire Railway Co. 30 L. J. C. P. (N. S.) 232.

This case again can be reconciled with Smeed *v.* Foord only by relying on the distinction between direct and consequential damages referred to by the court in Collard *v.* The Southeastern R. Co., a distinction which is generally important in fixing the damages in this class of cases. The two cannot be harmonized on the principle of the second branch of the rule in Hadley *v.* Baxendale, especially as in Smeed *v.* Foord it was known to the defendant that the machine was designed for the immediate threshing of wheat, which, whether intended for sale or not, must have had a market value; and in the present case, as would appear, the carrier was ignorant of the purpose for which the cloth was intended. Nor do there appear to have been any circumstances known to the carrier affecting or liable to affect the market value. The learned justices in this case concurred in placing the loss in the market value of the goods on the same ground with their intrinsic deterioration. See Davis *v.* Northwestern R. Co. 4 Jurist (N. S.) 1303.

So in the case of Wilson *v.* The York, Newcastle, & Berwick R. Co. 18 Eng. L. & E. 557 (note), it was held by Jervis, C. J. at Nisi Prius, that a carrier undertaking to carry fish to a particular market in time for the morning's sale was liable for the profit lost by his failure to get them there in time for that sale. This case, however, which preceded Hadley *v.* Baxendale, is also justified by the second head of the rule adopted in that case.

In the United States the same point has been frequently considered in recent cases. In Wisconsin, in an action for the carrier's delay in the delivery of flour, the measure of damages was the difference between the price of the flour when it should have arrived, and when it did arrive, if it was then sold for the depreciated price. Peet *v.* Chicago & Northwestern R. R. Co. 20 Wis. 594. In Massachusetts it was held, in a comparatively early case, that the measure of damages was not the profits lost (Waite *v.* Gilbert, 10 Cush. 177); but it has been since repeatedly decided in reference to the point in question, that it is the diminution in the market value of the goods at the place of delivery occasioned by the carrier's delay. Ingledew *v.* Northern R. R. Co. 7 Gray (Mass.) 86; Cutting *v.* Grand Trunk R. R. Co. 13 Allen, 381; Scott *v.* Boston and N. O. Steamship Co. 106 Mass. 468. And the same rule there applies where the subject of conveyance is live animals. Smith *v.* New Haven & Northampton R. Co. 12 Allen, 531. So in Vermont, a carrier engaging to transport live stock to market by the following market day, and failing to do so, is liable for the difference between what the stock was necessarily sold for, and what it would have brought on the market day. King *v.* Woodbridge, 34 Vt. 565. In Maine the same rule is adopted as to the conveyance of goods. Weston *v.* G. T. Railway Co. 54 Me. 376. So in Minnesota. Whalon *v.* Aldrich, 8 Minn. 346. And where the carrier undertook to deliver logs at a certain point during a certain season, what it would have cost to drive down the logs after the season had passed was held immaterial. *Ibid.* So in New Hampshire, in a late case in that State, where a large quantity of wool was delivered to the Grand Trunk R. Co. for transportation to Boston. The agent of the company was informed that it was sold if it could go at once, and agreed that it should go next morning. But the defendant delayed transporting it more than three weeks, and in consequence of the delay, the purchaser declined to take it. Meantime the demand and price had declined, and the defendant was held liable for the difference between the contract price and the value of the goods when delivered. Denning *v.* Railroad, 48 N. H. 455. In Georgia, where a manufacturer's business was suspended in consequence of delay

arrived at. In New York,* where case was brought against a

* Smith *v.* Griffith, 3 Hill, 333.[1]

in the arrival of coal through the carrier's default, evidence of the amount of profit which might have been realized but for the delay, is not admissible. Cooper *v.* Young, 22 Geo. 269 (*ante*, 356, note 3). So in Ohio, profits lost from the delay in delivering a boiler intended for a saw-mill were disallowed. Davis *v.* Cincinnati, Hamilton, & Dayton R. Co. 1 Disney, 23 (*supra*). In New York, until a late decision of the court of last resort, the rule was somewhat in doubt. Two decisions of the Supreme Court of the State in the eighth judicial district denied the right to recover the loss in market value as an item of damage in such cases. Wibert *v.* The New York and Erie R. R. Co. 19 Barb. (N. Y.) 36 (affirmed by the Court of Appeals on another ground, and without passing on the point); Jones *v.* The New York and Erie R. R. Co. 29 Barb. 633. The Superior Court of the city of New York also discountenanced such a recovery. Kirkland *v.* Leary, 2 Sweeny (N. Y.) 677. On the other hand, the Supreme Court in the seventh district sustained it. Kent *v.* The Hudson R. R. Co. 22 Barb. 278.

Since the last edition of this work, however, the question has been set at rest in that State by a decision of the court of last resort. Ward *v.* N. Y. Central R. R. Co. 47 N. Y. 29. It is here held that where a carrier, from mere negligence or plain violation of duty, omits to transport merchandise within a reasonable time, and its market value falls in the mean time, "the true rule of damages is the difference in its value at the time and place it ought to have been delivered, and the time of its actual delivery," the court observing that "sagacious men rely upon their ability to judge of the market in undertaking large commercial projects," and according to their views of the market, "send their merchandise by a quick or by a slow carrier, and make compensation accordingly. A contrary rule would deprive them of all benefit of a rapid transit." The court further remarked, "Had the goods been injured by reason of improper exposure by the carrier, and thus become depreciated in their market value, the carrier would be liable for the loss. Here his negligent delay caused the loss." "The injury also is natural and direct. Arriving later by the carrier's negligence, these goods, measured by the rule that governs the commercial community,—by the only standard that regulates values,—were not worth as much as at the time when they should have arrived."

The same rule was maintained by the Supreme Court of Michigan, in the case of Sisson *v.* The Cleveland & Toledo R. Co. 14 Mich. 489. In this case the contract of the carrier was to transport, from Toledo to Buffalo, cattle whose ultimate destination, as the carrier was informed at the time, was the Albany or New York market. There was no fall in prices before the cattle had reached Buffalo, but owing to the defendant's delay, they were not delivered at Albany until after a decline had occurred. The court held the loss to be the direct consequence of the defendant's delay attending the cattle to their destination, as the effects of a fatal injury would have followed them to their death, and one therefore for which it must make compensation.

Since the decision in the case of Ward *v.* N. Y. Central R. R. Co. above cited, there is no longer any serious conflict of authority on the point. The following observations, which appeared in the fourth edition of this work, have therefore received a sanction they did not then possess. We think the true rule is that which seems established in Great Britain. As in other questions of damages, the principle of indemnity should be our guide; and where, through the delay or other default of the carrier, profits are lost which would clearly have been otherwise realized as the natural and direct result of the safe and prompt transportation of marketable goods to the intended market, and not merely of a private or special speculation of the shipper, the loss should be borne by the carrier. No other rule, we think, will give the actual indemnity the law ordains. In the language of Mr. Justice Curtis, the "actual damages clearly include the direct and actual loss which the plaintiff sustains *propter rem ipsam non habitam.*" Philadelphia, Wilmington and Baltimore R. Co. *v.* Howard, 13 How. (U. S.) 307. If the profit lost, although certain, would have resulted only from a particular operation or speculation, of which the carrier had no knowledge beforehand, actual or presumed, it cannot be recovered.

The allowance, however, of the profits in the former case is not, we think, fairly liable to the objection of uncertainty. Such allowance must indeed be based on the fact that they would certainly have been obtainable if the carrier had fulfilled his duty. If, notwithstanding they had arrived within the reasonable time which the law prescribes, it might still have been impracticable to realize them, they should not be recovered.

Nor are they subject to the objection of remoteness. It is true a decline in the market

[1] The case of Smith *v.* Griffith, 3 Hill, 333, was approved in Kent *v.* The Hudson River Railroad Company, 22 Barb. (N. Y.) 278.

carrier for delay in forwarding Alpine mulberry-trees, in consequence of which a portion were destroyed, the plaintiff claimed as his damages the market value of the trees—four shillings each. The defendant's counsel offered to prove that, from subsequent experiments, this kind of tree had been ascertained to be of no intrinsic value; that the value put on them when the injury occurred was factitious; and that if as much had been known of them then as at the time of trial, they could have been bought for one cent each. He further offered to prove that Alpine mulberry-trees were not worth cultivating for the purpose of raising silk-worms; that those in question were purchased by the plaintiff with a view of growing seedlings for sale, and that they were of no value for that purpose the next year after they were bought. These offers were overruled, and (notwithstanding the dissenting opinion of Cowen, J.) the Supreme Court held rightly. Nelson, J., in delivering the opinion of the court, said,—

[360] "The damages should afford the plaintiff an adequate indemnity for the loss sustained at the *time the injury happened.* Assuming that there

during the period of the carrier's delay is in one sense the direct cause of the loss of profits. But the delay was the direct cause of the owner's inability to take advantage of the higher market rate. Had it not occurred, he would have made the profit. The loss is thus, we think, sufficiently proximate to make the responsibility attach, and its compensation conforms to the analogies of the law. (See *ante*, head p. 69, note 1.) The rule that the carrier, who is the party in the wrong, should bear this loss like any other which results from his default, has, we think, the advantage of justice—an advantage which we should never lose sight of in considering technical rules of law—and it conforms to the general principles which govern the allowance of profits. (*Ante*, 76, 80, note 1.) It should be added that the recovery for loss in market value is confined to that sustained by the goods which are actually delayed, except in the special cases considered, *ante*, head p. 81, note 1.

In a late action against a carrier for delay in transporting a boiler intended for a steam saw-mill within a reasonable time, Mr. J. Small, in delivering the opinion of the Supreme Court of Mississippi, after a wide survey of the field of damages, lays down the following compendious rules:

1. The proximate natural consequence of the breach must always be considered.

2. Such consequences as from the nature and subject matter of the contract may be reasonably thought to have been in the contemplation of the parties at the time it was entered into, should also be taken into account.

3. Damages not the natural sequence of the breach shall not be recovered, unless by the terms of the agreement, or by direct notice, they are brought within the expectation of the parties.

4. Loss of profit in a business cannot be allowed unless the data of estimate are so definite and certain that they can be ascertained reasonably by calculation, and then the party in fault must have had notice, either from the nature of the contract or by explanation of the circumstances at the time it was made, that such damages would ensue from non-performance.

5. If the contract was made with reference to embarking in a new business, such as sawing lumber, the speculative profits, which might have been expected, but which were defeated, cannot be looked to as an element of damage.

6. If the delay is in the transportation of machinery to be applied to a special use known to the carrier, he is responsible for such damages as are fairly attributable to the delay, such as the value of the use of the machinery, to be tested by the rental price or other approximate means, the expense of hands left idle, and the loss of gains on work contracted to be done, if such work could have been done had the machinery been delivered.

7. The party injured must not remain inactive, but should make reasonable exertions to help himself and diminish the responsibility of the party in default to him. Vicksburg & Meridian R. R. Co. *v.* Ragsdale, 46 Mississippi, 458.

is no defect in the quality of the article, the fair test of its *value*, and consequently of the loss to the owner, is its price at *the time in the market*. The objection to the evidence offered is, that it proposes to take into consideration the fluctuations of the market value long *subsequent to the time* when the injury happened, thereby making the measure of damage to depend on the accidental fall of prices at some future period, which might or might not occur, and if it did, the loss might or might not have fallen on the plaintiff, as for aught the court or jury could know, he may have parted with the property before its depreciation."

THE CARRIER MAY SHOW THAT THE LOSS WOULD HAVE RESULTED NOTWITHSTANDING HIS FAULT.—The general rule that we have noticed, when discussing the subject of agency, applies also to the class of cases which we are now examining, namely, that if the carrier break his contract or disobey his orders, any subsequent loss will be attributed to his illegal act,[1] but it is still competent for him to show that if he had performed his contract the same loss would have resulted to his employer; and in such a case the verdict will be for nominal damages only.

An action was brought in the English Common Pleas, against the owner of a ship for a breach of an agreement that she should, with all convenient speed, after discharging her cargo at Plymouth, proceed to Liverpool and take in a cargo of salt for Terceira, and after delivering it, should go to St. Maloes for fruit. The captain refused to go to Terceira, on the ground that that port was blockaded. But as to whether it was an effective blockade or not there was much contradictory testimony. Tindal, C. J., charged, that if the ship, when she arrived off Terceira, would have been prevented from entering by an effective blockade, then it would be a case for nominal damages only. But if otherwise, or if by waiting a reasonable time she could have got in, the jury should not confine themselves to nominal damages.[2]

[1] Circumstances may occur in which the duty of the carrier may go beyond the mere literal adherence to his contract or obedience to his orders. For example, the law imposes on the carrier by sea the duty of taking such reasonable and ordinary measures as are practicable to preserve the cargo from the serious deterioration which without such measures would result from an accident occurring during the transportation, even although the accident be one for which the ship would not be originally liable. And where a cargo of beans had been to some extent injured by having been wet, and notwithstanding that the ship had stopped for repairs on the voyage at an intermediate port, where the beans might readily have been dried, and thereby saved from further deterioration, the voyage was pursued without this having been done, the owner of the beans was held entitled to recover damages, the measure of which should be the difference between the damage they would probably have sustained if unshipped and dried at the intermediate port, and that which they actually sustained by having been carried thence undried to the port of destination. Notara *v.* Henderson, L. R. 7 Q. B. 225, 228.

[2] Medeiros *v.* Hill, 8 Bing. 231; 1 M. & Scott, 311; 5 C. & P. 182.

ACCEPTANCE OF GOODS DOES NOT BAR THE ACTION.—It is well settled, that in cases of negligence, the subsequent acceptance of the goods is no bar to an action for injuries such as those of which we have been treating. Nothing but a release or satisfaction constitutes such a bar. But acceptance may be given in evidence in mitigation of damages, so as to limit the recovery to the actual loss sustained by the owner.*[1]

AGREEMENTS TO FURNISH FREIGHT.—An interesting [361] question is sometimes presented, where the carrier brings suit on the violation of an agreement to furnish him a stipulated quantity of freight.[2] And here the principle applies which we have already had occasion to notice,† that the party plaintiff is bound to take reasonable measures to reduce the amount of injury consequent on the defendant's default; and it is held that the carrier must stand ready to receive any other freight that is offered, and thus, as far as is reasonably practicable, avoid throwing an unnecessary loss on the party in default.[3] Thus in New York, it has been decided, where a party contracts to load a ship with a given number of tons at a stipulated price, and fails to deliver the whole quantity, that if goods are offered by a third person to be shipped, to an amount sufficient to make up the deficiency, though at a reduced rate of compensation, but still at current prices, the owner or master is bound to receive such goods, and place to the credit of the original char-

* Story on Bailments, § 582 *a*; Bowman *v.* Teal, 23 Wend. 306; Baylis *v.* Usher, 4 Moore & P. 790; s. c. 7 Bing. 153; Willoughby *v.* Backhouse, 2 Barn. & Cres. 821.

† *Ante*, 95; and see *post*, ch. xvii, Recoupment.

[1] Hackett *v.* B. C. & M. Railroad, 35 N. H. 390 (*ante*, 359, note 3).

[2] See Benson *v.* Atwood, 13 Md. 20. On a contract to furnish freight at a distant port, to load a vessel which goes to the port but finds none, and is compelled to return empty, the measure of damages is the contract price. Bradley *v.* Denton, 3 Wis. 557.

[3] Murrell *v.* Whiting, 32 Ala. 54. See Utter *v.* Chapman, 38 Cal. 659. The measure of damages against a charterer who refuses to furnish a cargo according to his contract is the amount the vessel would have earned at the rates specified, deducting her net earnings during the time she would have been occupied in the charter, including the lay days. Ashburner *v.* Balchen, 7 N. Y. 262; Smith *v.* McGuire, 3 Hurl. & Nor. 554; Dean *v.* Ritter, 18 Mo. 182.

Where goods are wrongfully taken from a vessel by the shipper before the commencement of the voyage, the ship-owner is not entitled to the stipulated freight as such, but only to an indemnity for the breach of contract. All the attendant circumstances should be laid before the jury, to enable them to determine what will be an indemnity. If the carrier has received other goods in place of those withdrawn, or if by diligence he might have done so, or if he could have abandoned the contemplated voyage, and have found other employment for his vessel, these facts may be ground for a deduction from the entire sum stipulated to be paid as freight. Bailey *v.* Damon, 3 Gray (Mass.) 92.

Vice versa: where the carrier failed to have a ship at a foreign port ready to receive goods there, the measure of the damages recoverable against him was held to be the difference between the contract price and the market rate of freight at that port for the voyage, with interest from the time when the freight would have been payable if the contract had been kept. Higginson *v.* Weld, 14 Gray (Mass.) 165.

terer the net earnings of the substituted cargo, after making all reasonable deductions resulting from the circumstances of the case; and such is the English rule.* [1]

In a case † that came up to the Supreme Court of the United States, from the Pennsylvania Circuit, the plaintiff's intestate agreed to deliver for the defendant at St. Louis by a certain time a quantity of army stores, *supposed* to amount to 3,700 barrels, which the defendant on his part agreed to furnish on the Ohio river: the defendant to pay a certain sum per barrel, one half to be paid at St. Louis and the other half at Cincinnati, with a memorandum "that the payment to be made at Cincinnati was to be made in the paper of the Miami Exporting Company, or its equivalent." The defendant did not furnish the whole 3,700 barrels; and the plaintiff brought suit, as well for the freight of the portion furnished, as damages [362] for the non-delivery of the remainder. The notes of the Miami Company were not worth more than 66 per cent. The judge who tried the cause held—

"That the plaintiff could not recover damages according to the *number of tons* the boat was capable of containing. The rule of law in cases where there has been a failure to furnish the stipulated freight, and there exists no charter-party, is for the jury to take all the circumstances into consideration, and to make an allowance for any freight which the master has it in his power to transport in addition to that which was furnished. If the lading should not be complete, without the default of the master, the rule is to estimate the freight by means of an average, so as to take neither the greatest possible freight nor the least; and such average is the proper measure of damages."

And that as to the paper of the Miami Exporting Company, the defendant having failed to tender to the plaintiff's intestate that paper or its equivalent, the plaintiff was entitled to recover the amount in specie with interest. The Supreme Court reversed this judgment, on the grounds that the defendant had not stipulated to furnish any precise amount of freight, and that the specie value of the notes at the time they should have

* Heckscher *v.* McCrea, 24 Wend. 304; Shannon *v.* Comstock, 21 Wend. 457; Puller *v.* Staniforth, 11 East, 232. See these cases cited and confirmed in Costigan *v.* Mohawk and Hudson R. R. Co. 2 Denio, 610. See also, the reasoning of these cases adopted in Arkansas, in an able opinion of Scott, J., as to a contract for personal services. Walworth *v.* Pool, 4 English, 394; Abbott on Shipping, part iv, ch. 1, Of the carriage of goods in merchant ships, and cases there cited.

† Robinson *v.* Noble's Adm'rs, 8 Peters, 181.

[1] The measure is the difference between what the plaintiff would have earned had the contract been fulfilled and what he has earned notwithstanding the breach. Hunter *v.* Fry, 2 B. & A. 421.

been paid was the rule by which the damages should have been estimated.*

REFUSAL TO RECEIVE CARGO.—Agreements of this kind are sometimes broken, on the other hand, by the ship-owner refusing to receive the cargo on board.[1] In a case of this kind, where the contract was to take on board a vessel a cargo of wheat at a certain freight, and it was proved that the defendant refused to receive the wheat, and that the price of freight rose three pence per bushel between the date of the agreement and the sailing of the vessel, it was held that the difference between the price agreed upon for transporting the wheat, and that for which its carriage might have been obtained by others at the time when the ship was to receive it,[2] was the true measure of damages.[3]

* This case, though it raises some important questions, properly decides nothing as to the amount of damages; but it may be noticed, as to the latter point, that it is adverse to the decisions of the courts of New York in regard to notes payable in a specific article, it being there held, that if the specific article is not tendered the party loses his privilege, and must pay in money. (*Ante*, 252, 295.)

[1] The defendants, having contracted to be ready with their ship on the river Tyne on a certain day, to receive a cargo of coal to be carried to Havre for the plaintiff, broke their contract, and the plaintiff had in consequence, not only to charter vessels at an advanced freight, but also to buy coal at a higher price. He was held entitled, in the absence of proof that there had been an equivalent rise in coal at Havre, to recover for the loss on the coal, as well as on the freight. Featherston *v.* Wilkinson, L. R. 8 Exch. 122.

[2] Where a railway company refused to carry at the ordinary rate packed parcels for a carrier, whereby he was forced to send them by a circuitous route at a greater expense, he was held not entitled to recover for loss of business alleged to have been sustained in consequence. Crouch *v.* Great Northern R. Co. 11 Exch. 742.

[3] It is proper to mention here the cases upon the measure of damages for failure or delay to transport a passenger.

In an action against a common carrier for unreasonable delay in the transportation of a passenger, the plaintiff is entitled to recover his actual damages, but in the absence of malice or fraud not beyond these. Evidence of the rate of wages earned by persons of the plaintiff's trade, at the place of his destination, during the period of the delay, is admissible to guide the jury in fixing the damages. But that rate is not the measure. The jury are to consider the probabilities that the plaintiff would have obtained employment immediately upon his arrival, and that it would have continued during the entire period of the delay. Yonge *v.* The Pacific Mail Steamship Company, 1 Cal. 333. And where a person in a foreign port contracted with the master of a vessel for a passage to this country, and paid a part of the passage money in advance, but the master failed to fulfil his contract, it was held that the other party was entitled to recover the sum paid in advance, the expenses incurred in awaiting the sailing of another ship, and the sum paid to the second vessel for a passage in her. The Zenobia, 1 Abbott's Adm. R. 80. See also on this branch of the subject, Hamlin *v.* The Great Northern Railway Co. 1 H. & N. Exch. 408; Porter *v.* The Steamboat New England, 17 Mo. 290. So where the action was for neglect to transport the passenger, the latter's expenses during the detention and those of a consequent illnesss, and the time lost by him both directly from the detention and by the illness afterwards, so far as these were occasioned by the carrier's negligence and breach of duty, were all declared by the New York Court of Appeals legitimate items of damage. Williams *v.* Vanderbilt, 28 N. Y. 217. And in such an action, it was held by the same court, that the fact, there was no evidence of the value of the plaintiff's time, did not preclude the jury, from giving him such compensation therefor as they thought reasonable. Ward *v.* Vanderbilt, 34 Howard's Pr. R. 144.

In Mississippi, the physical condition of a passenger who had suffered great bodily exposure in consequence of the carrier's neglect to stop his vessel, and take him in according to agreement, was allowed to be shown in aggravation of the damages. Heirn *v.* McCaughan, 32 Miss. (3 George), 17.

Where the master of one of a line of steamers plying to and from San Francisco, and

It was insisted that the shipper was bound to show affirmatively, that he had a cargo of the kind agreed on, ready for shipment at the time fixed by the contract, or that he could only recover nominal damages; but it was decided that this was not necessary.* [1]

* Ogden *v.* Marshall, 4 Seld. 340.[2]

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then bound to that port, having on board a person who had under pain of death, in case of his return, been expelled from there by the "Vigilance Committee," a revolutionary authority in actual government of the city, stopped his vessel and put the passenger on a return steamer of the same line, to be taken back to the port from which he had embarked, although the act was illegal, the circumstances which induced it were allowed as an important mitigation of the damages, which were therefore reduced by the Supreme Court of the United States, on appeal, from $4,000 to $50. Inconvenience, loss, and delay subsequently sustained by the passenger in getting to San Francisco, in consequence of the generally known power and purpose of the "Vigilance Committee," were not attributable to the master, and could not be compensated in the action. Pearson *v.* Duane, 4 Wallace, 605.

[1] A party wrongfully excluded on account of color (or otherwise), from a railway car is entitled to nominal, without proof of actual damages. Westchester and Philadelphia R. R. Co. *v.* Miles, 55 Penn. St. 209; Pleasants *v.* N. B. and U. R. R. Co. 34 Cal. 586. Where a colored woman was excluded from a "ladies' car" on account of her color, it was held that the jury might add something to the actual damages for the indignity, vexation, and disgrace sustained. Chicago and Northwestern R. Co. *v.* Williams, 55 Ill. 185.

[2] Since the third edition of this work, the law relating to the recent invention of telegraphs may be said to have sprung up. It is true, that in one point of view it is but the application of established principles to new circumstances, but such is always the history of legal science. The novelty which tests the the wit of the bar and invites the wisdom of the bench in this inquiry, as in so many others which start up beneath the rapid steps of knowledge in this century, is not in the principle involved, but in the questions whether a certain known principle, or what one of several known principles, is applicable, and if the fact of the applicability be determined, to what extent it goes, and how far it is modified by the new circumstances.

The question which has been chiefly considered in determining the nature and extent of the telegraph company's liability, and as a consequence, the measure of the damages sustained by its default in transmitting and delivering a message, is whether it is to be regarded as a common carrier. If it is, we have rules established by the legal wisdom of centuries to enable us to determine the degree of its liability. By these rules, where the contract of transmission is unlimited by a special agreement, the liability would be that of an insurer, unless the case falls within one of the two familiar exceptions to that severe responsibility. As an insurer, it would be held to make full indemnity for the actual loss sustained, without regard to the limitations which restrict the liability in the case of other breaches of contract.

The adjudged cases are our only sure guide. In order to determine, therefore, whether or not the telegraph company is or not a common carrier, and at the same time to see on what other principles the damages arising from its default should be measured, we shall refer to the leading decisions on the subject, mainly in chronological order, first taking the cases where the severer liability has been maintained, and then the opposite class.

In the early case of McAndrew *v.* The Electric Telegraph Company (17 C. B. 3). A. D. 1855, it was considered that the telegraph company, as bound by the statutes regulating telegraphs to transmit all messages for the public, stood in the same position as carriers or inn-keepers, and was therefore held to the same degree of liability, though a nonsuit was sustained on another point.

In the case of Bowen *v.* The Lake Erie Telegraph Co. 1 Am. Law Reg. 685 (1858), the Court of Common Pleas of Ohio, at *Nisi Prius*, on the same ground held the company to the same degree of liability, considering (although not in terms calling it a common carrier) that as these companies hold themselves out to transmit despatches correctly, they are under obligation to do so, unless prevented by causes over which they have no control. In this case, owing to a mistake of the defendants in transmitting a despatch, one hundred shawls, instead of a single one, were sent from New York to Michigan, and the damages which the jury found in conformity with the charge of the court, consisted of a sum equal to the charges for freight and the depreciation in value of the shawls, which had to reshipped to the plaintiffs, and reached them after the shawl season had closed.

In the case of Parks *v.* Alta Cal. Telegraph Co. 13 Cal. 422 (1859), the telegraph

company undertook to transmit a message in the following words: "Due 1800. Attach if you can find property. Will send note by to-morrow's stage." Owing, as appeared, to the company's delay in forwarding the despatch till the following day, the debtor's property (which we infer would have been enough to cover the plaintiff's claim) was all seized under intervening process, and the plaintiff could attach nothing. It was held that the company's obligation was that of a common carrier, and that it was liable for the amount of the debt, the loss of which was considered to be the natural and proximate damage resulting from its breach of contract.

The same measure was applied with great stringency, under similar circumstances, in the case of Bryant *v.* The American Telegraph Company, 1 Daly, 575 (1865). In this case, which we will notice out of the chronological order, one of the plaintiffs had learned at a quarter past four o'clock in the afternoon, that a firm in Providence, Rhode Island, of which one Bennet was a member, and which owed them $12,000, was insolvent, and that Bennet, who had been temporarily in New York, had left for Providence by that afternoon's train. They thereupon directed their attorney to send a despatch to Providence—to have Bennet's house and lot attached for his debt. The attorney accordingly, at half-past eight o'clock in the evening, left a message to that effect at the defendant's office in New York, addressed to Mr. Paine, an attorney in Providence. By the laws of Rhode Island, the attachment could be made only when Bennet was out of the State. At the time of leaving the message, the attorney explained to the defendant's clerk that its object was to get an attachment on property, and that it would do no good unless delivered in time for the attachment to be made before the train on which Bennet was, should enter Rhode Island. The attorney paid for the despatch, and offered to pay any further expense necessary to send it at once. The clerk agreed to send it promptly, and it was despatched at ten minutes past nine and received by the operator in Providence at half past nine, with a direction to send it in haste. At the time of its receipt he was engaged in receiving reports for the press, which by statute were entitled to precedence over all other matters, and replied that it could not be sent that night, as the delivery boy had gone home. The New York operator rejoined that it must be delivered, to which the other then signified his assent. The newspaper reports continued uninterruptedly until half past eleven o'clock, when an interval occurring, the Providence operator had the despatch copied, and procured a chance messenger to deliver it, which was done a few minutes after. By the time the attorney was roused from his bed and the despatch delivered to him, it was too late to effect the attachment before Bennet's arrival in the State. He went into bankruptcy the next day, and the plaintiffs obtained but $500 from his estate. The house and lot were worth over $12,000. Considering that there was gross negligence in the want of promptness in delivering the message at Providence, a majority of the court held that the company was liable, and that the measure of damages was the amount of the debt with interest from the day of delivery of the message, less the $500 collected. Daly, First Judge, dissented in a carefully considered opinion, on grounds of which the following is a summary statement. Notwithstanding the explanation of the message to the defendant's clerk, the defendant having been under no obligation to assume so great a risk, could not, under the circumstances, with this imperfect information, have intended to do so for so trivial a compensation as the price of the despatch, even assuming the New York clerk to have had the authority necessary to bind the company to this extent. The company was not advised of the exact circumstances making diligence peculiarly necessary. It was not informed that the firm of which the plaintiff's debtor was a member was insolvent, that his house was unincumbered, nor that it was of value enough to pay the debt, nor could it be presumed to know how much time was necessary to make the attachment, nor its precise legal effect. The loss was too remote and contingent a result of the defendant's delay to impose so heavy a liability, and the plaintiffs themselves, with full knowledge of the facts, "had not been especially diligent." The learned judge observed also that the plaintiffs' debt had not been extinguished, and that although the debtors were then insolvent, they might become able and be compelled to pay the debt within the period during which it would continue as an obligation against them. Citing with approbation the case of Landsberger *v.* The Magnetic Telegraph Co. 32 Barb. 530 (*infra*), he held that the measure of the plaintiffs' damages should be confined to the expense sustained by them in the transmission of the despatch.

Besides the other reasons for dissenting from the judgment in this case, it seems especially open to question on the ground of the plaintiff's own contribution to the delay which caused the loss. It would appear from the report that but a comparatively small part of the time lost was due to the defendant's default. The decision was reversed by the Court of Appeals on technical grounds, without considering the merits.

In the case of The Washington and N. Orleans Telegraph Co. *v.* Hobson, 15 Gratt. 122 (1860), the Court of Appeals of Virginia, although considering that the question whether the jury might or might not regard the telegraph company as a common carrier was not properly before them, approved the refusal of the judge at Nisi Prius to instruct the jury that the company was to be considered as responsible, not as common carriers, "but as general agents only, not liable for damages from a mistake or misdelivery of a message, except in cases of such gross and culpable negligence as in law amounts to a fraud." The plaintiffs below had

delivered to the company a message to be transmitted to the plaintiffs' factors at New Orleans, instructing them to buy five hundred bales of cotton, which number by the company's fault was altered to twenty-five hundred, and the factors, under this misinformation, purchased two thousand and seventy-eight bales before the mistake was discovered. It was held that if the company were liable for the damages arising from the alteration of the message, the measure of these was what was lost on the sale at Mobile of the excess of the cotton above that ordered, or if it were sold elsewhere, what would have been the loss on it if sold at Mobile in the condition and circumstances in which it was when the mistake was discovered, and that the regular commission of the factors in the purchase should be included in the damages.

In the case of the New York and Washington Printing Telegraph Co. *v.* Dryburg, 35 Penn. 208 (1869), the agent of the company, who received a message directing the purchase of two hand bouquets, erroneously supposing the word "hand" to be "hund," and to stand for "hundred," delivered it thus altered. The Supreme Court of Pennsylvania, in an action on the case brought by the receiver of the message, held that "though telegraph companies are not like carriers, insurers for the safe delivery of what may be intrusted to them, their obligations as far as they reach spring from the same sources—namely, the public nature of their employment, and the contract under which the particular duty is assumed;" and that one of the plainest of these obligations was to transmit the very message prescribed. And a verdict for the loss and expense sustained by the florist in cutting and procuring a large number of flowers to fulfil the order, was sustained.

In the case of Rittenhouse *v.* The Independent Line of Telegraph, 1 Daly (N. Y. C. P.), 474 (1865) (affirmed by the Court of Appeals, December, 1870, 44 N. Y. 263), owing to the defendant's mistake in changing the wording of a despatch transmitted by it from the plaintiffs in Washington to their brokers in New York, the brokers bought at the morning's board of brokers in the latter city five hundred shares of Michigan Southern Railroad stock, instead of selling such amount of that stock as the plaintiffs then had on hand, and buying at that board five hundred shares of Hudson River Railroad stock; the plaintiffs, on discovering the defendant's mistake, corrected it by repeating the despatch, which in its right form was not received till after the morning's board had adjourned. On receiving it thus corrected, the brokers sold the five hundred shares of Michigan Southern and bought the Hudson River stock "on the street." The former were sold for the best price then obtainable, but which exceeded by $1,750 the lowest price at which they could have been bought had the message been correctly received in due time, and by $1,375 the average price of the morning board. The case having been tried before the court without a jury, judgment was given for the latter sum and on appeal sustained, the court holding in reference to the loss on the sale of the five hundred shares of Michigan Southern stock, that they were in legal effect purchased on the defendant's account. The company not having been notified beforehand of the intended sale, could not be held for this portion of the loss.

Again, in the case of De Rutte *v.* The New York, Albany & Buf. Telegraph Co., in the same court, 1 Daly (N. Y. C. P. R.), 547 (1866), it appeared that in the transmission of a despatch directing the purchase of wheat at the limit of twenty-two francs the hectolitre, by the defendant's mistake the number 22 was changed to 25, in consequence of which the wheat was purchased at what proved, on a sale of it made by the plaintiff on discovering the error, a loss of more than $2,000. The court held this loss to be the direct and immediate consequence of a breach of the contract of transmission, and to furnish the measure of the plaintiff's damages. Daly, First Judge, in delivering its opinion, held that the public policy which makes common carriers responsible as insurers, in order to prevent fraud and collusion with thieves, and because the owner having surrendered the possession of his property is generally unable to show how it was lost or injured, did not apply to telegraph companies, who could not, therefore be held as insurers; but that such policy on other grounds required that they should be held to a stricter accountability than ordinary bailees, and that as the value of their services consists in the correctness and diligence with which they transmit messages, any unreasonable delay or any error should be presumed to have arisen from their negligence, unless they can show it to have proceeded from causes beyond their control. Again, in Smithson *v.* U. S. Tel. Co. 29 Md. 162 (1868), it is held that telegraph companies are "bailees, not common carriers."

The severer rule and larger measure of damages have been often adopted by the courts in the United States at Nisi Prius. In a late case (tried in April, 1867) in the Superior Court of the city of New York, which was an action to recover damages claimed to have been sustained by the plaintiff from the defendant's failure to transmit a "telegram" from New York to St. Louis, instructing one D. L. Davison "to sell silver lepines for $10; also others for less," the despatch was not sent, and owing to the fluctuation in the price of gold, which was at a premium, there was a considerable decline in the market, before the arrival of a letter from the plaintiff at St. Louis containing the same instructions with the despatch. The plaintiff contended that the rule of damages was the difference between the market price of the watches at the time when the despatch should have been delivered and that when the

letter was received. The defendant's counsel insisted that these damages were too remote, and that the company were not informed by the purport of the despatch or otherwise, that it had a pecuniary value, or what would or might be the nature and extent of a loss from its non-delivery, and that they had entered into no engagement based upon the condition of the gold market, and had not assumed the risk of a fall in gold, nor even been apprised what the consequence of one would be. But the presiding judge (Jones, J.) denied a motion for a nonsuit on these grounds, and held that the company were bound as common carriers to exercise due diligence and care in the conduct of their business, without being notified of the specific pecuniary value of any despatch left with them. They were bound to infer that the despatch was of importance, and might be of pecuniary value to the persons sending and receiving it; and the damages should be measured by the decline in gold which made the difference in the market value. Strasburger *v.* Western Union Telegraph Co.

In the case of the United States Telegraph Co. *v.* Wenger, 55 Penn. St. 262 (1867), the message was a direction to buy stock at a limit mentioned in the telegram. The court held, that as the company through gross negligence did not transmit the message, and the stock was therefore not purchased till after a delay, and the message disclosed to the company's agents its nature, the measure of damages was the rise in the price of the stock between the time when it ought to have arrived and the time when the purchase was made.

The draft of the proposed civil code in New York proceeds on the more severe theory, and declares that every person who offers to the public at large to carry messages is a common carrier as to them. Draft of Civil Code, §§ 911, 934. The civil code lately adopted in California contains a similar provision. Cal. Civil Code, § 2168; also Art. IV.

We now turn to cases holding a less rigorous doctrine. In the case of Landsberger *v.* The Magnetic Telegraph Company, 32 Barb. 530 (1860), the plaintiff at New Orleans having contracted with a third person to buy goods for him on commission at New York, and bound himself to fulfil the contract in a specified sum as liquidated damages, remitted funds to New York to be used in the agreed purchase, which he telegraphed his agent in New York to make. The despatch directed the plaintiff's firm in New York to get from the Pacific Mail Company $10,000 which the plaintiff had remitted thither by that company, but did not indicate the particular purpose to which it was to be applied, in a manner intelligible to the telegraph company. Through the company's default, the message failed to reach New York in time to have the purchase made, so that the plaintiff lost his commissions and the use of his money for the time, and had to pay the stipulated damages. The court, intending to apply the rule in Hadley *v.* Baxendale, 9 Exch. 341, and Griffin *v.* Colver, 16 N. Y. 489 (*ante*, 76, note 1), held that he could recover only the cost of the despatch and the interest of his money while it lay idle. The loss of the commission and the payment of the liquidated damages were not regarded as having "entered into the contemplation of the parties at the time the contract was made."

The case does not directly turn, however, on the question of the nature of the company's liability as common carriers or not; but is put upon grounds consistent with either the more rigorous or the more lenient rule.

See, also, Shields *v.* Washington Telegraph Company, 9 West. Law Journ. 283 (1852), to a like effect.

In the case of Birney *v.* The New York and Washington Telegraph Company (18 Md. 341), it was held that the telegraph company was not a common carrier, and consequently not an insurer, but simply a bailee performing through its agents a work for its employer according to certain rules and regulations which, under the law, it has a right to make for its government. It is a party contracting to perform a service within the sphere of its business for a compensation. If it fail to perform the service, it must account for any loss or injury that results from its neglect, and such loss or injury will be the measure of damages to which the plaintiff is entitled. Rules and regulations by which the companies announce that important messages should be repeated, that a certain additional charge will be made for the repetition, that they will not be liable for any loss or damage by reason of any delay or mistake in the transmission or delivery of unrepeated messages, but engage only to use reasonable efforts to secure the services of competent employees so as to have their business transacted in good faith, and also limit their responsibility on a repeated message to a small sum unless it be insured at certain rates, were held to be reasonable, and having been publicly posted in the office of the company, parties employing the telegraph were held bound to know them. Such regulations, however, do not exempt the company from a responsibility measured by the rule before given, for loss ensuing from its neglect to make any effort to transmit the message.

And in the case of Breese & Mumford *v.* United States Telegraph Company, 45 Barb. (N. Y.) 274 (affirmed, 48 N. Y. 132; 1871), it was held by the Supreme Court of New York that the business of telegraphing is "radically and essentially different, not only in its nature and character, but in all its methods and agencies, from the business of transporting merchandise and material substances from place to place by a common carrier." In delivering the opinion of the Court of Appeals, however, affirming the judgment in this case, Earl, Chief Commissioner, however, made the following observations: "Telegraph companies may, in one sense, be called common carriers, as they are engaged in a public employment, and are

bound to transmit for all persons messages delivered to them for that purpose. But if we call them common carriers in this sense, it does not follow that they become insurers like the common carriers of goods. In the absence of any special contract, they do not insure the accurate transmission of messages, but they are bound to transmit them with care and diligence adequate to the business which they undertake. But they have the right to make reasonable rules for the conduct of their business. They can thus limit their liability for mistake not occasioned by gross negligence or wilful misconduct, and this they can do by notice brought home to a sender of the message or by special contract." Similar conclusions to those of the court below in the last cited case have been adopted by the Supreme Court of Michigan. The Western Union Telegraph Co. *v.* Carew, 7 Am. Law Reg. (N. S.) 18; 15 Mich. 525.

After this retrospect we can better answer the inquiry, whether telegraph companies are to be regarded as subject to the responsibility of common carriers. Their obligation is not, it is true, founded like that of the carrier at common law on the ancient custom of the realm. But the analogy between the undertaking of the two, notwithstanding the strong language to the contrary used in some of the cases last cited, is very obvious. "Any man undertaking to carry the goods of all persons indifferently is a common carrier," Gisbourn *v.* Hurst, 1 Salk. 249; and with the substitution of the new word "telegrams" for "goods," the same definition substantially describes the undertaking of the telegraph company. Both hold themselves out to the public as ready to deliver at a distant point for a certain rate of charge whatever may be confided to them within the scope of their business; and the fact that in the one case a parcel is to be transported, and in the other a message to be transmitted, does not appear in itself to affect the nature of the obligation. Nor does the distinction taken in one of the adjudications, that in the case of the telegraph company the message to be delivered is not physically identical with that received, but is a reproduction of it at the place of destination, seem to us necessarily material to the question. The message as transmitted has doubtless no tangible properties. But it is the identical idea of the sender as expressed in words or symbols which is undertaken to be actually transmitted.

The telegraph, it is true, is an agency so wonderful that the bald statement of its doings still seems to border on fable. Even in the beginning of this century, the feats of the "enchanted horse" and "magical carpet" of the Eastern tales would have appeared at least as feasible and credible as its ordinary performance of to-day. But the marvelousness of its operation does not strictly affect the question. One agency of nature, indeed, is intrinsically no more amazing than any other, and when we have become reconciled to the fact that the lightning *is* "harnessed" and become our common drudge, there is no difficulty in applying to transactions made through its agency, the same principles which were applicable when we resorted to slower messengers. Indeed where the policy of the government permits the conveyance of letters by carriers other than its own agents, the essential identity of the two undertakings becomes evident. Except, therefore, in the subject-matter to which it relates, the undertaking of the telegraph company, notwithstanding the difference of the means employed, is the same with that of the nearly obsolete carrier by wagon, of the present carrier by steam, or of the future carrier by that other vast force which has hitherto slumbered in the atmosphere unused and almost undetected, and which, as it now seems, is beginning to be developed and understood under the agency known as the "pneumatic despatch."

There is, it is true, in one aspect, a distinction between the two which is remarked on by Judge Daly in his able dissenting opinion in the case of Bryant *v.* The American Telegraph Company (1 Daly, 575), already cited. "In the case of the carrier," remarks the learned judge, "the package or property he is to carry is placed in his custody. He has for the time being exclusive dominion and control over it, and necessarily knows, if he fails to deliver it, that the value of it will be lost to the person who intrusted it to his care. But those who undertake to transmit intelligence do not necessarily know what may be the effect if the message should fail to reach the person to whom it is addressed." The difference in the nature of the two employments pointed out by the learned judge certainly exists. But it must, as we shall see, be limited in its legal effect on the measure of damages to a certain class of cases, since the carrier as well as the telegrapher often does "not necessarily know what may be the effect" if the subject of his undertaking "should fail to reach the person to whom it is addressed."

The essential distinctions between the two classes of obligations appear to us to be *first*, that the business of telegraphing is one of far more delicacy, and attended by much greater difficulties in its accurate discharge than that of the carrier, and should not therefore, be subjected to so severe a degree of responsibility. *Second*, That there is inherently *no valuable subject of insurance* in the contract for the sending of an electric message, and therefore, as a necessary consequence, the telegraph company cannot, in a definite sense, and without a special agreement, be held as an insurer.

The first of these distinctions hardly needs formal statement. A message more or less complex, not necessarily intelligible without explanation, but written sometimes in figures, or if in words, in words often so used or so combined as to convey no idea or a false idea

only to the uninstructed eyes of the company's agent, is intrusted to him for instant transmission, by a technical and delicate process, and by the subtle action of electricity along a mere wire, either through the air, which is sometimes charged with disturbing elements, or beneath the sea, to a point which may be in a distant zone or another hemisphere. In this message, the misspelling of a word, the addition or omission of a cipher, may so change its sense as received, that if the receiver acts upon it as thus changed, a loss may result from the consequent wrongful purchase or sale of property, or the prosecution or abandonment of an undertaking, which, in a pecuniary sense, may ruin the person affected by it. In the case of the carrier, however serious his responsibilities, no such risk is incurred.

Again, as to the second distinction. If the company is an insurer, what does it insure, and where is the measure of its liability in that character? No costly package is confided to its charge, the value of which a banker or a jeweler can determine at a glance, and which thus easily ascertained becomes the measure of the damage in case of loss. The insurance, if such the ordinary contract for transmission be called, applies to nothing substantial, nothing intrinsically valuable, but to a message only, the non-delivery or misdelivery of which *prima facie* imports only nominal damages beyond the cost of the despatch. On the other hand, if we leave this simple measure of damages—namely, the intrinsic value of the subject of the contract—the only one indeed in the case of the contract of carriage where it is regarded as one of insurance, and inquire into the consequential injury sustained, the measure of damages is no longer one which belongs to a contract of insurance as commonly understood, which is merely one of indemnity against the loss of the subject insured. Yet in breaches of contracts for telegraphing, a rule of damages which should not require something further than repaying the expense of the message, would not of course furnish a true indemity.

There is, as will have been observed, some inconsistency in the language of the bench on this point, growing, as we think, out of a confusion of subjects. A carrier is or may be held as an insurer, it is true; but it is not in the character of an insurer that he is sued, where consequential damages instead of the value of the goods are sought to be recovered. He is called an insurer because his contract implies an absolute engagement to deliver the goods, unless prevented by more than human power, or by the public enemy, and he is responsible for their value in case of loss, although not chargeable with negligence. But if consequential damages are sought for, his contract stands upon the same grounds with other contracts, and in case of its breach the same rules apply to it as to them. On the other hand, as we have said, substantial damages in an action against a telegraph company are *always* consequential. If, therefore, it is sought to hold the company as an *insurer*, this can only be done by virtue of an express agreement. If there is such an agreement, this will usually furnish the measure of damages. If there is none, the damages must be ascertained by the rules applicable to breaches of contract in general.

As we have had occasion to see in reference to carriers, in the discussion of the rule laid down in the often quoted case of Hadley *v.* Baxendale, 9 Exch. 341, and which furnishes the recognized measure of damages in actions of contract against them, so far as any definite measure exists, that rule divides itself into two parts. First, the party breaking the contract is liable for such damages as naturally and directly arise from the breach. This measure, in the case of the loss of a parcel, is usually its value. Applied to the case of the telegraph company, it reduces the measure of the recovery to the price of the despatch and the expense necessarily incident to sending it. But by the second branch of the rule, the party breaking the contract is liable for such damages as, although not at all or not merely the natural or usual result of the breach, were such as the parties had an opportunity to know, and should have expected would be the probable loss entailed by it under the circumstances of the particular case. This branch of the rule, as applied to telegraph companies, would make the measure of damages the same as in a corresponding action against the carrier. It is, as we have seen, generally applicable to breaches of contract, where the particular object of one party in making the contract is known to the other, and we see no good reason why it should not apply to contracts for the sending of messages by telegraph. And although the person or company engaged in the business of telegraphing may not be bound to know the contents of a despatch, except so far as to be responsible for mistakes made in transcribing it, we think the rule in question applies even more frequently in practice to their contracts than to those of a carrier of goods. Messages are generally sent by telegraph in order that some particular thing may be done, which thing the reading of the despatch even by a person who is not otherwise informed what it relates to, in ordinary cases goes far to explain. But in the case of the carrier, it is not even necessary that he should know the contents of a parcel in order to fulfil his contract intelligently, and the mere sight of the goods is usually of little use in making him understand the particular object of the shipper in relation to them. These conclusions are approved by the Supreme Court of the State of New York in the fourth district. Baldwin *v.* U. S. Tel. Co. 1 Lansing (N. Y.) 125; which case was affirmed by the Court of Appeals (45 N. Y. 744).

The distinction observed by the learned judge in the case of Bryant *v.* The American Tele-

graph Company, applies, we think, therefore, in practical effect, as regards the measure of damages, only to cases falling within the first of the two principles adopted in Hadley *v.* Baxendale. That is to say, while the carrier is in any event liable for the value of the package which he loses, whether he is aware what it is intended for or not, provided he knows what he is conveying, the telegraph company, which has no notice of the purpose intended by the message, cannot be held for the loss of property, or for other ill consequences entailed by the non-delivery, but is liable only for the cost of the despatch. This difference results from the fact that in the one case the subject of transmission has not intrinsic value, while in the other the subject of carriage has. When, however, the second principle (which, as we have before observed, is usually recognized as the rule characteristic of that case) applies, as in the case of unjustifiable delay with knowledge of the probable effect of the delay, the telegraph company is liable on the same grounds with the carrier, and also with any other person who breaks his contract. But the difficulty of securing uniform accuracy should make the company responsible only for such causes of loss as are within its control.

Our conclusion, therefore, is that notwithstanding the sameness of the telegraph company's obligation, considered without reference to its subject-matter, with that of the common carrier, yet from the difference of the conditions under which this obligation is assumed, the legal presumption of negligence by which the carrier is absolutely bound, at all events, in case of loss, does not apply to the telegraph company. But, as observed by Daly, First Judge, in the case of De Rutte *v.* The New York, Albany and Buffalo Telegraph Company (*supra*), as the business of these companies "is one which leads to their being intrusted with confidential and valuable information, especially in commercial matters, there are opportunities for fraud and abuses which, in view of the relation that they occupy to the public, make it necessary upon grounds of public policy they should be held to a more strict accountability than ordinary bailees." The rules of damages should be controlled by the circumstances of the loss, and the principles we have above considered.

Special contracts, however, under which safety and exactness are insured by the repetition of the despatch, and an additional sum is paid for the repetition, are often made in practice; and where such is the case, the telegraph company becomes liable for all damages which are the direct result, not merely of its default but of any failure in the transmission (see McAndrew *v.* The Electric Telegraph Co. *supra;* Camp *v.* Western Union Tel. Co. 1 Metc. (Ky.) 164; Potts *v.* The Electric Tel. Co. 18 Law Reporter, 476), unless the damages are liquidated by special agreement. Such an agreement it is doubtless competent for it to make, and the rules elsewhere considered touching stipulated damages then become applicable. (Ch. 16.) It may also agree, within *reasonable* limits, to restrict its liability. Ellis *v.* Am. Tel. Co. 13 Allen (Mass.) 226; Wann *v.* Western Union Tel. Co. 37 Mo. 472; U. S. Telegraph Co. *v.* Gildersleve, 29 Md. 232. And it seems that it may do so, even where the statute provides that a telegraph company is liable for all mistakes in transmitting messages. Sweatland *v.* Illinois and Mississippi Tel. Co. 27 Iowa, 432. What is necessary to constitute such agreements does not come within our province to discuss.

The foregoing considerations apply to actions by the senders of messages which are usually in contract, although an action on the case may also be maintained by them. Where the action is brought by the person to whom the message is addressed, as in the case of The New York and Washington Printing Telegraph Company *v.* Dryburg, it is in tort, and in that case the company is liable for the consequences of the wrong, pursuant to the rules elsewhere stated as to actions of tort.

It is held in England that the telegraph company cannot be made liable for loss for neglect to send a message in an action by the party to whom the message was addressed. Playford *v.* United Kingdom Tel. Co. 21 L. T. (N. S.) 21; L. R. 4 Q. B. 706; 38 L. J. (Q. B.) 249; 17 W. R. 968. This is on the ground that the obligation of the carrier to use due care arises out of contract only, and that the contract is with the sender of such messages only, and not with the sendee. By the American practice, however, the action may be in tort, and maintained by the receiver of the message. Elwood *v.* The Western Union Tel. Co. 45 N. Y. 549; N. Y. and Washington Printing Tel. Co. *v.* Dryburg, 35 Penn. 298 (*supra*); Rose *v.* United States Telegraph Co. 6 Rob. (N. Y. Superior Court), 305.

It was held by the Supreme Court of New York, that where a contract is made by telegraph it is not complete until the receipt by the party making a proposition, of notice of its acceptance. Telegraph companies not being like the post-office, a department or agency of government, it was said that the delivery to a telegraph company for transmission to a correspondent of a despatch accepting a proposition, had not the legal effect of closing a bargain which is the result of the deposit of a letter to a similar purport in the post-office—a conclusion which was sought to be further justified by the fact of the greater uncertainty as to the due delivery of the reply in the terms intended. Trevor *v.* Wood, 41 Barb. 255. See also Kinghorne *v.* The Montreal Telegraph Co. 18 U. C. 60. But, since the fourth edition of this work, the case of Trevor *v.* Wood has been reversed by the Court of Appeals, on grounds which accord with those suggested in the following comment on the case which appeared in that edition (36 N. Y. 307):

It would result from this principle, if it be sound, that if the extent of the telegraph company's liability must, in the absence of an agreement otherwise, be determined with reference to the condition of things at and after the receipt of the answer, and not at the time of sending it.

But, with great deference, we think the liability in this respect should be governed by the express or implied understanding of the parties, and if by such understanding the correspondence is to be conducted by telegraph, as would be usually implied on the part of the sender, from his adoption of that mode of communication, the receiver of a despatch should be bound from the time of the delivery of his answer for transmission, whenever its terms are such as to complete the contract between the parties, and the damages should be determined accordingly.

We have reprinted the foregoing part of this note as it appeared in the fourth edition, with slight additions, but without material change, except to note the subsequent affirmance, modification or reversal of any of the cases then cited. Later decisions have substantially confirmed the conclusions there expressed. It is insisted, in a treatise of authority, that telegraph companies are common carriers (Shearman and Redfield on Negligence, § 554, *et seq.*), but the decisions, though still not quite harmonious, are generally the other way. Whether or not they are common carriers as to messages, is now, however, a point of little practical importance, since it is no longer disputed by any respectable authority, that they are not subject to the common-law liability of carriers (Leonard *v.* The New York, Albany & Buffalo Magnetic Telegraph Company, 41 N. Y. 544, *supra;* Breese *v.* U. S. Telegraph Co. N. Y. Court of Appeals, Sept. 1871); and, as we have pointed out, where this liability does not exist, the same rules apply in ascertaining the damages caused by a telegrapher's breach of a contract, as in other cases. Moreover, messages designed for transmission are now almost uniformly written on printed blanks, defining the conditions upon which the company agrees to send them. So far as these conditions are reasonable (as, for instance, that which provides that the company shall not be responsible for a delay or mistake in the transmission of a message, unless it is repeated at a charge of fifty per cent. in addition to the usual rate—a condition which is held reasonable both in England and this country), they form part of the contract. If they are unreasonable, as we think is the case with stipulations exonerating the company from the consequences of not attempting to send a message which has been received, or to deliver one which has been transmitted, or from gross neglect in transmitting a repeated message, the damages are measured as if no such stipulations had been made. The chief practical point, in discussing the subject of the recovery of damages for the misdelivery or the non-delivery of telegraphic messages, usually relates to the right of recovering at all under the circumstances of each case, rather than to the measure of such damages —the question commonly being, where there is no stipulation as to consequential damages, whether the information as to the nature of the despatch, and of the possible consequences of a failure to deliver it correctly, has been so properly and fully given to the telegrapher, as to charge him, in case of his default, with the loss sustained. Where the company is liable, there are, in a general sense, commonly but two measures of damages. One of these is the mere expense incident to the sending of the despatch. The other is the direct loss actually resulting from the telegrapher's default, to be ascertained on the principles applying to other breaches of contract. In the case of a proposed sale, frustrated by such default, this measure embraces, according to the best late authorities, the loss necessarily sustained in market value. If, for example, the telegraph company has become liable for damages by reason of its neglect to deliver a despatch agreeing to accept an offer to sell certain goods at a specified place and price, in consequence of which the bargain is lost, the measure of the damages recoverable by the person who had intended to purchase is the additional sum he would have to pay in order to buy for the same price, at the same place, the same quantity of similar goods. Squire *v.* Western Union Telegraph Co. 98 Mass. 232 (1867). This is the loss which the company should have expected to follow its failure to deliver the message. The same rule of recovery includes any additional expense, such as increased freight, to which the injured party has been, in the ordinary course of business, also necessarily subjected, in consequence of the default. True *v.* The International Telegraph Co. 60 Maine, 9 (1870). But the further discussion of the law on the subject does not come within our province, and it remains only to add a reference to the decisions directly touching the measure of damages, not already noticed.

By a mistake of the telegraph company, the plaintiff was informed that he could be furnished with 8,000 bushels of wheat for transportation from Chatham to Oswego. The despatch should have stated 3,000 bushels. In consequence of the wrong information, he gave up a contract for a cargo from Detroit, and sent his vessel to Chatham, where he obtained the 3,000 bushels only. It was held, that the only damages which would naturally flow from the defendant's default, or which could have been in the contemplation of both parties at the time of the delivery of the despatch for transmission, was a reasonable compensation for sending the vessel to Chatham and back. The plaintiff was not entitled to freight on the five thousand bushels the vessel did not carry, as it did not appear that he could have ob-

tained this freight if the message had been correctly transmitted. His real damage consisted in giving up his contract; and this he could not recover, because the fact of his having such a contract had not been communicated to the defendant. Lane *v.* The Montreal Telegraph Co. 7 U. C. Com. Pl. R. 23 (1857).

Through the carelessness of a telegraphic operator, the following despatch, transmitted from Chicago to Owego, "Send five thousand sacks of salt immediately," was transcribed so as to read, "Send five thousand casks of salt immediately." The term "sack" at the time designated a package of fine salt, weighing about 14 pounds, and the term "cask" a package of coarse salt of about 320 pounds. In an action against the telegraph company for damages arising from the mistake, the measure of damage was held to be the difference between the market value at Owego and that at Chicago (which was less), together with the cost of transportation from Owego to Chicago. Leonard *v.* The New York, Albany & Buffalo Electro-magnetic Telegraph Co. 41 N. Y. 544 (1870).

Where a telegraph company delivered as genuine a message purporting to be from the officer of a bank, addressed to a banking firm in another place, saying that a bank would pay the checks of a third party to the amount of $20,000, which message was a forgery, and the bankers in consequence paid the third party $10,000; the company was held liable to the bankers for the loss, the measure of which was the amount so paid. Elwood v. Western Union Telegraph Co. 45 N. Y. 549 (May, 1871).

In the case of Baldwin *v.* The United States Telegraph Co., the owner of an interest in an oil well at Rouseville, Pennsylvania, having sent a despatch to a correspondent at that place, and after waiting several days, having received no despatch in answer, in consequence of the answer having been wrongly addressed by a mistake of the telegraph company, sold the well for $3,800. It could have been sold for $5,000, and the undelivered despatch would have conveyed him this information. A verdict of $1,200 was directed by the judge at the trial, and was affirmed by the Supreme Court at general term (1 Lansing, 125; 1869). But the judgment was reversed by the Court of Appeals, which held that the special purpose of the despatch not having been indicated by the message, nor otherwise known to the company could not be considered in the assessment of the damages (45 N. Y. 744; June, 1871). The case of the United States Telegraph Co. *v.* Gildersleve, 29 Md. 162 (1868), is similar in principle. Where the telegraph company negligently omitted to deliver to the plaintiff the following message: "Ship oil as soon as possible at the very best rates you can," it was held by the Supreme Court of Colorado, that the profits which the sender might have made upon the oil could not be recovered, but that the measure of damages included, besides the cost of the despatch, all expenses incurred by the plaintiff by reason of the defendant's failure to fulfil the contract, among which was the increased price of freight he had to pay. Western Union Telegraph Co. *v.* Graham, 1 Colorado, 230; s. c. 10 Am. Law Register, 319 (1871).

It may be observed, in regard to the foregoing case, that while it disallows the recovery of profits, it cites with approval the cases of Squire *v.* Western Union Tel. Co. 98 Mass. 232, and Leonard *v.* The New York, Albany and Buffalo Magnetic Tel. Co. 41 N. Y. 544, above cited, in both of which a recovery of the loss in market value was allowed. In these the recovery was necessary to indemnify the plaintiff without giving him a profit. But, in both, are cited as authority, those decisions, in actions against carriers on the ground of negligent delay (such as Cutting *v.* Grand Trunk Railway, 13 Allen, 381), elsewhere noticed (*ante*, 359, n. 3). by which a recovery was allowed of the difference in market value of the retarded goods lost at the the place of their *destination*, and which included the shipper's or consignee's profit. We think that, by analogy, the recovery in corresponding cases against the telegraph company, where it has become liable on the ground of negligence, should include the loss in market value, even where the making good of this loss imports an actual profit.

CHAPTER XIV.

OF CERTAIN SPECIAL CONTRACTS, AND OF THE COMMON-LAW ACTION OF COVENANT.

Cases of Contracts not considered in the Previous Chapters.—Damages on Agreements for Forbearance.—Contractors on Public Works.—Misappropriation of Pledges.—Cases examined.—Forfeiture of Stock by Corporation.—Refusal by Corporation to permit Transfer of Stock.—Damages in suits by Assignees of Bankrupts.—Breach of Promise of Marriage.—Action of Covenant.—Charter Parties.—Assignments of Judgments.—Leases.

We have thus examined the measure of relief in the prominent cases of contract, where the damages are in no way liquidated by the parties. Before we approach the consideration of those cases where the compensation is controlled either by a penalty or a more precise stipulation, we have yet to discuss the question of Interest, together with some contracts not embraced in the foregoing divisions, as well as the measure of damages in the action of covenant.

Reserving for the next chapter the examination of the subject of Interest, we shall here discuss some particular contracts not included in our previous classification, and shall then treat of those cases which are exclusively presented in the common-law action of Covenant.

Contracts for Forbearance.—And first, of contracts for forbearance. These contracts are often entered into by creditors for certain considerations, on which they forbear to pursue their debtor during a given time.[1] In a case of this kind where the plaintiff had recovered judgment against his debtor, the defendant, in consideration that the plaintiff would forbear to

[1] Agreements to refrain from carrying on a particular occupation in a certain place or within prescribed limits, constitute another class of contracts for forbearance. The damages for the breach of these are usually liquidated in the contract itself, and where they are thus liquidated, the rule in regard to them will be hereafter considered. (Chap. 16.) But it sometimes occurs in this class of cases that no damages are stipulated. In such cases the plaintiff is entitled to recover the actual damages sustained from the breach. Jenkins *v.* Temples, 39 Geo. 655. So in an action against a physician for breach of an agreement not to practice, the measure of damages was held to be such sum as the jury might find to have been the value of the practice which the plaintiff lost between the time when the defendant resumed practice and the time of instituting the suit. Warfield *v.* Booth, 33 Md. 63.

sue out execution for a certain time, agreed to erect a house and lease it to the plaintiff; such erection and lease to be in full satisfaction of the judgment. The agreement not being performed, it was held that the value of the house was the measure of damages, and not the difference between the amount of the judgment and value of the house.*[1] [364]

SUITS BY CONTRACTORS.—There is another class of cases of not infrequent occurrence, to which incidental reference has already been had,† that of contractors, as they are called, or parties who undertake to construct public works on a large scale, such as railroads, canals, or government buildings. It appears to be settled in regard to this class of agreements, that the contractor is entitled to recover the profits which he has lost by the default of the other party to the undertaking;[2] that in estimating these profits, his subcontracts are not to be taken as evidence thereof;[3] but that they are to be arrived at by taking the market value at the time of the breach, and if there be no market value, then by a minute inquiry into the cost of materials, the expense of transportation, the amount and value

* Strutt *v.* Farlar, 16 M. & Wells. 249. See Ellison *v.* Dove, 8 Blatchf. 571, and *supra*, 200.

† *Ante*, 236.

[1] The measure of damages in contracts of sale may be affected by the actual forbearance of the vendee at the express or implied request of the vendor, although there is no new contract between the parties. Thus, where the defendants had by three bought and sold notes, contracted to sell the plaintiff five hundred tons of iron, the delivery to extend to July 25, 1865, but delivered none up to that time nor up to February following, when the plaintiff bought the iron in the market, and the price had then risen since July, a recovery for the amount of the difference between the price in February and in the previous July was sustained. The facts did not show a fresh contract by parol such as would take the case out of the statute of frauds, but merely a voluntary waiting by the buyer at the express or implied request of the seller. This operated so far as to amount to a postponement of the day when the plaintiff might go into the market, and on which the jury might calculate the measure of damages. Ogle *v.* Earl Vane, 2 L. R. (Q. B.) 275; 36 L. J. R. (Q. B.) 175; aff'd 9 B. & S. 182; 3 L. R. Q. B. 27.

For breach of a contract to stay execution, it is held in Indiana that the measure of damages is limited by the amount forborne, with interest and costs to the sale. Damages sustained by a forced sale of the property levied on are too remote. Indiana and Illinois Central Railway Company *v.* Scearce, 23 Ind. 223.

In such an action, the true measure is the value of the plaintiff's labor, and the profits he could have fairly derived from the labor he was prevented from performing. Cunningham *v.* Dorsey, 6 Cal. 19.

[2] In the case of the violation of a contract entered into for the express purpose of procuring goods for sale at their place of destination, even the loss of profits, if within the contemplation of the parties at the time of entering into the contract, and a direct consequence of the breach, and not speculative, may be recovered. Heinemann *v.* Heard, 50 N. Y. 27.

[3] So in an action for breach of contract in not furnishing logs to the plaintiffs for the manufacture of lumber, the terms of the plaintiffs' lease of the mill worked by them and stopped in consequence of the defendant's failure to furnish the logs, are immaterial. Lovejoy *v.* Morrison, 10 Minn. 136. See Caledonian R. Co. *v.* Cole, 3 L. T. 252; *ante*, 355; also, Story *v.* The New York & Harlem Railroad Co. 2 Seld. (N. Y.) 85.

of labor required; and the opinions of witnesses will not be received.*

Even with these data, the estimate of profits must be somewhat conjectural; and in such case it has been said to be the duty of the jury not to assess damages rigorously, but to moderate them so as to make allowance for any partial uncertainty that may exist.†

Where a millwright agreed to put machinery into the plaintiff's mill in a good and workmanlike manner, and he did it so unskilfully that the same was of little or no value, and the plaintiff lost the profit and benefit of his mill for a long space of time, and was obliged to alter the machinery, [365] it was held that the plaintiff was entitled to recover such additional sum, beyond the expense of the repairs, as the mill would have been worth to him if the defendant had fulfilled his contract, more than it was worth while the machinery was insufficient, and that the opinions of witnesses might be received. I suppose that in this case the court meant to give the profits of working the mill.‡[1]

Pledges.—We come next to pledges. Where an article is pledged for a specific object, and the pledgee misappropriates it in violation of the agreement, the remedy furnished by our law is either in an action of assumpsit or covenant, according as the engagement is sealed or unsealed, or in an action of trover. In either case, however, the question turns on the true construction of the contract. In an early case in New York, the plaintiff's intestate deposited with the defendant a certain depreciated note on the 29th of April, 1786, of the nominal value of $2,629, to be delivered to the intestate on the payment of $600 and interest. In 1788, the defendant sold the note for the best

* Masterton *v.* Mayor of Brooklyn, 7 Hill, 62; Lawrence *v.* Wardwell, 6 Barb. S. C. R. 423; N. Y. & H. R. R. Co. *v.* Story, 6 Barb. S. C. R. 419; Clark *v.* The Mayor, 3 Barb. S. C. R. 288. This case was reversed by the Court of Appeals, on the ground that when the contractor elects to consider the contract as rescinded, and brings his action for work and labor generally, he cannot recover for profits on the unexecuted part of the work; and that in such a case the rule of damages is the actual value of what has been done. But the general right to recover the profits which he would have made, where he brings his action for a breach of the agreement, was recognized. Clark *v.* The Mayor, 4 Comstock, 338; Seaton *v.* Second Municipality, 3 La. Ann. R. 45. In Louisiana, a contract made by a partnership as undertakers for the construction of a railroad will be canceled by the death of any of the parties, and the other contracting party is only bound to pay the value of the work already done, and that of the materials already prepared, proportionably to the price agreed on. McCord *v.* The West Feliciana Company, 3 La. Ann. R. 285.

† Seaton *v.* Second Municipality, 3 La. Ann. R. 45.

‡ Clifford *v.* Richardson, 18 Verm. 620.

[1] In an action for breach of a contract by which the defendant agreed to cultivate a farm on shares, the measure of damages is the profit which the plaintiff would have made if the contract had been fulfilled. Hoy *v.* Gronoble, 34 Penn. St. 9. See Wolf *v.* Studebaker, 65 Penn. St. 459.

price he could get, leaving a small balance still due him. In 1791 or 1792, the intestate died; and the plaintiff as his administrator, in 1799, went to the defendant's house to redeem, but was prevented by his illness from seeing him. The Supreme Court held that the defendant's sale was unauthorized, and that the rule of damages was the value of the certificate at the time of the application to redeem. It would seem from the language of the opinion, that the note had risen in value between the time of the sale and that of the application. It was insisted in this case, that the measure of damages was a mere question for the jury; but Kent, J., said: "In cases where there is a criterion for an accurate computation, that criterion must be followed, and it becomes then a rule of law. I have no doubt the rule in the present case is a rule of law, and the only examination is to discover it."* It is a matter of inquiry, in a case like this, whether the measure of damages should be the value at the time of conversion, which in Cortelyou *v.* Lansing would have been the price realized at the time of the irregular sale; or the value at the time of [366] the offer to redeem; or yet again, the value at the time of trial. These questions we have already considered,† and we shall have to examine them again more fully when we come to treat of the action of trover. In the mean time it may be noticed, that when the mortgagee of real or personal estate takes the thing pledged and sells it, or finally converts it to his own use, he is held to be paid so much only towards his debt as the thing sold for, or was worth at the time of the conversion.‡[1] These, however, are not, like those which we are here considering, cases of misappropriation.[2]

* Cortelyou *v.* Lansing, 2 C. C. in Error, 200 and 215. In Barrow *v.* Paxton, 5 J. R. 258, 260, it is said by Kent, J., that he never delivered this opinion; but it has been frequently recognized as law. Garlick *v.* James, 12 J. R. 146.

† *Ante*, 274, *et seq.*

‡ Globe Ins. Co. *v.* Lansing, 5 Cow. 380; Lansing *v.* Goelet, 9 Cow. 346; Spencer *v.* Ex'rs of Harford, 4 Wend. 381; Case *v.* Boughton, 11 Wend. 106.

[1] See the discussion of the rule of damages in trover, *post*, 481, note. In an action of assumpsit in Pennsylvania, where a debtor had conveyed lands in satisfaction of his indebtedness, taking a verbal agreement from his grantee, (which by the laws of the State was valid), that he should have the privilege of reselling the property within five years, and all the profit on the resale over the amount of the debt, if any, and before the five years had expired, gave notice to the grantee to sell, but the latter had already in good faith sold for less than the amount due him, it was held that the measure of damages was not the difference between the debt and the highest price that might have been obtained in the five years, but must be estimated by the price that could be had at the time the notice was given. Means *v.* Milliken, 33 Penn. St. 517.

[2] In a case in California, Mr. and Mrs. Price having borrowed of one Reeves $250, for which they gave him their promissory note, deposited with him, as collateral security, the note of one Johnston to Mrs. Price, for $1,200, secured by Johnston's mortgage on real estate. The last mentioned note and mortgage were Mrs. Price's separate property. Reeves foreclosed the mortgage, and agreed, at Price's request, to bid in the premises at the foreclosure

In Massachusetts,* where the plaintiff had pledged his brother's note as security for goods to the defendant, and the goods being paid for, but the note not being delivered up, he brought assumpsit on the implied promise contained in the receipt, the jury found a verdict for the plaintiff for the full amount of the note; and the Supreme Court said, "That though they were not bound to give him the nominal amount of the note, yet they were at liberty to do it." With deference, I do not see how the jury could have been at liberty to do otherwise, nor what different criterion could have been adopted. It was certainly no case for them to exercise a vague discretion. The whole amount was due, or nothing.†

Actions against Stockholders.—The measure of damages in actions brought by incorporated companies against stockholders, upon calls made for payment of stock, furnishes us with another subject of inquiry. Where the defendant subscribed for stock which had been forfeited by the company, it has been held in New York, that the forfeiture was not a bar to the action, but that the nominal value of the stock forfeited, less the actual cash value at the time it was declared forfeited, was the measure of compensation.‡ And unless the [367] value of the stock reaches the whole debt and interest, ‖ the plaintiff must have judgment for the balance.[1]

Refusal to Transfer Stock.—The refusal of corporations

* Thomas *v.* Waterman, 7 Met. 227.

† In Massachusetts, Jarvis *v.* Rogers, 15 Mass. 389, presents an interesting decision as to the measure of damages in the case of misappropriation of pledges. See it cited with approbation in Stearns *v.* Marsh, 4 Denio, 227.[2]

‡ Herkimer Man. Co. *v.* Small, 21 Wend. 273.

‖ S. C. 2 Hill, 127.

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sale, and hold the sheriff's certificate of the sale as security for the payment of Mr. and Mrs. Price's note, as he had done with the Johnston note and mortgage. Instead of this, however, he sold the premises to one Wilson, who took them with knowledge of the facts. Reeves and Wilson having sold the premises to an innocent purchaser, and thereby put it out of their power to convey them to Mrs. Price, were decreed to pay her $5,200, which was their value at the commencement of the suit, deducting from this amount that due from her to Reeves. Price *v.* Reeves, 38 Cal. 457.

[1] See also, Johnson *v.* Stear, 15 C. B. (N. S.) 330.

[2] Subscriptions.—Actions on subscriptions may be referred to here. Where in such actions, all the money subscribed is necessary for the purpose intended, the recovery is of course measured and limited by the amount subscribed; but if an amount less than the amount subscribed, is all that is in fact required, it is held, in Illinois, that the recovery should be *pro rata*. Miller *v.* Ballard, 46 Ill. 377. A promise to subscribe for a certain amount of stock in a plank-road company, to induce the selection of a particular route, if accepted, is valid, and may be enforced. The measure of damages is the difference between the value of the stock at the time of the trial, and the amount agreed to be paid for it. Rhey *v.* Ebensburg & Susquehanna Plank-road Co. 27 Penn. St. 261. On the other hand, on a breach of an agreement to give land for stock, if a specific performance cannot be decreed, in estimating the damages, reference should be had not to the nominal value of the stock, but to the land which ought to have been conveyed. Dayton *v.* Hatch, 1 Disney (Superior Court of Cincinnati), R. 84.

to permit transfers of their stock, presents another interesting question. In New York, where an action was brought * upon refusal of a bank to permit a transfer of stock on its books, the judge charged that the rule of damages was the highest price that the stock bore at any time after the demand for permission to transfer, and before the commencement of the suit. The defendants contended that the plaintiffs should recover the damages actually sustained, and which they insisted were only the excess of price in the market over the par value which might have been realized upon a sale and transfer. But the Supreme Court said:—

"This assumes the plaintiff to be still the owner of the stock. But the defendants have denied this ownership altogether. They possessed the means of preventing its use or enjoyment, and if the plaintiff should now recover only his loss occasioned by his inability to sell in the market, the measure would be obviously incomplete. We are not to assume, in the absence of any change of intention on the part of the bank, that a second application for a transfer would be more successful than the first. Upon this limited measure of damages, the plaintiff might be kept in continual litigation, at the volition of the defendants, or be driven to abandon his property."

This case was carried up to the Court of Errors, where the judgment was affirmed, with an intimation that perhaps the damages should have included the highest price to the day of trial.† [1] In England the rule would appear the same. In an early case, a mandamus to compel the bank to transfer stock was refused by Lord Mansfield, on the ground that an action would lie for complete satisfaction equivalent to specific relief.‡

In Massachusetts also, it has been held that the value of the stock at the time of the demand and refusal to transfer, is the true measure of damages.‖ [2] The rule in Massachusetts [3] and in New York is the same; but it is proper to notice that, in the one State, the analogy between the measure [368] of compensation in this case and in the action of trover is preserved; while in the other the analogy of the rule which

* Kortright *v.* Buffalo Commercial Bank, 20 Wend. 91.

† The chancellor, however, delivered a dissenting opinion, both as to the right of the plaintiff, and as to the measure of damages. Comm. Bank of Buffalo *v.* Kortright, 22 Wend. 348.

‡ The King *v.* The Bank of England, Douglass, 524.

‖ Gray *v.* Portland Bank, 3 Mass. R. 364; Sargent *v.* Franklin Ins. Co. 8 Pick. 90.

[1] So Arnold *v.* Suffolk Bank, 27 Barb. 424. See *post*, 481, note.

[2] So in Pennsylvania, The German Union Building and Saving Fund Association *v.* Sendmeyer, 50 Penn. S. (14 Wright) 67. And in New Hampshire, Pinkerton *v.* Manchester and Lawrence Railroad, 42 N. H. 424.

[3] Eastern R. R. Co. *v.* Levi Benedict, 10 Gray, 212.

we have already noticed,* that in sales of chattels where the property is paid for, the highest value up to the time of trial shall be given is entirely disregarded. This principle is based upon the idea that the property of the plaintiff is placed beyond his control by the act of the defendant; and the refusal to permit a transfer of stock presents a very similar state of things in this respect.[1]

SUITS BY ASSIGNEES OF BANKRUPTS.—Interesting questions are often presented in suits by assignees seeking to enforce contracts made by the bankrupt. In a case in assumpsit in the English Exchequer, the facts were that the bankrupt had, previous to his bankruptcy, delivered to the defendant a bill of exchange for £600, which he promised to discount, retaining £100 and the discount. He kept the bill, however, and paid nothing to the bankrupt. On this state of facts, the judge who tried the cause told the jury that they were bound to give the £600, less the £100 and the discount. An effort was made to set the verdict aside, on the ground that the cause should have been left to the jury at large, and that the judge erred in telling them, as *a point of law*, that the sum above stated was the measure of damages. But the charge was held right, and the court said, "No doubt all questions of damage are, strictly speaking, for the jury, and however clear and plain may be the rule of law on which the damages are to be found, the act of finding is for them. But there are certain established rules according to which they ought to find; and here there is a clear rule, that the amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken."†[2] The decision is important, as being one of that large class of cases in which the modern determination of the courts to reduce the subject of damages to settled rules is most distinctly visible.[3]

* *Ante*, 261.

† Alder *v.* Keighley, 15 M. & Wels. 171.

[1] RULE IN EQUITY.—Equity always gives the largest measure, when its powers are properly invoked on the ground of fraud or breach of trust. A party liable to account for stock, is chargeable with the highest market price on his refusal to account. Reitenbaugh v. Ludwick, 31 Penn. St. 131. So stock improperly sold by a pledgee must be accounted for at the highest price it attained at any time afterwards. Conyngham's Appeal, 57 Penn. St. 474.

[2] The equitable assignee in this class of cases has no greater right than the plaintiffs in the record. Valpy *v.* Oakeley, 16 Q. B. 941; Griffiths *v.* Perry, 1 E. & E. 680; Porter *v.* Vorley 9 Bing. 93, 95. See also, Hill *v.* Smith, 12 M & W. 618.

[3] In an action for a false representation, by which the plaintiff was alleged to have been compelled to pay £2,000, and thereby became bankrupt, and suffered great annoyance and inconvenience, the only damage recoverable was the direct pecuniary loss, the right to which passed to the assignees. Hodgson *v.* Sidney, 1 L. R. Exch. 313. Where property has been wrongfully taken, in an action by the *general assignee* of the owner for the conversion, the fact that it was taken from the defendant by attachments in favor of the creditors does not

BREACH OF PROMISE.—The action for breach of promise of marriage, as has been already said,* though nominally an action founded on the breach of an agreement, presents a striking exception to the general rules which govern [369] contracts.[1] This action is given as an indemnity to the injured party for the loss she has sustained, and has been always held to embrace the injury to the feelings, affections, and wounded pride, as well as the loss of marriage.†[2] From the nature of the case, it has been found impossible to fix the amount of compensation by any precise rule; and, as in tort, the measure of damages is a question for the sound discretion of the jury in each particular instance,‡[3] subject, of course, to the general restriction that a verdict influenced by prejudice, passion, or corruption, will not be allowed to stand.[4]

Beyond this the power of the court is limited, as in cases of tort, almost exclusively to questions arising on the admissibility of evidence when offered by way of enhancing or mitigating damages.[5] So where it appears that the promise was made by

* *Ante*, 210.
† Wells *v.* Padgett, 8 Barb. S. C. R. 323.
‡ Southard *v.* Rexford, 6 Cowen, 254.

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defeat the action. But the proceeds of the sale under the attachments are a defence *pro tanto*. If, however, the property was sold for much less than its real value, the defendant, being the wrong-doer, must suffer the depreciation. The measure of damages is the actual value at the time of the taking, less the amount produced at the sale. Ward *v.* Benson, 31 How. Pr. R. (N. Y.) 411. Where the assignor of the plaintiff owed her $500, for which she held his note, and he assigned her in good faith property to the amount of $900, taking up his note, she agreeing that, after collecting enough to pay it, she would apply the balance in payment of two other creditors of the assignor, and if anything remained after that, distribute it among the remaining creditors, and the defendants, as attaching creditors, took the assigned property, it was held that the plaintiff was entitled to recover the full amount of the property found, instead of the amount of the assignor's debt to her only. Robbins *v.* Fitz, 33 N. Y. 420. In an action by assignees in insolvency to recover the value of goods consigned, in violation of the statute against fraudulent preferences, by their insolvent to one of his creditors, the measure of damages is the value of the goods at the time when the preference was made Burpee *v.* Sparhawk, 97 Mass. 342.

[1] "Damages in this action," says Mr. Justice E. D. Smith, in a late case in the New York Court of Appeals, "have never been limited to the simple rules governing actions upon simple contracts for the payment of money only." Thorn *v.* Knapp, 42 N. Y. 494.

[2] Tobin *v.* Shaw, 45 Maine, 348. [3] *Ib.*

[4] The court will not, therefore, set aside the verdict on the ground of excessive damages, even if they think the amount "*entirely* disproportionate" to the case made by the proof. Goodall *v.* Thurman, 1 Head (Tenn.) 209.

[5] The length of time during which an engagement has subsisted is a proper circumstance for the jury to consider. Grant *v.* Wiley, 101 Mass 356. It was held by a majority of the New York Court of Appeals that the defendant might show in mitigation of this action, that the breach proceeded from no change of feeling on his part, but was in deference to the wishes of his mother, a woman in infirm health. Johnson *v.* Jenkins, 24 N. Y. 252. But such evidence must be taken merely as tending to reduce the standard to compensatory, and to exclude exemplary damages. The plaintiff cannot be the less entitled to compensation for the injury sustained, because of the circumstances which palliate the defendant's conduct.

The jury may take into account the plaintiff's altered social position in consequence of the defendant's misconduct. Berry *v* Dacosta, 1 L. R. C. P. 331. See Smith *v.* Woodfine, 1 C. B. 660, where the cases are reviewed, and the remarks of the author here, and at page 210, are cited by Mr. Justice Willes with approbation.

the defendant with a view to seduce the plaintiff, and that the defendant thereby did in fact seduce the plaintiff, this will be allowed to go to the jury [1] in aggravation.* [2]

* Paul *v.* Frazer, 3 Mass. 73; Green *v.* Spencer, 3 Mo. 225; Hill *v.* Maupin, *Ibid.* 323; Burks *v.* Shain, 2 Bibb, 341; Whalen *v.* Layman, 2 Blackf. 194; Wells *v.* Padgett, 8 Barb. S. C. R. 323. The contrary has been held in Pennsylvania; Weaver *v.* Bachert, 2 Barr, 80. But there the improper, cruel, and indecent conduct of the defendant will go to aggravate the damages. Baldy *v.* Stratton, 11 Penn. R. 316.

[1] Kniffen *v.* McConnell, 30 N. Y. 285; Kelly *v.* Riley, 106 Mass. 339; Burnett *v.* Simpkins, 24 Ill. 264; King *v.* Kersey, 2 Ind. 492; Tubbs *v.* Van Kleek, 12 Ill. 446; Coil *v.* Wallace, 4 Zabr. (N. J.) 291; Roper *v.* Clay, 18 Mo. 383; White v. Campbell, 13 Gratt. (Va.) 573. So in an action for breach of promise, it was lately held by the Supreme Court of Massachusetts, that although it might be true that damages for the seduction, as a distinct ground of action, could not be added to the damages to which the plaintiff was entitled for the breach of the alleged promise, and these damages must be awarded solely for the suffering which resulted from the defendant's refusal to perform his promise, yet that it would not follow that the act of the seduction was not to be taken into consideration by the jury. The damages, even under this rule, could not be justly estimated without regarding the increased exposure to mortification and distress to which the plaintiff had been left by a seduction under a promise of marriage afterwards broken. Sherman *v.* Rawson, 102 Mass. 395. See to the same purpose, Sauer *v.* Schulenberg, 33 Mo. 288. But to aggravate the damages, the seduction must be effected by means of the promise. Espy *v.* Jones, 1 Ala. 454.

[2] The rule observed in many of the States in actions of libel applies here, and if a plea of justification is interposed and fails, it will go in aggravation of the damages. Thorn *v.* Knapp, 42 N. Y. 474; Davis *v.* Slagle, 27 Mo. (6 Jones) 600. This is on the ground that the justification is placed on the record, and will remain there as a continual reiteration of the charge against the plaintiff, and that therefore "a trifling verdict would not show that such charge was unfounded." Kniffen *v.* McConnell, 30 N. Y. 285. And in New York it has been held by the court of last resort, that although justification on this ground be not pleaded, the unsuccessful attempt of the defendant to prove in mitigation the plaintiff's misconduct with other men, aggravates the damages. *Ibid.* In the charge of the judge at Nisi Prius in this case, which was sustained on the appeal, he instructed the jury that if the defendant had attempted to prove the plaintiff guilty of misconduct with other men, *of which he knew she was not guilty*, it aggravated the damages. This language by itself might perhaps in effect be justified within the rule of exemplary damages, which is sufficiently flexible and comprehensive to admit the consideration of all circumstances showing the *animus* of the defendant, although in cases proper for such damages, the jury should be permitted only, not instructed, to find them. But the attempt, at least beyond established precedents, to explore the motives of a defence, with a view to affecting the amount of the verdict, seems to us very dangerous. In this case, the judge refused to charge that "unless the jury were fully satisfied that the defendant was the father of the child with which the plaintiff was pregnant, they must find for the defendant," and the evidence, as reported, seemed at least to justify the defendant in an honest belief in the plaintiff's misconduct with other men. Whether the verdict (which, as rendered, even exceeded the amount claimed, though the plaintiff waived the excess) was right or not, we cannot think due legal precautions were taken to make it so. The case is regarded by Mr. Justice Ingraham, who pronounced the opinion of the court, although dissenting from the particular conclusion now under consideration, as carrying the principle to an unreasonable and unwarrantable extent. "It is an anomaly in an action for a breach of contract," says that learned judge, "to hold that setting up matters to excuse such breach in an answer, the proo of which fails, is an aggravation of the damages," and he thinks the rule should at least go no further. With great deference to the opinion of the majority of the court, we venture to think so too. Even a justification in the answer not made out by the proof, may have been in good faith, and although the charge continues on the record, it is always neutralized by a verdict for the plaintiff, which, if small in amount, may have been so for the reason that the jury were inclined to attach some credence to the defendant's charges. That such a justification, if unsuccessful, should increase the damages, should seem hard enough. But if the defendant takes the *onus* of the breach of the contract upon himself in his plea, it would seem unreasonable that he should be debarred from proving what led him to change his mind, by the fear of a very heavy verdict against him in case the evidence should fail to produce on the calmer apprehension of the jury, the same effect that it had on his own interested and sensitive judgment. "It was proved," says the report of the case in question, that the plaintiff had "invited young men into her room;" . . . . that in September, 1855, she "spent the

So also, it is held that the defendant may show in mitigation of damages, the licentious conduct of the plaintiff, and her general character as to sobriety or virtue, without any limitation of time whatever.* [1]

It is also settled that, in this action, *dissolute* conduct on the part of the female *after* the promise (or before if unknown), discharges the contract altogether. *Indecent* conduct *before* the promise, if unknown to the defendant, or *after* the promise, goes in mitigation of damages.†[2] No evidence can be given of any fact having a tendency to aggravate the damages, which has occurred after the commencement of the suit. So in an action for breach of promise, an indecent and insulting letter written by defendant to the plaintiff after suit [370] brought cannot be proved.‡

* Johnston *v.* Caulkins, 1 J. C. 116.

† Boynton *v.* Kellogg, 3 Mass. 189; Willard *v.* Stone, 7 Cowen, 22; Palmer *v.* Andrews, 7 Wend. 142; Irving *v.* Greenwood, 1 C. & P. 350; Capehart *v.* Carradine, 4 Strobhart, 42.

‡ Greenleaf *v.* McColley, 14 N. H. 304. But in seduction, where the child was born after the action was commenced, damages were given for the expense consequent thereon. Stiles *v.* Tilford, 10 Wend. 338. In the one case, however, the court took into view what

night at a tavern with a young man other than the defendant, and that they lodged together; and a similar occurrence in July or August, 1854," was also in evidence. Without the least design to do injustice, any man (unless we should except the jury in this case), might by evidence of this kind be both reasonably and honestly deterred from fulfilling a contract of marriage, the inducements to which should seem to have been so greatly diminished In such a case the right to inflict exemplary damages, which as we, have said would give the jury ample power to punish a clearly dishonest attempt to injure a plaintiff's character under the pretence of justification, should seem sufficient for the plaintiff's protection without an arbitrary rule compelling them to give such damages. See *post*, 547.

In Iowa the damages are enhanced or unaffected in such a case, according as the justification is or is not pleaded in good faith. Denslow *v.* Van Horn, 16 Iowa, 476. And such is the rule in several of the States of the Union. An unsuccessful attempt of the defendant to prove that while the plaintiff claimed to be waiting for the defendant to marry her, she was trying to marry another man, should not aggravate the damages. Simpson *v.* Black, 27 Wisc. 206.

[1] So also the plaintiff's breach of the criminal law by profanity, is said to go in mitigation. Berry *v.* Bakeman, 44 Me. 164.

[2] So the fact of a female plaintiff's having had an illegitimate child, if known to the defendant at the time of the promise, is no defence to the action, but goes in mitigation. Denslow *v.* Van Horn, 16 Iowa, 476. So in Illinois, the woman's connection with a man other than the defendant, before as well as after the promise, although the engagement was formed or continued by the defendant, with knowledge of her shame, goes in mitigation of the damages, on the ground that an unchaste woman cannot be injured by a breach of the marriage promise to the same extent with a virtuous one. Burnett *v.* Simpkins, 24 Ill. 264. So far, however, as the damages are a pecuniary compensation for the loss of an advantageous match, the measure should not be affected by previous misconduct of the woman which had been forgiven by the defendant. Indeed, as a matter of dollars and cents, a reputable woman's loss would perhaps not be so great as that of one whose reputation is tarnished, as it would generally be more easily supplied. Perhaps, moreover, as regards other damages, the loss of the opportunity of retrieving her name, and reassuming a position of respectability, is an injury practically equivalent to the keener mortification which a virtuous woman may be thought to sustain from a suitor's faithlessness. In the case, however, of the continuance of the woman's degradation, if such continuance be without the suitor's knowledge, she is entitled to nothing, and if with his acquiescence, to nominal damages only, both on the ground of her misconduct, and because the loss of a husband who has connived at his wife's shame inflicts no damage.

It may be shown in mitigation, that the defendant was affected with an incurable disease at the time of his breach of the promise. Sprague *v.* Craig, 51 Ill. 586.

HIRE OF SLAVES.—In regard to the hire of slaves, it has been held in Arkansas, as the value of slave hire fluctuates, that in an action for the hire of slaves for one year it is erroneous to instruct the jury that what the defendant paid the year previous is the correct criterion of their value, and that what such slaves hired for during the year in controversy would be the measure of relief.*[1] Where slaves are hired for a specific time and die within the period, but without fault of the hirer, the better opinion seems to be that the hirer is only liable for the time up to the negro's death,† though a contrary opinion has been in one case intimated.[2]

THE COMMON-LAW ACTION OF COVENANT.—Having thus considered various cases belonging to the great action of assumpsit, we now turn to others which are embraced in that of covenant. This is the remedy provided by our ancient jurisprudence for the recovery of damages upon the breach of a covenant, or contract under seal. The addition of a seal to the signature of the contracting parties is pregnant with important consequences, both in regard to the form of the action, and in many instances to the substantial rights of the parties; but it has no effect whatever on the *rule of damages*, except in regard to that class of cases embracing real covenants, which we have already considered. If the contract relate to personal property, the measure of damages is the same, whether it be sealed or unsealed,

was the direct and natural result of the illegal act. In the other it excluded the consideration of a new tort wholly distinct and independent from the original cause of action.

* Adamson *v.* Adamson, 4 English, 26.

† In Virginia, George *v.* Elliott, 2 Hen. & Munf. 5. In North Carolina, Williams *v.* Holcomb, 1 N. C. L. R. 365. In South Carolina, Bacot *v.* Parnell, 2 Bailey, 424; and in Arkansas, Collins *v.* Woodruff, 4 English, 463. But in Kentucky, they have held the owner liable for the whole term. Harrison *v.* Murrell, 5 Mon. 359; Redding *v.* Hall, 1 Bibb, 536.

[1] For breach of covenant in not teaching a slave a trade, the measure of damages is not the cost of the instruction, but the difference between his value with and without it. Bell *v.* Walker, 5 Jones' Law (N. C.), 43.

[2] The principle as to the right and measure of recovery in the species of bailment known as *locatio rei*, to which the hiring mentioned in the text belongs, is this. The bailee is bound to ordinary care of the property bailed, having reference to its nature and to the circumstances. When the contract of bailment is violated, and the property is damaged, it is *prima facie* an injury for which the bailee is liable to the extent of the value of the thing bailed. Being in the wrong, it is for him to relieve himself in respect to the actual loss, by proving that it could not have been the result of the want of that care which the contract required. Thus, where the hirer of a slave agreed with the owner that he should work all the time under the eye of a white overseer, which was not done, and the slave, while working with other slaves, and without a white overseer, was killed in some unexplained way, it was held that the hirer, in the absence of proof that the presence of the white overseer would have had no effect in regard to his death, was liable for his value. Knox *v.* North Carolina R. R. Co. 6 Jones' Law (N. C.), 415. Where the hirer of the slave, by cruel treatment, caused him to run away, in consequence of which he perished, the hirer was held responsible for his value and for his hire during the term of his engagement, with interest up to the commencement of the suit. Robinson *v.* Varnell, 16 Texas, 382.

and, consequently, whether the remedy be by covenant or assumpsit.

The questions, therefore, that present themselves in actions of covenant, are usually identical with those which we have been considering in assumpsit. There are cases, however, coming up in this form of action, which cannot arise [371] in any other, inasmuch as the instruments out of which they grow are always executed under seal.[1] Such are assignments of judgments, charter-parties, and leases for terms of years.[2]

ASSIGNMENTS OF JUDGMENT.—In the case of an assignment of a judgment containing a warranty that the sum specified remained due and unpaid, when in fact no judgment had ever been entered up, the Supreme Court of New York held, in an action of covenant, that the measure of damages was not the amount recovered as stated in the assignment of the judgment, but the amount of property owned by the judgment debtor, and which might have been taken in execution intermediate the time of assignment and the commencement of the suit.* It is worthy of notice here, that the amount of consideration or value paid did not appear on the face of the assignment, and that it is not stated in the report whether the evidence in regard to the amount of property owned by the alleged judgment debtor came from the plaintiff or defendant; although, as the declaration is stated to have averred that the plaintiff had property enough to satisfy the demand, the pleader seems to have thought that, regularly, it should have come from the plaintiff. It would seem that, *primâ facie*, either the amount appearing to have been paid for the judgment, or the amount recovered by it, should be the measure of damages. If the analogy of conveyances of real estate were followed, then the consideration paid would govern. If the assignment were treated as a chattel, then the price paid would again be the

* Jansen *v.* Ball, 6 Cow. 628.

[1] In a grant of land there was a covenant that the defendant should sink upon the demised premises a pit to the depth of 130 yards in search of coal, and, in case a marketable vein should be reached, pay the plaintiff £2,500. In an action by the plaintiff for breach of this covenant, evidence being given to show that if the defendants had sunk the pit, marketable coal might have been found, it was held, that the plaintiff was entitled to more than nominal damages, and that the true measure of damage was the amount which he had lost by being deprived of the opportunity of finding marketable coal. Pell *v.* Shearman, 32 Eng. L. & E. 496.

See the measure of damages under the Mexican laws, in case of breach of covenant, stated in Garrett *v.* Gaines, 6 Tex. 435.

[2] No damages are recoverable in *scire facias* for delay of an execution. Vredenburgh *v.* Snyder, 6 Iowa, 39.

rule, subject to the plaintiff's right to show that the whole amount could have been recovered, and then for its value beyond the price; and also subject to the further right of the defendant to show that, owing to the judgment debtor's insolvency, it was worthless. If the analogy in the case of sheriffs were adopted, then the amount recovered by the judgment would be the *primâ facie* measure, subject to the defendant's right to reduce the sum by showing that, owing to the judgment debtor's circumstances, its whole amount could not be collected. I make these remarks as serving to illustrate the contradictions and perplexity that pervade the whole [372] subject; indeed, we are sometimes induced to say, with Huberus, *Valde lubrica est hujus rei praxis, et tantum non arbitraria.** [1]

Charter-Parties.—Charter-parties also being under seal, are to be included under this head; and we have already considered the measure of damages in actions of this kind.† [2]

Leases.—Leases, being also usually sealed instruments, generally find their appropriate remedy in this action; but the measure of damages in these cases has been already discussed elsewhere. ‡ [3]

* Huber. Præl. Jur. lib. 22, tit. 1, vol. iii, p. 89.

† Wheelwright *v.* Beers, 2 Hall, 382 and 391. *Ante*, 371, *et seq.*

‡ *Ante*, 165, *et seq.*; 194, *et seq.*

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[1] Where one of three judgment debtors had been released, it was held, in an action by the assignee of the judgment against the assignor for breach of covenant, that neither of the others had been released, there having been no fraud; and in the absence of proof that the judgment was wholly valueless, the assignee could not, while retaining it, recover as if there had been a total failure of consideration. He would be entitled in such a case to the expenses of attempting to enforce the judgment against the released debtor. Weston *v.* Chamberlain, 56 Barb. 415.

[2] On a charter-party, or instrument in the nature of one, the rule is the difference between the contract price and what the vessel might have earned by pursuing her voyage with other freight, together with the fair value of the time lost by her through the defendant's breach of contract. Husten *v.* Richards, 44 Maine, 182; Hunter *v.* Fry, 2 B. & A. 421.

But where by the terms of the charter different articles of freight are to be paid for at different rates by weight, and the freighter is at liberty to supply them in such proportions as he may choose, the proper measure of damages in an action for not supplying cargo is the average value of freight for the voyage, calculated on the various rates of freight in the proportion of the different articles usually carried on similar voyages. Thomas *v.* Clarke, 2 Starkie, N. P. 450.

But where some of the enumerated articles are limited as to the amount which may be carried, and that limit has been reached, the freight of substituted articles can be calculated only on an average of the remaining goods. Cockburn *v.* Alexander, 6 C. B. 791.

[3] It may be noticed that in cases where the amount of damages depends on the length of a life in being, as in the case of a lease for life or a dower right, the courts, if not by the assent of parties, usually by the rules of their practice, resort to the standard annuity tables, as the Northampton or Wigglesworth Tables. The value of the life for a year being ascertained by the jury, the expectation of the life becomes a matter of calculation from the tables. See How *v.* How, 48 Me. 428.

Having thus examined the rule of damages in actions on contracts where the measure of remuneration is not fixed by the parties, we shall, after treating of the subject of Interest, turn to those cases where, either by a penalty or by a more precise stipulation, the parties endeavor to determine the amount of compensation which shall be recoverable on a breach of the agreement.[1]

[1] The rule of actual compensation is to be followed in the action of covenant. Where a defendant assigned a policy of insurance for £1,000, on which he was to pay the premium to trustees for his creditors by a deed containing a covenant that he would do nothing to avoid the policy, which was subject to a condition that if the assured should go beyond the limits of Europe, it should be void, and he violated this covenant, thereby avoiding the policy, it was held that the measure of damages was the value of the policy at the time of the judgment, taking into consideration the fact that the defendant had covenanted to pay and should pay the premium thereon. Hawkins *v.* Coulthurst, 5 B. & S. (Q. B.) 343.

CHAPTER XV.

OF INTEREST WITH REFERENCE TO DAMAGES.

Interest first given in England by Statute.—When allowed as Matter of Law.—When by the Jury in their Discretion.—Allowed where a Principal Sum is to be paid at a Fixed Time.—Where an Agreement can be inferred.—Not allowed where the Demand is unliquidated.—Conflict between English and American Decisions.—Money improperly detained.—Cash Advances—Special Cases.—Compound Interest.—Cash Advances.—Discretion of the Jury.—In Trover and Trespass.—Interest on Error.—On Judgment.—When Principal has been paid.

INTEREST AS DAMAGES.—Before taking leave of those contracts in which the damages are unliquidated, we have to examine the cases in which interest is allowed as damages. We have already seen * that in actions brought on promises to pay a liquidated sum of money, as on promissory notes or bills, where no question arises as to the currency or rate of exchange, the rule of damages is fixed and arbitrary, being identical with the rate of legal interest. We are now considering a different and more complex class of agreements. In these, the question of interest often depends on the true construction of the contract, or the just inference to be drawn from the evidence as to the intention of the parties; and when this is the case, it does not properly come within the scope of this treatise. The allowance or infliction of interest often, however, presents itself entirely disconnected from any question of contract; and in this aspect the subject cannot be omitted in any work which treats of compensation; for it is to be observed generally, to use the language of Lord Kenyon,† "that where interest is intended to be given, it forms part of the damages assessed by the jury, or by those who are substituted in their place by the parties." ‡[1]

* *Ante*, ch. viii, p. 233.

† Lee *v.* Lingard, 1 East, 401.

‡ And so says Huberus, *Explicata est pars prima Rubricæ de usuris, quibus admodum affine esse* id *quod* interest *aliquoties intellexinus.* Huber. Præl. Jur. vol. iii, p. 88, § 30.

[1] Where interest is thus allowed by the jury, it must enter into their estimate of the damages, and be found as a part of them.

Thus where, in an action for the wrongful sale of real estate, the jury found a verdict for a specified sum, with interest from the day of sale, and judgment was entered accordingly, it

The subject of interest is susceptible of a very clearly [374] defined division; *first*, where it can be claimed as a right, either because there is an express contract to pay it, or because it is recoverable as damages which the party is legally bound to pay for the detention of money or property improperly withheld;*[1] *second*, where it is imposed to punish negligent, tortious, or fraudulent conduct. In the first case it is recoverable as matter of law.[2] In the second case it rests entirely in the pleasure of the jury.

STATUTES OF HENRY VIII AND ANNE.—We have already had occasion to notice that interest was originally introduced into English jurisprudence by statutory provision.† "Before the statute of Henry VIII,"‡ says Lord Mansfield,‖ "all interest on money lent was prohibited by the common law, as it is now in Roman Catholic countries.¶. This statute provided that none should take for any loan or commodity above the rate of ten pounds for one hundred pounds for one whole year, which rate was reduced to five per cent. by a subsequent act.**

AGREEMENT FOR INTEREST IMPLIED IN CASE OF DEFAULT IN PAYMENT OF MONEY AT A GIVEN TIME.—Where a principal sum

* Abbott *v.* Wilmot, 22 Verm. 437.

† *Ante*, ch. viii, pp. 236, 237.

‡ 37 Hen. VIII, c. 9.

‖ In Lowe *v.* Waller, Douglass, 736 and 740.

¶ This conclusion, notwithstanding a contrary dictum of Lord Hale [Hard. Rep. 420], is arrived at by Mr. Senator Spencer, in his very able dissenting opinion in the Rens. Glass Factory *v.* Reid, 5 Cowen, 587 and 604, hereafter cited.

** 12 Anne, stat. 2, c. 16.

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was reversed, and judgment was entered by the appellate court for the amount of the verdict, less the interest. Dozier *v.* Jerman, 30 Mo. 216.

So in an action of *quantum meruit* upon an unliquidated contract, the jury cannot award interest, *eo nomine*, upon the amount of their verdict, but, if it is taken into consideration, it must only go to enhance the sum awarded as damages. Dotterer *v.* Bennett, 5 Rich. (S. C.) L. 295. Where interest is comprehended within the terms of a contract, it is not added by way of *damages*, but is a substantive part of the debt. Hummell *v.* Brown, 24 Penn. St. 310. Interest, in the State of Illinois, in actions purely *ex contractu*, and where there is nothing tortious in the character of the indebtedness, can only be recovered in the cases specified by statute, or where there has been an express promise to pay interest, or where a promise can be inferred from circumstances, from the particular mode of dealing adopted by the parties, or the usage of the trade in which they dealt. Sammis *v.* Clark, 13 Ill. 544; Hitt *v.* Allen, *Ibid.* 592.

[1] A purchaser who has paid in advance, and recovers damages for non-delivery, cannot, on affirming the contract, recover interest on his advances. Dobenspeck *v.* Armel, 11 Ind. 31.

In New Hampshire, interest is recoverable upon the amount of an insurance policy wrongfully withheld. The Swampscott Machine Co. *v.* Partridge, 5 Fost. 369; see also, as to the recovery of interest where money is withheld wrongfully, Whitworth *v.* Hart, 22 Ala. 343.

[2] Richmond *v.* Bronson, 5 Denio, 55; Robinson *v.* Corn Exchange Ins. Co. 1 Ab. Pr. (N. S.) 186. See Gillett *v.* Van Rensselaer, 15 N. Y. 397.

Interest is due on coupons or interest warrants, without their having been presented for payment, if when they were due there were no funds at the place of payment. North Penn. R. Co. *v.* Adams, 54 Penn. St. 94; Mills *v.* Jefferson, 20 Wisc. 50.

is to be paid at a specific time, the English law has always since the passage of this act, implied an agreement to make good the loss arising from a default, by the payment of interest. This was expressly said,* by Lord Mansfield, in an early case.

"Where money is made payable by an agreement between parties, and a time given for the payment of it, this is a contract *to pay the money at a given time, and to pay interest for it from the given day in case of failure of payment at that day.* So that the action is, in effect, brought to obtain a specific performance of the contract. For pecuniary damages, as upon a contract for the payment of money, are from the nature of the thing, a specific performance, and the relief is defective so far as all the money is not paid."

[375] And Lord Thurlow said,† "All contracts to pay undoubtedly give a right to interest from the time when the principal ought to be paid." This language has been cited with approbation in this country.‡[1] In these cases the interest computed at the legal rate, becomes the fixed measure of damages, to which the plaintiff is entitled as of right, as on a bill[2] or note for instance, the refusal of which would be error, and no more than which can be recovered.‖ Lord Mansfield extended the principle further than it had been carried before his time, holding that in such actions interest should be computed to the time of the verdict, instead of, as had been previously practiced, to the commencement of the suit.¶

WHERE THE TIME OF PAYMENT IS INDEFINITE, THE ENGLISH RULE DOES NOT IMPLY INTEREST.—But where money is due, without any definite time of payment,[3] and there is no contract, express or implied, that interest shall be paid, the English rule, independent of statute, is, that it cannot be claimed. In the

* Robinson *v.* Bland, 2 Burr. 1077 and 1086 (1760).
† Boddam *v.* Riley, 2 Bro. C. C. 2.
‡ Williams *v.* Sherman, 7 Wend. 109. In New York, interest accruing in cases of contract, subsequent to the verdict, is taxed with the costs, but not in cases of tort. 2 R. S. 364, § 9. Henning *v.* Van Tyne, 19 Wendell, 101.
‖ *Ante*, 233; *ante*, of Bills and Notes, 237.
¶ Robinson *v.* Bland, 2 Burr. 1077, 1086.

[1] Adams *v.* The Fort Plain Bank, 36 N. Y. 255. "*Vice versa*," where the purchase money of real estate has been ready, and no interest has been made of it, the purchaser may recover interest upon it. Flureau *v.* Thornhill, 2 Black. 1078; Richards *v.* Barton, 1 Esp. N. P. 268.

[2] If a bill of exchange, on the face of which no interest is reserved, is drawn in one country payable in another, the drawer is liable on its dishonor to pay as damages interest at the current rate in the country where the bill was drawn. Gibbs *v.* Fremont, 9 Exch. 25; s. c. 20 Eng. L. & E. 555.

[3] Upon a bond conditioned for the payment of a sum of money, where no time was mentioned for the payment, and it was not even stated to be payable on demand, and nothing was said about interest, it was held that interest was payable from the date of the bond. Purdy *v.* Phillips, 1 Kern. (N. Y.) 406.

Common Pleas,* it was early said, that in an action for money had and received, the plaintiff could recover nothing but the net sum without interest. In the King's Bench,† Lord Ellenborough said, "Lord Mansfield sat here for upwards of thirty years, Lord Kenyon for above thirteen years, and I have now sat here for more than nine years; and during this long course of time, no case has occurred, where, upon a mere simple contract of lending, without an agreement for payment of the principal at a certain time, or for interest to run immediately, or under special circumstances from whence a contract for interest was to be inferred, interest has ever been given." The interest here claimed was on money lent.‡ In a subsequent case,‖ Abbott, C. J., said, "It is now established as a general principle, that interest is allowed by law only upon mercantile securities, or in those cases where there has been an express [376] promise to pay interest, or where such promise is implied from the usage of trade or other circumstances."

NOR DOES FRAUD ALTER THE ENGLISH RULE.—The rule here laid down has been, as we shall see, a good deal modified in this country; but the English courts have adhered to the doctrine with considerable rigor. Thus they have refused interest where property has been unjustly detained, or payment improperly refused, even in cases of fraud; Lord Ellenborough ¶ saying, that the fraud did not take this case out of the rule which he had previously laid down,** that there must be an agreement, express or implied; and the same principle was afterwards adhered to.††[1]

* Walker *v.* Constable, 1 Bos. & Pul. 307, and Tappenden *v.* Randall, 2 B. & P. 472.

† Calton *v.* Bragg, 15 East, 223 (1812).

‡ See also, Arnott *v.* Redfern, 3 Bing. 353.

‖ Higgins *v.* Sargent, 2 B. & Cres. 348.

¶ Crockford *v.* Winter, 1 Camp. 129.

** De Havilland *v.* Bowerbank, 1 Camp. 50.

†† De Bernales *v.* Fuller, 2 Camp. 426. The English courts do not appear to have in any way departed from the rule of De Bernales *v.* Fuller, and De Havilland *v.* Bowerbank; see Fruhling *v.* Schroeder, 2 Bing. N. C. 77; but in a large class of cases a different rule has been introduced by statute. The 3 and 4 Will. IV, c. 42, 38, declares, "that upon all debts or sums certain, payable at a certain time, or otherwise, the jury on the trial of any issue, or on any inquisition of damages, *may, if they shall* think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest, from the time when said debts or sums were payable, if such debts or sums be payable by virtue of some written instrument at a certain time; or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment, provided that interest shall be payable in all cases in which it is now payable in law." This statutory regulation recognizes the hardship of the old rule, but leaves the matter in great uncertainty, the whole thing being given to the discretion of a jury in the particular case. As to this statute, see Davis *v.* Smyth, 8 Mees. & Wels. 399, an action of debt for goods sold and delivered. It was found that the defendant had agreed, at the time of the contract, to give a bill or note for the price. The jury gave interest, and it was held right. And see also, Harper *v.* Williams, 4 Q. B. 219.

[1] And where a bank has stopped payment, interest is not allowed in England upon its notes until they have been presented for payment. *In re* Herefordshire Banking Co. L. R. 4 Eq. 250.

CASE OF PAYMENT BY SURETY.—But a surety who is indemnified against all loss by his principal, and who is compelled to pay the debt of his principal, is entitled to interest on the amount so paid, though interest was not expressly mentioned in the contract between them, and though there was not any demand of interest, and though the claim in respect thereof was not made till many years after payment.*

AGREEMENT FOR INTEREST INFERRED FROM USAGE.—It is well settled in the United States, that an agreement to pay interest may be inferred from usage. Thus, in New York,† interest has been allowed on the account of a forwarding merchant, on the ground of a universal custom to charge interest on such [377] accounts, the custom being known to the defendant; and Savage, C. J., said, "Interest is always properly chargeable when there is either an express or an implied agreement to pay it." ‡

INTEREST NOT RECOVERABLE ON UNLIQUIDATED DEMANDS.—It is also a general rule, that interest is not recoverable on unliquidated demands.[1] In an action ‖ for not delivering teas according to agreement, Judge Washington, at Nisi Prius, said, "It is not agreeable to legal principles to allow interest on unliquidated or contested claims in damages." "The rule is well settled," says Parker, J., in the Supreme Court of New York, "that interest is not recoverable on running or unliquidated accounts, unless there is an agreement, either express or implied, to pay interest.¶[2] So in Massachusetts, it is said, "that interest cannot be recovered upon an open and running ac-

* Petre *v.* Duncombe, 15 Jur. 86; 2 Lowndes, M. & P. Pr. Cas. 107.

† Meech *v.* Smith, 7 Wend. 315.

‡ See also, S. P. Reab *v.* M'Allister, 8 Wend. 109.

‖ Gilpins *v.* Consequa, Peters' C. C. R. 88.

¶ Esterly *v.* Cole, 1 Barb. S. C. Rep. 235; affirmed, 3 N. Y. 502. See also, Newell *v.* Griswold, 6 J. R. 45; Trotter *v.* Grant, 2 Wend. 413; Wood *v.* Hickok. 2 Wend. 501; McKnight *v.* Dunlop, 4 Barb. S. C. R. 36.

[1] Holmes *v.* Rankin, 17 Barb. (N. Y.) 454. But this rule is greatly modified by recent decisions; see Mote *v.* The Chicago and Northwestern R. R. Co. 27 Iowa, 22; and *post*, head pp. 467, n. 1, 476, n. 1; see also Fitch *v.* Livingston, 4 Sandf. (N. Y.) 492.

Where a party contracting to furnish labor and materials has completely fulfilled the contract on his part in due time, he is entitled to recover, in a suit for the compensation stipulated by the contract, interest on the amount due him, at least from the commencement of the suit. But where, in such case, the right of the party to recover his compensation under the contract is doubtful, and contested on reasonable grounds, and the amount due him requires to be adjusted by the proceedings in the suit, interest is only recoverable after the right of the party to recover, and the amount of his recovery, have been determined. The Isaac Newton, 1 Abbott's Adm. R. 588. In Connecticut, a mere book account does not draw interest (Day *v.* Lockwood, 24 Conn. 186), except by the understanding of the parties, or on proof of a custom to allow it. Crosby *v.* Mason, 32 Conn. 182.

[2] Interest, therefore, cannot be allowed on each item of a mutual running account. It is recoverable only from the time the amount is liquidated. Salter *v.* Parkhurst, 2 Daly, 240. See Reddington *v.* Gilman, 10 Bosw. (N. Y.) 235.

count for work and labor, goods sold, and the like, unless there is some contract to pay interest, or some usage, as in the case of the custom of merchants, from which a contract may be inferred." * [1] And so also in Texas, interest is denied on an open account.† So, in an action on a policy of insurance, if the preliminary proofs are so vague that the claim cannot be computed, interest is not allowable.‡ [2] On the other hand, on liquidated amounts, interest is recoverable; [3] as, when accounts are stated between the parties, or rendered, and not dissented from.‖ [4]

In America, Interest follows the Fraudulent Detention of Money.—We have seen above, that, in England, interest has been refused, even where fraud is practiced by the defendant; ¶ but this is not the American rule. In an early case, the

* Hunt *v.* Nevers, 15 Pick. 500; Goff *v.* Inhab. of Rehoboth, 2 Cush. 475.

† Cloud *v.* Smith, 1 Texas, 102.

‡ M'Loughlin *v.* Washington Ins. Co. 23 Wend. 525. But in an early case it was held, that though interest is not strictly recoverable as of right on a partial loss under a policy of insurance, still the jury may give it if they think proper. Anon. 1 J. R. 315.

‖ Walden *v.* Sherburne, 15 J. R. 409.

¶ *Ante*, 376.

[1] In New Hampshire, where goods are sold and delivered, and the time of payment is agreed on by the parties, interest is recoverable from the period so fixed, by way of damages, for the wrongful detention of the money after that time. And where no time of payment is fixed, but a demand of payment is made, interest is recoverable from the time of the demand. The National Lancers *v.* Lovering, 10 Fost. (N. H.) 511. In Illinois, interest is not allowed upon an account, unless there is unreasonable and vexatious delay in the payment of the money. Aldrich *v.* Dunham, 16 Ill. 403. A delay from October to December was held not to be unreasonable, in McCormick *v.* Elston, *Ibid.* 204.

It is now settled in New York, that in actions of contract interest is no longer in the discretion of the jury, but a matter of right, and as essential to legal indemnity as the principal sum or ascertained value to which it is incident. For the non-delivery of merchandise, therefore, pursuant to contract, interest on the value of the merchandise, from the time when it should have been delivered is recoverable, as of right. See Dana *v.* Fiedler, 12 N. Y. 40, 50. And in actions of tort, the Superior Court of the city of New York, going, we think, somewhat beyond previous decisions, have lately applied the principle not merely to the wrongful taking or conversion of specific personal property, but to other actions for the loss or destruction of property of ascertainable value, holding, in an action against a municipal corporation, to recover damages for injuries done to real estate by a mob, that the jury were properly instructed to allow interest on the value of the buildings destroyed. Greer *v.* The Mayor, 3 Robertson (N. Y. Superior), 406. It was lately held by the Supreme Court of New York, in a similar case, that the jury *might* give interest if they thought justice required it. Orr *v.* Mayor of New York, 64 Barb. 106. But see *post*, 386, note.

[2] Nor unless the insurer be in default in payment. Oriental B'k *v.* Tremont Ins. Co. 4 Met. (Mass.) 1; Gammage *v.* Alexander, 14 Tex. 414. Nor is a debtor chargeable with interest on the debt by a delay in its payment caused by his being summoned as trustee of the creditor in a trustee process. Bickford *v.* Rich, 105 Mass. 340.

[3] Hollingsworth *v.* Hammond, 30 Ala. 668. Interest is recoverable upon all liquidated demands; upon bonds, notes, bills of exchange, and accounts stated. A judgment is a liquidated demand, though it be rendered in a foreign court. A sum certain, a fixed time of payment, and the parties by whom and to whom payment is to be made,—these are the essentials of a liquidated demand. Nelson *v.* Felder, 7 Rich. (S. C.) Eq. 395.

[4] Without proof of the time when payment was demanded, interest can be allowed only from the time of suit brought. Rawson *v.* Grow, 4 E. D. S (N. Y.) 18. But no demand is necessary where it had been the defendant's duty to remit the money; and in such cases interest is recoverable from the time when it should have been remitted. Stacey *v.* Graham, 14 N. Y. 492.

English cases were reviewed at length by the Supreme Court of the State of New York, and their principle was disap-
[378] proved of. When money is received by a party who improperly detains it, or converts it to his own use, he must with us pay interest.*[1] So when money has been improperly withheld by a public officer, as where a sheriff retains money after the return day of the execution, he is liable for interest.†[2] So a party receiving money belonging to another, and refusing to pay it over, is chargeable with interest, although he has a set-off, and the precise amount due from him is not liquidated previous to the commencement of the suit.‡

So in Vermont, where the defendant had made a gross and fraudulent misapplication of funds, he was held rightly chargeable with interest, and the jury were so instructed.‖ And the rule in Pennsylvania is the same.¶ In Massachusetts also, it has been held, that where the defendant in an action for money had and received has fraudulently obtained or wrongfully detained the plaintiff's money, he is chargeable with interest from the time of his so obtaining or detaining the same.** In a more recent case in that State, it has been held, where an agent, although acting in good faith, unreasonably neglected to inform his principal of the receipt of money, that he was liable for interest; and it was then generally intimated, that when the payment of money due is withheld unlawfully and against right, the law will allow interest.††[3]

But in the same State it is held, that where money is pay-

* People *v.* Gasherie, 9 J. R. 71; Lynch *v.* De Viar, 3 J. C. 303.

† Slingerland *v.* Swart, 13 J. R. 255; Crane *v.* Dygert, 4 Wend. 675.

‡ Greenly *v.* Hopkins, 10 Wend. 96.

‖ Crane *v.* Thayer, 18 Verm. 162.

¶ Commonwealth *v.* Crevor, 3 Binn. 121 and 123.

** Wood *v.* Robbins, 11 Mass. 504; Goff *v.* Inhab. of Rehoboth, 2 Cush. 475; Hubbard *et al. v.* Charlestown Branch R. R. Co. 11 Met. 124.

†† Dodge *v.* Perkins, 9 Pick. 368.

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[1] Barr *v.* Haseldon, 10 Rich. Eq. (S. C.) 53; Tarpley *v.* Wilson, 33 Miss. (4 George) 467; Parker *v.* Biglow, 14 Pick. 436. In a case in Connecticut where by the then existing law usurious contracts were void to the extent only of all the agreed interest, and if anything had been paid on account of the usurious interest, such amount was deducted from the debt, and judgment rendered for such sum as would give the plaintiff in the whole the amount originally lent only, without interest (Conn. Laws, 1849), the Supreme Court held that while the defendant had the right under the statute to deduct the usurious interest taken, it was not the less his legal duty to pay the remainder on the maturity of the obligation, and allowed the plaintiff as damages a sum equivalent to the interest on the unpaid principal from the time it became due. Fisher *v.* Bidwell, 27 Conn. 363.

[2] Paige *v.* Willett, 38 N. Y. 28.

[3] An agent with whom money is deposited for a definite owner is chargeable with the interest which he receives for the use of such money. Bassett *v.* Kinney, 24 Conn. 267. So where one collects money for another, and refuses to pay it over, the jury may allow damages for the detention, and the measure of damages is the lawful rate of interest. Close *v.* Field, 13 Tex. 623. But a mere stake-holder is not liable for interest upon money in his hands, although he makes a profit by the use of it. Jones *v.* Mallory, 22 Conn. 386. See, however, Ruckman *v.* Pitcher, 20 N. Y. 9; *post*, 380, note 3.

able on demand, and there is no contract or usage to pay interest, and the defendant is not a wrongdoer in acquiring or detaining it, interest is to be computed from the service of the writ only.*[1]

In many cases, an express demand is necessary. So, an attorney who has advised his principal is not liable [379] till demand, unless expressly directed to remit.†

Examination of American Cases.—In North Carolina, after stating the English rule, the court said, "Our decisions have extended the rule; and for money lent, or money paid or had and received, or due on an account stated, the jury ought to be instructed to allow interest, the promise to pay it being implied from the nature of the transaction." But in the case in which this language was held, the court refused to allow it on the award of arbitrators.‡[2]

In a case in which a man covenanted to convey lands without fraud, and it afterwards appeared that in truth he had no title to the land, it has been held in Virginia, that whether the jury should allow interest on the value of the land from the date of the contract must depend on the circumstances of the case, of which they are the proper judges; and that it is competent to the defendant to give in evidence any circumstances tending to show that interest should not be allowed.‖ This distinction between a party withholding money due in good faith or otherwise, presents the question which we have heretofore considered—whether it is proper in an action of contract, under the forms of our law, to raise an issue which is strictly one of tort. And I refer the learned reader to the discussion of that question which has already been had.¶

In South Carolina the rule above stated appears to be adhered to, interest being denied on accounts for work done or

* Hunt *v.* Nevers, 15 Pick. 500. See also, Brewer *v.* Tyringham, 12 Pick. 547; Haven *v.* Foster, 9 Pick. 112. As to interest against executors, Dawes *v.* Winship, 5 Pick. 97; Parker *v.* Thompson, 3 Pick. 429; Hubbard *et al. v.* Charlestown B. P. R. Co. 11 Met. 124.

† Williams *v.* Storrs, 6 J. Ch. R. 353.

‡ Devereux *v.* Burgwin, 11 Iredell, 491.

‖ Letcher *v.* Woodson, 1 Brock. C. C. R. 212.

¶ *Ante*, 204, *et seq.*

[1] Where by an arrangement with a banking firm a depositor was allowed five per cent. interest on his current balance, and he died leaving a balance in their hands, and a period of nearly four years elapsed between his death and the issue of letters of administration on his estate, the bankers not having signified their election not to use the amount by making a special deposit of it in some bank, or by keeping a fund continually reserved to the extent of the balance, were held liable to pay the administrator the five per cent. interest during the period. Watts *v.* Garcia, 40 Barb. 656.

[2] In making up a judgment upon an award, interest on the amount awarded cannot be allowed. Kendall *v.* The Lewiston Water Power Co. 36 Me. 19.

goods sold and delivered, or any other open accounts, although the money is withheld after the time of payment is past.*

[380] In a case in New York,† the whole subject was much discussed by the courts of that State, and the English and American decisions reviewed at length. It was an action brought by an agent to recover for cash advances and salary. And Savage, C. J., said,‡ "From an examination of the cases, it seems that interest is allowed—*First*, upon a special agreement. *Second*, upon an implied promise to pay it, and this may arise from usage between the parties, or usage of a particular trade.[1] *Third*, where money is withheld against the will of the owner.[2] *Fourth*, by way of punishment for any illegal conversion or use of another's property. *Fifth*, upon advances of cash.‖[3] And in the principal case interest was allowed upon a running account of cash advances, without any liquidation of the account or promise to pay. It was denied, however on the agent's claim for salary; and it seems to be the general rule, that, subject to the qualifications above laid down, it will not be allowed for goods or labor.¶

It has been decided, however, that interest is allowable from the time of suit brought for the recovery of an amount due for work under a special contract,** unless the testimony offered by way of abatement, mitigation, or recoupment, makes the principal debt stand open for liquidation.††[4]

* Knight *v.* Mitchell, 3 Brev. 506; Goddard *v.* Bulow, 1 Nott & M'Cord, 45; and Farrand *v.* Bouchell, Harpers' Rep. 83.

† Reid *v.* The Rensselaer Glass Factory, 3 Cowen, 393; and in Error, 5 Cow. 587; and the whole subject has been again recently reviewed by Willard, J., in Van Rensselaer *v.* Jones, 2 Barb. S. C. R. 643, where an able opinion will be found, collecting and commenting upon the cases.

‡ 3 Cowen, 436.

‖ This same point that interest was chargeable on cash advances, had previously been decided in an early case in New York. Liotard *v.* Graves, 3 Caines, 226.

¶ Doyle's Adm'rs *v.* St. James' Church, 7 Wend. 178; Tucker *v.* Ives, 6 Cowen, 193; Kane *v.* Smith, 12 J. R. 156; Van Beuren *v.* Van Gaasbeck, 4 Cowen, 496.

** Feeter *v.* Heath, 11 Wend. 478.

†† Still *v.* Hall, 20 Wend. 51.

The subject was examined at an early day

[1] So on default in performance of an alternative agreement to pay cash or give notes, interest runs from the time the notes or cash should have been given. Stuart *v.* Binsse, 10 Bosw. 436.

[2] Where money won in a wager contrary to law is paid over to the winner by the stakeholder, interest from the time of the demand as well as the principal may be recovered from him by the loser. Ruckman *v.* Pitcher, 20 N. Y. 9.

[3] Gillet *v.* Van Rensselaer, 15 N. Y. 397.

[4] See The Isaac Newton, 1 Abbott's Adm. R. 588. It is there held also, that where by the terms of a contract for work and materials, a part of the contract price is to be paid in instalments as the work advances, the employed is not entitled, on the adjustment of a decree for a balance remaining due on the work, to be credited with interest on the payments made by him while it was advancing.

"There is another ground upon which interest sometimes is allowed, and perhaps with propriety may be, although the amount of the demand neither has been nor can be readily ascertained, namely, that the debtor is in default for not having taken the requisite steps to ascertain the amount of the debt." Per Selden, Justice, delivering the opinion of the Court of Appeals of New York in McMahon *v.* The N. Y. & Erie R. R. Co. 20 N. Y. 463.

It has been held in Massachusetts,* that in an action for money paid interest is recoverable from the time of [381] payment, without proof of a demand of payment. But as between principal and agent, the general rule is that, in the absence of any contract, or custom which may be evidence of contract, a factor is not liable for interest until he is in some default.†

On the Rhode Island circuit,‡ Story, J., sitting in equity, held, that an administrator is not liable to pay interest on assets in his hands, unless under special circumstances; saying, also, "Interest is not allowed on partnership accounts, generally, until after a balance is struck, or a settlement between the parties, unless the parties have otherwise agreed or acted in the partnership concerns." In New Hampshire, in assumpsit for goods sold and delivered, it is held that the jury should allow interest, by way of damages, for the detention of the debt, upon the amount they find due from the time of a demand of payment,[1] if one be proved, or, if there be no demand, from the commencement of the suit.‖

In an action of covenant to recover rent, it has been held in New York that the plaintiff was entitled to interest, it being for a sum certain, and payable in money.¶ It was originally held that it could not be recovered where the rent was payable in wheat.** But this is now settled the other way; and in a case where the rent was payable in wheat and services, the Court of Appeals of New York held this language: [382] "Whenever a debtor is in default for not paying money, delivering property, or rendering services, in pursuance of his contract, justice requires that he should indemnify the creditor

in Connecticut, and the following propositions declared:

1. Interest will be allowed when there is an express contract to pay it.

2. Such contract may be inferred from usage, special or general.

3. Where there is a contract to pay money on a day certain, and the agreement is broken, interest will be allowed by way of damages, as on notes, etc.

4. Where goods are sold to be paid for on a day certain, interest in like manner follows.

5. Where money is received for the use of another, and there is neglect in not paying it, interest follows.

6. Where money is obtained by fraud, interest is allowed.

7. When an account is liquidated and balance ascertained, interest begins to run.

8. Where goods are delivered to be paid for, not at a day certain, but in a reasonable time, and there is unreasonable delay, interest is allowed.

9. But where there are current accounts founded on mutual dealings, and no promise to pay interest, interest will not be allowed. Selleck *v.* French, 1 Conn. 32.

* Ilsley *v.* Jewett, 2 Met. 168.

† Ellery *v.* Cunningham, 1 Met. 112.

‡ Dexter *v.* Arnold, 3 Mason, 284.

‖ McIlvaine *v.* Wilkins, 12 N. H. 474.

¶ Clark *v.* Barlow, 4 J. R. 183. So, too, in Kentucky, Burnham *v.* Best, 10 B. Monroe, 227.

** Van Rensselaer's Executors *v.* Platner's Adm'rs, 1 J. R. 276.

[1] Livermore *v.* Rand, 6 Fost. (N. H.) 85.

for the wrong which has been done him; and a just indemnity, though it may sometimes be more, can never be less than the specified amount of money or the value of the property or services at the time they should have been paid or rendered, with interest from the time of the default until the obligation is discharged. And if the creditor is obliged to resort to the court for redress, he ought in all such cases to recover interest, in addition to the debt, by way of damages. It is true that on an agreement like the one under consideration, the amount of the debt can only be ascertained by inquiry concerning the value of the property and services; but the value can be ascertained, and when that has been done, the creditor, as a question of principle, is just as plainly entitled to interest after the default as he would be if the like sum had been payable in money."* [1]

It has been said by Mr. Justice Story, on the Massachusetts circuit, that in claims for wages interest is generally allowed from the time of a demand made, and this both at common law and in the admiralty.† It seems a general principle that a mortgagee in possession is not to pay interest on rents unless there are special circumstances rendering it equitable that he should do so.‡

Interest is not recoverable on a bill of official fees, unless there has been a regular taxation.‖

The State is liable to pay interest upon the amount of a legal appraisement of damages for land taken for public use, after demand made.¶

In Virginia, without deciding as a general rule whether interest can properly be allowed upon the arrears of an annuity, it has been held that, under the circumstances of the case, where the annuity was to be paid in pork and corn delivered at
[383] a particular place, the value of which was to be ascertained by testimony, and in the absence of any satisfac-

* Van Rensselaer *v.* Jewett, 5 Denio, 135, and 2 Comstock, 135. See also an able opinion of Willard, J., in Van Rensselaer *v.* Jones, 2 Barb. S. C. R. 643, where the whole subject is examined.

† Gammell *v.* Skinner, 2 Gallison, 45.

‡ Breckenridge *v.* Brooks, 2 A. K. Marsh. 341; Story *v.* Livingston, 13 Peters, 359.

‖ Mumford *v.* Hawkins, 5 Denio, 355.

¶ People *v.* Canal Commissioners, 5 Denio, 401.

[1] The doctrine of these cases was reaffirmed in Livingston *v.* Miller, 11 N. Y. 80.

See Stuart *v.* Binsse, 10 Bosw. 436. Where a bill of goods was purchased at one time, at a price fixed by the parties, and no precise time of credit was given, and the bill was presented after the lapse of a reasonable time, the defendants were in default for withholding payment, and interest was properly chargeable from the time of the demand. Beers *v.* Reynolds, 11 N. Y. 101. So in *assumpsit* founded on a sale, where the price is paid in advance, interest in those States where the "fluctuating rule" of value in such cases is rejected (see *ante*, 265; *post*, 481, note), is allowed on the *value* of the property from the time appointed for its delivery. Bickell *v.* Colton, 41 Miss. 368.

tory proof of a demand at the place where it was to be paid, or of an agreement to dispense with such demand, and convert it into money, no interest should have been allowed on the arrears.*

DIFFERENCE BETWEEN AMERICAN AND ENGLISH CASES.—There is considerable conflict and contradiction between the English and American cases on this subject. But as a general thing it may be said that while the tribunals of the former country restrict themselves generally to those cases where an agreement to pay interest can be proved or inferred, the courts of the United States, on the other hand, have shown themselves more liberally disposed, making the allowance of interest more nearly to depend on the equity of the case, and not requiring either an express or implied promise to sustain the claim.†

The leading difference seems to grow out of a different consideration of the nature of money. The American cases look upon the interest as the necessary incident, the natural growth of the money, and therefore incline to give it with the principal,[1] while the English treat it as something distinct and independent, and only to be had by virtue of some positive agreement.‡ [2]

COMPOUND INTEREST.—Before quitting the consideration of those cases in which the allowance of interest is entirely under the control of the court, we must consider the subject of compound interest, and the practice of annual rests in mercantile accounts. In regard to compound interest, or interest on inter-

* Philips *v.* Williams, 5 Grattan, 259.

† For an examination of the English and American decisions, see Wood *et al. v.* Robbins, 11 Mass. 504, and Pope *v.* Barrett, 1 Mason, 117, in which latter case it was held by Mr. J. Story, that interest was due when money was improperly withheld after demand.

‡ See the subject discussed, and the cases collected and cited in Alabama, in Boyd *v.* Gilchrist, 15 Ala. 849.

[1] The law in this country annexes interest as an invariable incident in all cases of default to pay the principal sum, when the debtor knows what that sum is, and when he is to pay it. Spencer *v.* Pierce, 5 R. I. 63; People *v.* New York, 5 Cow. 331 (*post*, 390). In other words, "it is a legal and uniform rate of damages allowed in the absence of any express contract when payment is withheld, after it has become the duty of the debtor to discharge the debt." Kelsey *v.* Murphy, 30 Penn. St. 340; and see Minard *v.* Beans, 64 Penn. St. 411. This principle is so well established that it is not necessary to cite other cases in which it is illustrated or applied.

[2] Interest is not allowable on a recovery of the whole amount of a premium note for the non-payment of an assessment, such a recovery being in the nature of a penalty. Bangs *v.* McIntosh, 23 Barb. 591; Bangs *v.* Bailey, 37 Barb. 630. But where the suit on the note is only for the amount of the assessments for losses actually incurred, interest is chargeable from the date when the assessments were payable. Hyatt *v.* Wait, 37 Barb. 29.

Interest may be recovered in New York on an attorney's bill, the reasonableness of which is conceded, or which is not objected to till after suit brought on it. Under these circumstances it is regarded as an account stated. Mygatt *v.* Wilcox, 45 N. Y. 306; Case *v.* Hotchkiss, 3 Keyes, 334. But it has been held by the Supreme Court of that State, that in the absence of proof of a custom to charge interest on such accounts, it is not recoverable till the demand is formally adjusted. People *v.* Supervisors, 9 Abb. (N. S.) 408.

est, there has existed much doubt and difference of opinion. It was rigorously prohibited by the Roman law: *Nullo modo usuræ usurarum a debitoribus exigantur.** The English law followed in the same track. So in an early case in chancery, Lord Cowper held a clause in a mortgage, that if the interest was behind six months, then it should be accounted principal and compound interest, was "void and of no use;" "that to make interest principal, it is requisite that it be grown due, and then an agreement concerning it may make it principal." † It is not regarded as within the statutory prohibition of usury, but as leading to oppression and abuse. So Lord Eldon has said, "There is nothing unfair or perhaps illegal in taking a covenant, originally, that if interest is not paid at the end of the year, it shall be converted into principal. But this court will not permit that, as tending to usury, though it is not usury." ‡[1]

The cases were reviewed at length by Chancellor Kent, in an early case in New York; and it was said, "The cases and language in the books are clear in acknowledging the rule [384] that even an agreement, made at the time of the original contract, to allow interest upon interest as it should become due, is not to be supported;" ‖ and he placed the objection to the provision on the ground of its harsh and oppressive character. Again in a subsequent case, the same learned judge laid down the rule that "*compound interest cannot be demanded and taken, except upon a special agreement made after the interest has become due;*" ¶ and the general principle has been again and still more recently redeclared.** [2] In this case it was said, however, that if compound interest be voluntarily paid, it cannot be recovered back.†† So in ascertaining the amount due on a note made payable with interest annually, simple interest

* Cod. 4, 32, 38.

† Ossulston *v.* Yarmouth, 2 Salk. 449.

‡ Chambers *v.* Goldwin, 9 Vesey, 271.

‖ Connecticut *v.* Jackson, 1 J. Ch. 13.

¶ Van Benschoten *v.* Lawson, 6 J. Ch. R. 313.

** Mowry *v.* Bishop, 5 Paige, 98.

†† See, also, as to demand of compound interest, Von Hemert *v.* Porter, 11 Met. 210. In Connecticut, a contract for the payment of compound interest, made before interest has accrued, is to that extent void, and will not, unless in special cases, be enforced either in law or in equity. Camp *v.* Bates, 11 Conn. 487; Rose *v.* City of Bridgeport, 17 Conn. 243. In Louisiana, compound interest is prohibited by the Code: "Interest upon interest cannot be recovered, unless it be added to the principal and by another contract made a new debt. No stipulation to that effect in the original contract is valid." Art. 1934. The whole subject of interest is codified in that State. In Indiana, see Miles *v.* Board of Commis'rs, 8 Blatchford, 158.

[1] It should be mentioned that no screen to cover up a usurious demand under a claim for damages can be made availing. The law sharply detects and relentlessly strips off any such cloak. Where, for instance, charges of 2½ per cent. commission were made for six months' advances, based on an alleged failure of the defendants to furnish iron to be sold on commission, the claim was rejected as usurious. Grubb *v.* Brooke, 47 Penn. 485. See *infra*, 400.

[2] So in Mason *v.* Callender, 2 Minn. 350.

only is to be computed;* and interest on the interest will not be allowed.† But if a new note is given for the interest, it is thereby converted into capital, and it may be given with interest.‡

WHERE ALLOWED.—An exception has been, however, introduced by the usages of modern trade to the general rule which denies compound interest. As between merchants upon their mutual accounts, it is the custom to cast interest upon the several items, and to strike a balance at the end of the year of the items of principal and those of interest, and to carry the footing of the two to a new account, as forming the first item of principal for the ensuing year. In this manner, yearly rests, as they are called, have for a long time been made and acquiesced in by the mercantile world.‖ But after the mutual trade and dealings have ceased, the right to make annual [385] rests ceases; and in the absence of any specific agreement, the creditor is allowed simple interest only on the balance of his account; the right to make the yearly rests growing out of the mutuality of the debts and credits; and the allowing of interest on each side.¶

Another exception to the general rule denying compound interest grows out of the conduct of the defendant; where that is grossly delinquent or intentionally contrary to his duty, compound interest is sometimes inflicted by way of punishment.** Where partial payments have been made in cash, or by rents and profits, or otherwise, the payments are to be first applied to the satisfaction of the interest then due, and the balance only is to go towards the reduction of the principal.††

INTEREST, WHEN GIVEN AS DAMAGES.—In the cases which we have been considering, interest is, as we have seen, a matter resting in the control of the court, and allowed or disallowed upon certain rules of law. In these it is said to be given *as in-*

* Hastings *v.* Wiswall, 8 Mass. 455; Dean *v.* Williams, 17 Mass. 417; Von Hemert *v.* Porter, 11 Met. 210; Doe *v.* Warren, 7 Greenl. 48.

† Ferry *v.* Ferry, 2 Cush. 98.

‡ Wilcox *v.* Howland, 23 Pick. 167.

‖ Eaton *v.* Bell, 5 B. & Ald. 34; Stoughton *v.* Lynch, 2 J. Ch. 214; Barclay *v.* Kennedy, 3 Wash. C. C. 350; Von Hemert *v.* Porter, 11 Met. 210.

¶ Denniston *v.* Imbree, 3 Wash. C. C. R. 402; Von Hemert *v.* Porter, 11 Met. 210.

** 1 Vesey, 92; Hopkins R. 424; Ackerman *v.* Emott, 4 Barb. S. C. R. 626.

†† Dean *v.* Williams, 17 Mass. 417; Fay *v.* Bradley, 1 Pick. 167; Reed *v.* Reed, 10 Pick. 398. In New Hampshire, it was said, in an early case (1818), that on a note payable with interest annually, interest at the rate of six per cent. per annum should be cast on the principal, and interest on the annual interest in the nature of damages for its detention, from the time it became payable. Pierce *v.* Rowe, 1 N. H. 179. I do not know if this has been adhered to in that State; it is certainly not the general rule.

terest; we have now to consider a class of cases where it is to be settled by the verdict of the jury, as we have already seen intimated; and here it is given more strictly as damages.[1]

"There are two classes of cases," says the Supreme Court of New Hampshire, "in which interest may be recovered. The first is where it is incident to the debt, founded on the agreement of the parties, and is a legal claim, and the court are bound to allow it. The other class is where the interest may be allowed by a jury in the nature of damages." *

This is generally so in actions of *tort*, as trover or trespass for taking goods, where interest is allowed at the discretion of the jury. So in an action of trespass, the Supreme Court of New York said, "The plaintiff ought not to be deprived of his property for years without compensation for the loss of the use of it; and the jury had a discretion to allow interest in [386] this case as damages. It has been allowed in actions of trover, and the same rule applies in trespass when brought for the recovery of property." † So in Kentucky, in case of a fraudulent refusal to convey land. ‡ And so declared also in North Carolina in cases of trover and trespass. ‖

In Louisiana, it has been said that the allowance of interest as damages, *ex delicto*, from the date of the act complained of, is unauthorized by law. ¶ This is certainly adverse to the general current of our authorities, and, as it appears to me, to the better reason of the matter; for if the jury are to have any discretion at all in such cases, it could hardly be refused them in regard to the allowance of interest.

The discretionary rule has been applied in many cases of

* McIlvaine *v.* Wilkins, 12 N. H. 475.

† Beals *v.* Guernsey, 8 J. R. 446. So in trover, Hyde *v.* Stone, 7 Wend. 354; Bissel *v.* Hopkins, 4 Cow. 53; Kennedy *v.* Strong, 14 J. R. 128; Hallett *v.* Novion, 14 J. R. 273, and 16 J. R. 327. And in replevin, Rowley *v.* Gibbs, 14 J. R. 385. So in case for negligence, Thomas *v.* Weed, 14 J. R. 255.

‡ Handley *v.* Chambers, 1 Littell's R. 358; *ante*, 193.

‖ Devereux *v.* Burgwin, 11 Iredell, 490.

¶ Green *v.* Garcia, 3 La. Ann. R. 702.

[1] See, with regard to the allowance of interest in trover, page 491, *post.* In New York, and generally in the United States, interest on the value of property lost or destroyed, by a wrongful or negligent act, is now properly included in the damages to be recovered. Parrott *v.* Knickerbocker Ice Co. 46 N. Y. 361; Propeller Mary Vaughan *v.* Steamboat Telegraph, 2 Benedict, 47. So in an action against warehousemen for refusing to deliver goods, interest on the value of the goods is a proper item of damages. Schwerin *v.* McKie, 51 N. Y. 180. In an action against a town for an injury caused by a defective highway, it is held in Maine, however, that no interest can be added by the jury to the sum found as damages. Sargent *v.* Hampden, 38 Me. 581. In Georgia, during the existence of slavery, in trespass for carrying away slaves, interest on the hire of the slaves was allowed as matter of law. Brown *v.* Southwestern R. R. Co. 36 Geo. 377.

Interest, when not specifically claimed in the complaint, cannot be considered as part of the debt, and can only be recovered as damages. March *v.* Wright, 14 Ill. 248. But this rule is applicable only to interest due at the time the bill is filed. When the interest accrues subsequently, it is the practice of the court, upon further directions, to order that the interest be computed, although there be no prayer in the bill to that effect. Godwin *v.* McGehee, 19 Ala. 468.

contract. So in an action on an agreement to deliver wheat, the value of the wheat with interest thereon was given.* [1] And the Supreme Court, on the argument of the case, said, "The judge who tried the cause did not *direct the jury* to allow interest on the sum which they should find the wheat to be worth after the demand; but in ascertaining the plaintiff's damages, he observed that they *might if they thought proper*, from the nature of the transaction, include interest as an item in making up the amount of damages. There was not in this remark any direction contrary to law."

"Interest," said Washington, J., on the Pennsylvania circuit, "is a question generally in the discretion of a jury." †

So, in two actions against the master of a ship for the non-delivery of goods, it was held in New York, that the jury might give damages if the conduct of the defendant was improper, *i. e.* where fraud or gross misconduct could be imputed to him; but it appearing that such was not the fact, it was not allowed; and the court in the former case said, "Interest is not in every case and of course recoverable, because the amount of the loss is unliquidated, and sounds in damages to be assessed by the jury. ‡

INTEREST IN THE ACTION OF DEBT.—In the action of [387] debt, interest is given, as we shall see, in some cases. But, as a general rule, it must be separately assessed, as damages for its detention. ‖ [2] In England, where a statute authorized a dock company to bring debt for calls of payments to be made on the shares of the company, interest not having been included as part of the money due for calls, and not being declared on in a separate count, but having been allowed by the jury, it was held that they might rightly give it; and Tindal, C. J., said, "When the act of Parliament gives the action of debt, it gives

* Dox *et al. v.* Dey, 3 Wend. 356.

† Gilpins *v.* Consequa, Peters' C. C. R. 86; Willing *v.* Consequa, *Ibid.* 172.

‡ Watkinson *v.* Loughton, 8 J. R. 213; and Amory *v.* McGregor, 15 J. R. 24.

‖ 1 Saund. 201, *a*, note *n*; Osbourne *v.* Hosier, 6 Mod. 167; Sayre *v.* Austin, 3 Wend. 496; North River Meadow Co. *v.* Christ Church, 2 Zabriskie, 425; Williams *v.* Bank of Illinois, 1 Gilman, 667.

[1] So in actions against carriers and warehousemen for failure to deliver goods. Richmond *v.* Bronson, 5 Denio, 55; Schwerin *v.* McKie, 5 Robertson (N. Y. Superior), 404; aff'd, 51 N. Y. 180; *ante*, 386, n. In an action against a carrier for injuries to goods in his charge, the jury may allow interest, but it is error to instruct them to do so. Black *v.* Camden and Amboy R. R. Co. 45 Barb. (N. Y.) 40.

[2] After the principal of a bond payable in a certain time, with interest periodically from date, has fallen due, interest (at the legal and not the conventional rate) is payable, not by the terms of the contract, but as damages for its breach. Hamilton *v.* Van Rensselaer, 43 N. Y. 244.

all that by the common law is incident to that form of action, namely, damages for the detention of the debt.* But Maule, J., concurring with the chief justice, said, "The statute is perfectly clear as to what shall be stated in the declaration; and under that statement interest will form part of the debt to be recovered." †

In a case where the declaration stated that, on the 15th of June, 1832, the defendant covenanted to pay the plaintiff £270, with interest, on the 15th of December then next, and that there was due the said sum of £270 and interest, in all £300, it concluded to the plaintiff's damage of £10. But the judge who tried the cause would only allow the verdict to be taken for the £270 and interest, £276 15*s.*; all the rest being damages for the detention, and the plaintiff having laid those damages at £10 could not recover more.‡

We have already seen,‖ that in certain cases of contract, where the breach appears to be fraudulent, interest and sometimes even substantial damages, are held to be properly chargeable.

INTEREST IN ERROR.—Interest is sometimes given in error, by way of damages. In an early case,¶ on affirmance of judgment in the King's Bench on error, a rule was obtained to show cause why the master should not compute interest, [388] and add it to the costs, on the ground of an old statute,** which enacted on a writ of error being brought, and judgment affirmed, the person against whom it is sued out shall recover his costs and damages. And it was held that "interest ought to be the measure of damages."

The principle of this statute has been fixed in American legislation. By the judiciary act of the United States,†† the Supreme Court is authorized, in case of affirmance of any judgment or decree, to award to the respondent just damages for his delay. And by the rules of the same court,‡‡ in cases where the suit is defended for mere delay, damages are to be awarded at the rate of ten per centum per annum on the amount of the judgment, to the time of the affirmance thereof. Where there is a real controversy, the damages are to be at the rate of six per cent. per annum only. And in both cases, the interest is

* Southampton Dock Co. *v.* Richards, 1 Mann. & Granger, 448.

† *Quære*, then, if it was here allowed as part of the debt, or as the damages? See also, London and Brighton Railway Company *v.* Fairclough, 3 Scott New R. 69 and 88.

‡ Watkins *v.* Morgan, 6 Car. & P. 661.

‖ *Ante*, 190, 209.

¶ Zink *v.* Langton, Douglass, 751, in notes.

** 3 Hen. VII, c. 10.

†† 1789, c. 20, § 23.

‡‡ Made in February term, 1803, and February term, 1807.

to be computed as part of the damages. It is therefore entirely for the decision of the court, whether any damages, or interest as a part thereof, are to be allowed or not, in cases of affirmance.*

The same principle has been followed in New York, where it is provided by statute,† that "If upon writ of error, the judgment be affirmed, or the writ be discontinued or quashed, or the plaintiff in error be nonsuited, the defendant in error shall recover costs, and also *damages for the delay and vexation, to be assessed in the discretion of the court* before whom the writ was returnable." The limit of discretion under this statute is legal interest. The allowance of damages, however, in these cases rests entirely in discretion; and so, where the action was in tort, the Court of Errors refused it.‡[1] It was allowed, however, in another case, on a judgment in trover.‖ But this branch of the subject rather belongs to the [389] head of statutes regulating damages, which we shall elsewhere consider.

INTEREST ON JUDGMENTS.—The allowance of interest on judgments generally has been a subject of much discussion. In England, the doubt is solved by a recent statute, which declares that every judgment debt shall carry interest at the rate of four per centum per annum, from the time of entering up the judgment, or from the time of the passage of the act in cases of judgment then entered up and not carrying interest, until the same shall be satisfied; and such interest may be levied under a writ of execution on such judgment.¶

In New York, it has been decided that interest is recoverable in an action of debt on judgment, whether the original demand carried interest or not.**[2] But in debt on judgment for a tort,

* Boyce's Executors *v.* Grundy, 9 Peters, 275; Himley *v.* Rose, 5 Cranch, 313; Santa Maria, 10 Wheat. 431–442.

† 2 R. S. 618, § 33.

‡ Gelston *v.* Hoyt, 13 J. R. 561.

‖ Bissell *v.* Hopkins, 4 Cowen, 53. In the same State it has been said that, "the judicial doctrine of allowing and disallowing interest on judgments, whether on affirmance in error, or in other cases, seems in some respects to rest rather upon arbitrary discretion, practice, or precedent, than any principle which conforms to our general notions of justice." Klock *v.* Robinson, 22 Wend. 157 and 160.

¶ 1 & 2 Vict. c. 110, § 17. See Fisher *v.* Dudding, 3 Scott N. Rep. 516. See also, Crafts *v.* Wilkinson, 4 Q. B. 74.

** Klock *v.* Robinson, 22 Wend. 157, where the English cases are reviewed.

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[1] See Hoard *v.* Garner, 3 Sandf. (N. Y.) 179.

[2] So generally in the States of the Union interest is now allowed on a judgment irrespective of the nature of the original cause of action, as damages for the default of a debtor in withholding another's money. See Booth *v.* Ableman, 20 Wis. 602.

And a creditor by judgment recovered in a foreign court, who comes in under a creditor's bill and proves his demand, is entitled to interest on the amount of the judgment from the

interest is recoverable only from the date of the judgment, and not from the finding of the verdict.*[1] Where the judgment is rendered on contract, it can in New York, by express statute, be collected on execution.†[2]

How far interest is recoverable under the penalty of a bond, we shall have occasion to examine in the next chapter.

INTEREST AFTER PAYMENT OF PRINCIPAL.—It has never been doubted, that where interest is made payable before the principal, suit can be brought for the non-payment of the interest alone;‡[3] but an important question has been presented, how far an action can be maintained for interest after the payment of the principal. In New York, it has been decided that where interest is not stipulated for in the contract, but is recoverable merely as damages, a creditor is precluded from sustaining an action for its recovery after accepting the principal; but that where interest is stipulated for in the contract, suit may be brought for it, although the principal has been paid.‖

So, payment of the amount of principal money due from a debtor to his creditor, will not necessarily prevent an [390] action for the amount of interest. If made generally, it

* Lord *v.* The Mayor of New York, 3 Hill, 426.

† Sayre *v.* Austin, 3 Wend. 496; 2 R. S. 364. It had been previously decided otherwise. Watson *v.* Fuller, 6 J. R. 283.

‡ Cooley v. Rose, 3 Mass. 221.

‖ Fake *v.* Eddy's Ex'rs, 15 Wend. 76.

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time it was rendered, although it does not appear whether the judgment bears interest by the law of the country where it was rendered, or not. Nelson *v.* Felder, 7 Rich. (S. C.) Eq. 395.

It is to be observed that a difference may sometimes exist between the rate of interest on the original contract and the rate on the judgment. Thus, in Illinois, A. made his promissory note to B. for five hundred dollars with interest at ten per cent. after maturity. After the note became due, an action was brought against the maker by an indorsee who recovered judgment. The maker being insolvent, the indorsee brought a second action against his indorser, and introduced in evidence the record of the previous judgment, claiming nevertheless to recover ten per cent, on the face of the note. But the court held that only interest on the judgment at six per cent. could be recovered. Corgan *v.* Frew, 39 Ill. 31; see *post*, head p. 493, n. 2.

In an action of assumpsit, on a promise to pay the amount of a judgment from which defendant had been discharged under the insolvent debtors' act: Held, that the true measure of damages was the amount of the debt, interest, and costs, on the day of the entry of the judgment, with interest on the amount from the day of the entry to the trial. Gatewood *v.* Moses, 5 Richardson (S. C.), Law, 244. As to the allowance of interest on the costs on a judgment, see Rogers *v.* Burns, 27 Penn. St. 525.

[1] By the act of May 7, 1844, however, interest may be taxed on all verdicts and reports of referees, as costs, from the time of obtaining them to that of perfecting the judgment. 4 Edmonds' Gen. Stat. (N. Y.) 629.

[2] On all judgments in civil cases in the United States District or Circuit Courts, interest is allowed wherever, by the law of the State in which such Circuit or District Court is held, interest may be levied under execution on judgments recovered in the State courts. Laws, 1842, § 8, ch. 188 (5 U. S. Stat. at Large, 518).

[3] Upon a note for money payable at a future pay day, whether in an entire sum or by instalments, "*with interest to be paid annually*," the interest which may have accrued in any year may be recovered, if sued for before the pay day of the principal. Bannister *v.* Roberts, 35 Me. 75.

applies first to extinguish the interest, and the balance may be sued for as the principal.*

It seems well settled that where an attachment or injunction is laid on a party liable to pay interest, it ceases running till the legal impediment is removed.† [1]

* People *v.* County of New York, 5 Cowen, 331.

† Willings *v.* Consequa, Peters' C. C. R. 171, 321; Fitzgerald *v.* Caldwell, 2 Dall. 215; 2 Yates, 280; Osborne *v.* U. S. Bank, 9 Wheat. 738; Stevens *v.* Barringer, 13 Wend. 639; Le Braithewait *v.* Halsey, 4 Halsted, 3.

See also, Kellog *v.* Hickok, 1 Wend. 251; Bainbridge *v.* Wilcocks, Baldwin's C. C. R. 536; Legrange *v.* Hamilton, 4 T. R. 613; 2 H. Black. 144.

[1] In California, where the rates of interest may be fixed by the parties themselves in their contracts, but is ten per cent. in the absence of any stipulation, that rate and no more was before that act recoverable as damages for the detention of money in an action on the injunction bond, when an officer is enjoined from paying it over. Lally *v.* Wise, 28 Cal. 539.

By a late act, the interest on judgments, in that State, for money lent, is seven per cent. Act April 4, 1870, amending act of March 13, 1840, as previously amended March 30, 1868. Gen. laws of California, vol. iii, 8642, 8643. See White *v.* Lyons, 42 Cal. 279.

CHAPTER XVI.

OF PENALTIES; LIQUIDATED DAMAGES; AND THE COMMON-LAW ACTION OF DEBT.

Debt and Covenant.—Debt on Bond.—Amount of recovery within the Penalty.—Assignment of Breaches.—Liquidated Damages.—Statutory Bonds.—Ne Exeat Bonds.—Bonds to resign Livings.—Recovery beyond the Penalty.

We have just terminated the consideration of a large class of cases, in which the damages are in no wise determined by the agreement of the parties. We now come to another class, where the contracting parties fix or liquidate the amount that shall furnish the measure of compensation in case of non-fulfilment of the agreement, either in the shape of a penalty, or of stipulated damages. The questions arising under this branch of our subject are generally presented in one of the two common-law actions known as debt and covenant; but we shall endeavor to consider the matter at large, without confining ourselves strictly to either of these technical forms.

At the same time it is impossible altogether to dismiss them from view. The common-law action of *debt* is applicable in all cases where a sum certain is due, whether the contract be by parol, under seal, or of record; while *covenant* is the remedy for breaches of all contracts under seal, whether for sums certain or uncertain. And owing to this arbitrary division of actions, the rules of damages conform in many cases rather to the remedy than the right; we must therefore not lose sight of this technical distinction.

Debt on Bond.—Of all forms of debt, that of debt on bond has latterly been the most frequent. In the early periods of our jurisprudence debt was the common action for goods sold and delivered, and for work and labor done; but it was
[392] subsequently to a great extent superseded by the proceeding in assumpsit.* It is true, as a general rule, that in the action of debt, which is brought for the recovery of a sum certain, no damages can be claimed on account of the debt

* *Ante*, 225; Rudder *v.* Price, 1 H. Bl. 547.

itself, this being recoverable in *numero;* but damages are given on account of the detention of the debt. In an action of debt on bond, therefore, only nominal damages are assessed; nor is it in general necessary to have them assessed to the amount even of what is due for interest, because as under the verdict the plaintiff is entitled to the whole penalty; this, which is double the sum mentioned in the condition, is usually sufficient to cover what is due for interest. But this subject will be more fully noticed in another part of this chapter.

The form of the *obligation* or *bond* of the English law is technical and peculiar. The obligor *binds*, or *obliges* himself to pay a certain sum of money at a certain time, to the obligee. This, if under seal, would be a single bond, or *simplex obligatio;* and would only differ from a note, in being under seal, and not negotiable. But in the bond we find a clause appended, declaring that the previous obligation shall be void on the payment of some lesser sum of money, or the performance of some particular act. The latter part, or *condition*, of the bond, is that which discloses the real nature of the contract, and contains its essence; the former part is the *penalty.** *Penal obligations* are well known to other systems of law besides our own;† but the precise form of contract by which an absolute obligation is at first declared, and this converted into a mere penalty by the addition of a subsequent condition is, I believe, entirely peculiar to the English law.

From this form of obligation or contract, various results, flowing from the technical rules of the common law, were deduced by the founders of our jurisprudence. If the condition was not strictly complied with, as in regard to the payment of money on a day certain, the moment the day was passed the penalty became the debt, and was at law recoverable; and neither payment nor tender after the day would avail, because a condition once broken was gone forever. If the [393] condition were to do anything other than pay money, and were not fulfilled, the penalty again became the debt, and was recoverable without any reference whatever to the actual damages incurred. Hence many difficulties arose. Lord Kaimes says,‡ that the bond was introduced originally to evade the common law of England, which prohibted the taking interest for money. Whatever reason led to its introduction, certain it is, that its peculiar form has occasioned infinite doubt and contra-

* Black. Com. ii, ch. 20, p. 340.

† Pothier, Traité des Obligations, part ii, ch. v, des Obligation Pénales.

‡ Prin. of Equity, book iii, ch. ii, p. 279.

diction. In regard to our present subject, we shall *first* consider what sum can be recovered under or within the penalty; *secondly*, how, by assigning breaches, that sum is arrived at; *thirdly*, when the penalty is considered as liquidated damages; and *lastly*, what can be recovered beyond the penalty.

DAMAGES WITHIN THE PENALTY.—And first as to the damages that may be recovered *under* or *within* the penalty.

The action of debt, as has been said, is the usual remedy provided by the common law for the recovery of a sum certain. And in an action of debt for condition broken, the amount of the plaintiff's recovery was originally, as has also been said, the penalty; nor could the action be relieved against, either by payment or tender: no defence would avail but a release under seal. And this severe rule of the common law was only mitigated by the practice of the courts of chancery, which interposed, and would not allow a man to take more than in conscience he ought.* It became early settled in equity, that the condition of the bond was the agreement of the parties, and as such the obligor was relieved from the penalty.† Lord Somers said,‡ "that where the party might be put in as good a plight as where the condition itself was literally performed, there the Court of Chancery would relieve, though the letter of it were not strictly performed, as payment of money, etc. But where the condition was collateral and in recompense, and no [394] value could be put on the breach of it, then no relief could be had for the breach of it."[1] This practice was followed by the common-law tribunals, which ordered the proceedings to be stayed upon bringing into court the principal debt, interest, and costs.‖ Finally, this discretionary power was confirmed by a statutory regulation, which provided that in actions on bonds with penalties, the defendant might bring in the principal debt, interests, and costs, and be discharged.¶

This legislation has been followed in this country. In New

* Black. Com. book ii, ch. 20, p. 341. For cases of this description in chancery, see Hale *v.* Thomas, 1 Vern. 349, and Steward *v.* Rumball, 2 Vern. 509; also, Show. Par. Cas. 15; Bond and Penalty, Abr. Eq. 91, 92.

† Acton *v.* Pierce, 2 Vern. 480; Cannel *v.* Buckle, 2 P. Wms 243; Watkyns *v.* Watkyns, 2 Atk. 97; Bishop *v.* Church, 2 Ves. 371; Parks *v.* Wilson, 10 Mod. 515; Hobson *v.* Trevor, 2 P. Wms. 191; Chilliner *v.* Chilliner, 2 Ves. 528; Collins *v.* Collins, 2 Burr. 820. See Pothier, by Evans, on Penal Obligations, appendix, and Fonblanque's Treatise on Equity.

‡ Prec. in Ch. 487.

‖ Gregg's case, 2 Salk. 596; Anon. 6 Mod. 11; Butler *v.* Rolf, *Ibid.* 25; Anon. *Ibid.* 29; Burridge *v.* Fortescue, *Ibid.* 60, and Ireland's case, *Ibid.* 101. In Burridge *v.* Fortescue, the court said, "It is an equitable motion, to be relieved against the penalty."

¶ 4 Anne, ch. 16, §§ 12 and 13.

[1] Courts of equity will not relieve against stipulated damages. Williams *v.* Green, 14 Barb. (Ark.) 315 Westerman *v.* Means, 12 Penn. St. 97.

York,* it is declared that in actions on penalty bonds, the plaintiff may plead payment of the debt made before suit brought, though not according to the condition; and that after suit brought, the defendant may bring debt, principal, and costs into court, and that thereupon the action shall be discontinued. Speaking of the English original of this statute, Lord Mansfield said: †

"That it was made to remove the absurdity which Sir Thomas More unsuccessfully attempted to persuade the judges to remedy in the reign of Hen. VII; for he summoned them to a conference concerning the granting relief at law, after the forfeiture of bonds, upon payment of principal, interest, and costs, and when they said they could not relieve against the penalty, he swore by the body of God he would grant an injunction."

And in another case,‡ he said:

"It was extraordinary that after it was settled in *equity* that the forfeiture might be saved by the performing the intent, and that this was the nature of a bond, the courts of law did not follow equity, but still continued to do *injustice as of course*, and put the parties to the delay and expense of setting it right *elsewhere as of course*." ‖

Assignment of Breaches.—Notwithstanding this statute, however, it is apparent that great injustice [395] might be committed, because the plaintiff was entitled to judgment for the whole amount of the penalty, and the defendant could only be discharged by addressing himself to the equitable consideration of the court. Hence was imposed the obligation to *assign breaches*. By a statute enacted at nearly the same time,¶ it was declared "that in all actions, etc., upon any bond or bonds, or on any penal sum for non-performance of any covenants or agreements in any indenture, deed, or writing certain, the plaintiff or plaintiffs *may* assign as many breaches as he or they shall think fit; and the jury, upon trial of such action or actions, shall and may assess, not only such damages and costs of suit as have heretofore been usually done in such cases, but also damages for such of said breaches so to be assigned as the plaintiff on the trial of the same shall prove to have been broken." [1] The

* Rev. Stat. vol. ii, p. 353, §§ 26, 27.
† Wyllie *v.* Wilkes, Doug. 519.
‡ Bonafous *v.* Rybot, 3 Burr. 1370, 1374.
‖ In this last case it was held that bonds conditioned for payment of money by instalments were within the act of 4 Anne.
¶ 8 and 9 Will. III, ch. 11, § 8.

[1] Prior to this act, the court assessed such damages only as had accrued at the date of the writ. Under it and similar statutes in this country, it has been held that the jury were authorized to assess the damages *to the time of the trial*. Waldo *v.* Forbes, 1 Mass. 10;

language here is, that the plaintiff *may* assign breaches; but it has been settled that the statute is compulsory,* and that a judgment obtained under the former practice of the common law is bad in error. In the case last cited, Lord Kenyon and Mr. J. Buller said,—

"It is apparent to us that the law was made in favor of defendants, and is highly remedial, calculated to give plaintiffs relief up to the extent of the damage sustained, and to protect defendants against the payment of further sums than what is in conscience due; and also to take away the necessity of proceedings in equity to obtain relief against an unconscionable demand of the whole penalty in cases where small damages only have accrued."

And it was accordingly held, that the plaintiff *must* assign breaches, and that the jury *must* assess the damages.

The principles of this act have been engrafted upon the legislation of this country. In New York it is provided:†

"When an action shall be prosecuted in any court of law, upon any bond, for the breach of any condition other than for the payment of money, or shall be prosecuted for any penal sum for the non-performance of any covenant or written agreement, the plaintiff *in his declaration* shall assign the specific breaches for which the action is brought.

[396] "Upon the trial of such action if the jury find that any assignment of such breaches is true, and that the plaintiff should recover damages therefor, they shall assess such damages, and shall specify the amount thereof in their verdict, in addition to their finding upon any other question of fact submitted to them.

"In every such action, if the plaintiff recover, the verdict of the jury assessing the plaintiff's damages shall be entered on the record, and judgment shall be rendered for the penalty of the bond, or for the penal sum forfeited as in other actions of debt, together with costs of suit; and with a further judgment that the plaintiff have execution to collect the amount of the damages so assessed by the jury, which damages shall be specified in such judgment."‡[1]

* Roles *v.* Rosewell, 5 T. R. 538, and Hardy *v.* Bern, *Ibid.* 636.

† Revision of 1813 (R. Laws, vol. i, p. 518), and Revised Statutes, vol. ii, p. 300, 2d ed.; 378, 1st ed.

‡ This act has been applied to bonds conditioned for the performance of covenants contained in the same, or in any other deed or writing; for the payment of money by instalments; for the payment of an annuity; or

Gardner *v.* Niles, 16 Me. 279. But if the bond is not one for the performance of an agreement or covenant, but is only *to be void* on the conditions therein specified, there can be but one breach of it, and therefore but one suit and one assessment of damages. For such damages judgment is rendered and execution issued as in other cases. Unless every particular in the condition is performed the whole condition is broken, and all the damages are in contemplation of law sustained at that time. If the condition is a continuing one, as for the present and future support of the obligee, the damages must be not only to the time of the trial but prospective beyond that. See Philbrook *v.* Burgess, 52 Maine, 271, where the principles governing the assessment of damages on bonds are reviewed.

[1] In Illinois, in actions on penal bonds, if the plaintiff recover, his recovery is for the amount of the penalty as debt, and such sum as may be found as damages. The jury in

THE PLAINTIFF'S ACTUAL LOSS ONLY RECOVERABLE UNDER THE PENALTY.—These two statutes have together produced this reasonable and equitable result, that in the case of an agreement to do or refrain from doing any particular act secured by a penalty, the amount of the penalty is in no sense the measure of compensation;[1] and the plaintiff must show the particular injury of which he complains, and have his damages assessed by the jury. It may, therefore, be laid down as a settled rule that no other sum can be recovered under a penalty, than that which shall compensate the plaintiff for his actual loss.[2]

In the action of debt on bond, however, judgment still goes for the penalty, owing to the technical rule, [397] that in this action the entire sum is demanded, and the

for the payment of an award; to bonds given by deputy sheriffs for the faithful performance of the duties of their office, Barnard *v.* Darling, 11 Wend. 28; for the performance of any other specific act, not being the payment of a sum of money in gross. It has also been applied to replevin bonds, and to bail bonds, and to bonds conditioned to restore the amount recovered in the event of a reversal on *certiorari*. Graham's Practice, 2d ed. 319 and 801.

Previous to the Revised Statutes, it was held, in New York, that the breaches might be assigned in the replication, or on the circuit or Nisi Prius roll; but the present statute is more special; and in Reed *v.* Drake, 7 Wend. 345, it was held that the breaches must be assigned in the declaration; and where the plaintiff, in a suit on an arbitration bond, had omitted to do this, but had assigned the breaches in the replication, and the jury had found a correct verdict, the court in error refused permission to amend the declaration by inserting an assignment of breaches, and reversed the judgment, expressing their opinion, however, "that the court below would allow the plaintiff to amend his declaration on the usual terms."

Again, in Livingston *v.* The Superior Court of the City of New York, 10 Wend. 545, the plaintiff, in a suit on a bond given to prosecute a replevin suit in New Jersey, omitted to assign breaches in his declaration, had nominal damages assessed, and entered judgment for the debt, damages, and costs: the defendant paid the nominal damages and costs, and applied to the court below, the Superior Court of the City of New York, for an entry of satisfaction, which that court refused. On an application to the Supreme Court for a mandamus, Nelson, J., said, that the court inclined to the opinion that it was obligatory on the plaintiff to assign breaches, but refused the motion, and left the parties to their remedy in the court below.

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such cases should find the amounts of the debt and damages separately. The penalty is the debt; the injury sustained is the damages; and the court should render judgment for the amount of the penalty as the debt, to be discharged on payment of the damages. Toles *v.* Cole; 11 Ill. 562; Austin *v.* People, 11 Ill. 452; Freeman *v.* People, 54 Ill. 153.

[1] Like other contracts, bonds should be reasonably construed as to the amount of damages in case of an alleged breach. And where the condition of a bond for the plaintiff's maintenance required the defendant to furnish the plaintiff "with money necessary to spend whenever he thinks proper to visit his friends," the defendant was held bound to furnish a sum proper for such expenses only to the extent of reasonable visits, and not where the plaintiff having recently visited the friends, there was really no occasion for further visits. Berry *v.* Harris, 44 N. H. 370.

[2] Richardson owing $5,000 to Ricketson, conveyed to the latter by a deed absolute in form executed by his agent, a tract of land, partly with the purpose of paying the debt, and partly that the land might be sold in the Eastern States. The agent took back Ricketson's bond in the penalty of $32,000, payable to himself, and conditioned to pay him at least $16,180 if the land were sold, and half the profits, and if it were not sold, to reconvey it to him within the year. For a breach of the agreement to reconvey, Ricketson was held liable for the actual damages only, not the $16,180 stipulated in the condition. Ricketson *v.* Richardson, 19 Cal. 330; Leonard *v.* Speidel, 104 Mass. 356, 360. See Dehler *v.* Held, 50 Ill. 491.

penalty is the debt, according to the express terms of the instrument; this, however, is corrected by the practice which forbids the execution to issue for more than the sum really due.[1]

Damages are given in the action of debt on bond for the detention of the debt; but such damages are in general purely nominal;* and it is proper to notice that nominal damages may be given by verdict, but not on default.† If, however, the interest exceed the penalty, it will no doubt be necessary to have the actual damages assessed by the jury; if the judgment goes by default, the taxing officer allows the excess in the costs. But the damages are not necessarily nominal, and the jury may give substantial damages if they see fit.‡[2]

* In Pennsylvania, it has been held that, in debt for a penalty by the party aggrieved, damages may be given for the detention; but not in the case of a common informer. Ritchie *v.* Shannon, 2 Rawle, 196; Norris *v.* Pilmore, 1 Yeates, 408. In O'Neal *v.* O'Neal, 5 Watts & Serg. 130, it is said that damages in debt at common law are usually nominal.

† People *v.* Hallett, 4 Cowen, 67; Lil. Ent. 473, 483, 503; Tidd's Pr. Forms, 169–70; 5 Wentw. 165–6, 414; 10 *Ibid.* 427–8, 453; 7 *Ibid.* 402; Lil. Ent. 257, 379; Tidd Pr. Forms, 186, 187; Clapp *v.* Reynolds, 2 J. Cas. 409; Lord Lonsdale *v.* Church, 2 T. R. 388; Wilde *v.* Clarkson, 6 T. R. 303; Smedes *v.* Hooghtaling, 3 Caines, 48; Cook *v.* Tousey, 3 Wend. 444; 2 Saun. 107, note 2.

‡ Henry *v.* Earl, 8 M. & Wels. 233. In Belbin *v.* Butt, however, 2 Mees. & Wels. 422, the English Court of Exchequer refused to let in evidence to reduce the damages in an action of debt, on the ground that there was no inquiry in that action as to damages. But might it not have been admissible, if offered directly to reduce the damages for the detention?

[1] Where a judgment was recovered in one State for the amount of the penalty of a bond, to stand as security for future as well as to satisfy past breaches, a plaintiff suing on such judgment in another State can recover the amount of damages only for past breaches for which execution was awarded in the original suit. Nor is the rule affected by the fact that the defendant has removed from the jurisdiction where the judgment was recovered. Battey *v.* Holbrook, 11 Gray, 212.

[2] Statutory Bonds.—In suits on statutory undertakings and bonds given to secure a defendant against damages and costs resulting from an attachment, injunction, or other provisional remedy wrongfully issued or applied, the measure of damages is substantially indicated by the terms of the instrument as authorized by the statute, and is the actual expense and loss occasioned by the writ or order, excluding remote damage. Campbell *v.* Chamberlain, 10 Iowa, 337; Plumb *v.* Woodmansee, 34 Iowa, 116. See Bennet *v.* Brown, 31 Barb. 158; 20 N. Y. 99; De Mattos *v.* Gibson, 3 L. T. R. (N. S.) 121, Pr. V. C. Wood; Silsbe *v.* Lucas, 53 Ill. 479; Collins *v.* Sinclair, 51 Ill. 328.

Counsel Fees.—The expense recoverable includes the costs of the original proceeding (Dunning *v.* Humphrey, 24 Wend. 31; Schuyler *v.* Sylvester, 4 Dutch. (N. J.) 487; Hayden *v.* Sample, 10 Mo. 215), and usually has been held by the State courts to include also the reasonable counsel fees paid for setting aside the injunction or attachment. Andrews *v.* The Glenville Woolen Co. 50 N. Y. 282; Corcoran *v.* Judson, 24 N. Y. 106; Brown *v.* Jones, 5 Nev. 374; Littlejohn *v.* Wilcox, 2 La. Ann. 620; Fitzpatrick *v.* Flagg, 12 Ab. Pr. R. (N. Y.) 189; Accessory Transit Co. of Nicaragua *v.* McCerren, 13 La. Ann. 214; Moore *v.* Withenburg, 13 La. Ann. 22; Trapnall *v.* McAfee, 3 Metc. (Ky.) 34; Phelps *v.* Coggeshall, 13 La. Ann. 440; Seay *v.* Greenwood, 21 Ala. (N. S.) 491; Morris *v.* Price, 2 Blackf. (Ind.) 457. Such fees cannot, however, be recovered in an action of trespass. Williams *v.* Scott, 30 Ala. (N. S.) 241. Nor can counsel fees be allowed for resisting the granting of an injunction which is granted and afterwards vacated. The damages caused by the injunction cannot precede it. Sturgis *v.* Knapp, 38 Vt. 486. See Police Jury of West Baton Rouge *v.* Bergeron, 11 La. Ann. 390; Corder v. Martin, 17 Mo. 41. In Alabama, counsel fees necessarily incurred, although not paid, may be recovered. Garrett *v.* Logan, 19 Ala. (N. S.) 344; Miller *v.* Garrett, 35 Ala. (N. S.) 96. So in Louisiana. McRea *v.* Brown, 12 La. Ann. 181. In Kentucky, it is sufficient that they should have been liquidated. Schultz *v.* Morrison, 3 Metc. (Ky.) 98. In New Hampshire, where reasonable counsel fees are allowed, it is made a condition of their recovery that they could not have been collected from the parties defend-

LIQUIDATED DAMAGES.—We now approach another class of cases, where the parties have agreed on a sum certain as the

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ing the suit at law or prosecuting the bill in equity. Derry Bank *v.* Heath, 45 N. H. 524. And where there is nothing to show that the trial of an action on which a preliminary injunction had been granted, is more difficult on account of the injunction, or that the costs and expenses of the defence were increased by it, the costs and counsel fees of defending the action in which it was granted have been denied. Allen *v.* Brown, 5 Lansing (N. Y.), 511. See also, Hovey *v.* The Rubber Tip Pencil Co. 50 N. Y. 335. And it is decided by the Supreme Court of the United States, in conformity with its general practice as now settled (*ante*, 99, *post*, 573, *n.* 1), that counsel fees are not recoverable on injunction bonds. Dietrichs *v.* Spain, 15 Wall. 211. So in South Carolina counsel fees have been held not recoverable. Gadsen *v.* Bank of Georgetown, 5 Rich. (S. C.) L. 336. But see Sims *v.* Goudelock, 7 *Ibid.* 23. To recover such fees in California, they must have been actually paid. Prader *v.* Grimm, 28 Cal. 11; Willson *v.* McEvoy, 25 Cal. 169. And in an early case in California they were not allowed. Heath *v.* Lent, 1 Cal. 410. Fees of counsel employed to prosecute the claim for damages, cannot be recovered. Offut *v.* Edwards, 9 Rob. (La.) 90.

INJURIES TO CREDIT AND BUSINESS.—The damages recoverable on an attachment should be the actual loss from the deprivation of the use of the property. They should be reasonably certain, and a natural and proximate consequence of the breach. So in Maryland, injury to or destruction of the plaintiff's business, by the taking of the goods, may be allowed for, if the destruction or loss was the natural result of the trespass. Moore *v.* Schultz, 31 Md. 418. But injuries consequent on loss of credit occasioned by the attachment cannot be compensated for. Pettit *v.* Mercer, 8 B. Munroe, 51. So it has been held that neither the injury to a merchant's credit from the attachment of his real estate, nor the depreciation of the real estate pending the attachment, are sufficiently proximate and certain to be allowed. Heath *v.* Lent, *supra*. In Maine, however, the depreciation of the plaintiff's stock while withheld from sale on account of the attachment is a legitimate item to be recovered. Ripley *v.* Mosely, 57 Maine, 76. This, we think, is now the general rule. But loss of probable profits during the time the plaintiff's stock was under the control of the attaching officer, or which are the consequence of the plaintiff's illness while trying to relieve the stock from attachment; diminution of profits from the reduction of the stock; prospective damages caused by the attachment, from the want of mercantile credit; and the expenses of the plaintiff and his counsel in procuring the defendants to enter into the bond in the suit cannot be recovered. *Ib.* But where by the attachment a party is prevented from performing his contract, and material or property prepared or procured to enable him to do so is thus depreciated in its value to him, such damage is considered by the Court of Appeals of Kentucky as embraced by the attachment bond. Carpenter *v.* Stevenson, 6 Bush (Ky.), 259. And in Illinois, injury to credit and business reputation are considered a proper element of damage in such cases. Lawrence *v.* Hagerman, 56 Ill. 674. So in Alabama, if the wrongful attachment be malicious, such damages include injuries to the credit and business, and exemplary damages may be recovered. McCullough *v.* Walton, 11 Ala. (N. S.) 492; Kirksey *v.* Jones, 7 Ala. (N. S.) 622; Seay *v.* Greenwood, 21 Ala. 493; Spivey *v.* McGehee, 21 Ala. 417; Forest *v.* Collier, 20 Ala. 175. The existence of probable cause to believe that the grounds on which the attachment was served were true, goes in mitigation of such damages. Metcalf *v.* Young, 43 Ala. (N. S.) 643. See, also, Offutt *v.* Edwards, 9 Rob. (La.) 90; State *v.* Thomas, 19 Mo. 613; Moore *v.* Withenburg, 14 La. Ann. 22. But for reasons elsewhere more fully stated (465, note), we think that injuries to credit and business, being really compensatory in their nature, as well as remote and speculative, cannot properly be included even in exemplary damages in these actions. See Campbell *v.* Chamberlain, 10 Iowa, 337, *supra*. If considered at all, it should be so far only as they may properly go to show the extent of the plaintiff's loss.

OTHER MEASURES OF DAMAGE.—We add, in further illustration of the general subject, a few cases to show the extent of loss or damage for which compensation is to be had in these actions. Pending a preliminary injunction forbidding the defendants in a suit brought under the New York Code of Procedure, from interfering with some logs which were on the defendant's land, which were claimed by the plaintiffs, who brought the suit to establish their title to them, the plaintiffs carried away the logs, converted them into lumber, made a general assignment for the benefit of creditors, and became insolvent. On an undertaking of a surety given at the time of obtaining the injunction, to the effect that the plaintiff would pay all damages, not exceeding a specified amount, the defendants might sustain by reason of the injunction, the New York Court of Appeals held that the measure of the defendant's damages was *primâ facie* the value of the property. Barton *v.* Fisk, 30 N. Y. 166. And where an injunction restraining a party from taking possession of a farm was issued in the spring and dissolved in September following, the court in the action on the injunction bond held that the measure of the plaintiff's damages was not merely the value of the use of the land during the continuance of the injunction,

measure of damages; and this branch of our subject, owing to the existence of the technical penalty, will be found environed by much doubt and contradiction.

When speaking of the subject of damages with regard to the action of debt on bond,* we have stated the rule, resulting from the peculiar form of that instrument, which fixes a penalty subject to a certain condition. We have now to consider the same matter in another sense.

It is competent for parties entering upon an agreement to avoid all future questions as to the amount of damages which may result from the violation of the contract, and to [398] agree upon a definite sum, as that which shall be paid to the party who alleges and establishes the violation of the agreement.† [1] In this case the damages so fixed are termed

* *Ante*, 392, *et seq.*

† A provision of this nature has been engrafted on charter-parties, and is familiarly known as demurrage.

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but the whole damage occasioned by his being kept out of possession, including the consequent loss of crops. Edwards *v.* Edwards, 31 Ill. 474. In an action on a bond given on obtaining an injunction restraining the plaintiffs' action at law on a promissory note, interest on the note during the pendency of the injunction was held recoverable only on its being shown that the makers of the note had become insolvent, or that in some other way, without fault of the plaintiffs, they had suffered damage to the amount of the interest. Derry Bank *v.* Heath, 45 N. H. 524, *supra*. In debt on a replevin bond conditioned to pay all such damages as the defendants in that action should recover, the measure of damages is the judgment in the replevin suit. Claggett *v.* Richards, 45 N. H. 360.

Mitigation.—In conformity with the general principle of indemnity, the rules of mitigation applicable to trover and other classes of actions, are recognized here. Thus where a plaintiff had been nonsuited in the original action in which he had obtained an attachment, it was permitted to be shown in mitigation of damages in the action on the attachment bond, that the property thus attached had been reattached in a subsequent action by him, which had been prosecuted to a judgment, under which the property was sold. Earl *v.* Spooner, 3 Denio, 246. Had the original taking been an absolute trespass, however, without color of legal right, it is presumed that the mitigation would not have been allowed, on the principle that a wrong-doer cannot qualify or apportion his wrong. So, again, where the statute provided that in actions to determine claims to real property, the plaintiff must recover on the strength of his own title, it was held in an action on a bond given upon the granting of an injunction to restrain a plaintiff from cutting timber on a tract of land, that the defendant might show in mitigation that the plaintiff had no title to the land and no right to cut timber on it. Jenkins *v.* Parkhill, 25 Ind. 473. See *post*, 550, note. The probability and justice of the claim, on the other hand, it is said in Louisiana, will go in mitigation of the damages. Cox *v.* Robinson, 2 Rob. (La.) 313. But this must be taken with reference to the question of exemplary damages only.

A question has recently been decided by the Supreme Court of the United States, concerning the measure of damages in actions brought by one public officer to recover for ouster by another. A, being duly elected mayor of Georgetown, B was nevertheless sworn into office, and entered upon the duties. A, proceeding by *quo warranto*, recovered judgment of ouster. B took a writ of error to review this judgment, and gave a bond to answer all damages and costs, &c. The writ of error was subsequently dismissed, and A brought suit on the bond, to recover the amount received by B as salary from the date of the bond to the time when A got the benefit of the judgment of ouster. Held, that the plaintiff was entitled to recover the amount so received. United States *v.* Addison, 6 Wallace, 291. A bond was given to an officer conditioned to indemnify him from all suits, damages and costs whereto he might be liable or obliged by law to pay by reason of an attachment. The owner of the property attached recovered judgment against the officer for more than the amount of the penalty of the bond, and the execution was satisfied by the assignment of the bond to the owner of the property. In a suit on the bond it was held that the obligor was liable for the full amount of the penalty, with interest. White *v.* French, 15 Gray, 339.

[1] Smith *v.* Whitaker, 23 Ill. 367; Bingham *v.* Richardson, Winston's Law R. (N. C.) 217.

liquidated, stipulated, or stated damages. But even where this course has been adopted, and a sum certain named in the contract, difficulty has arisen as to whether it should be considered as such liquidated damages, or only as a penalty.* It being settled by the courts, both of equity and law, that a penalty was only intended as a security for the principal sum due, or the actual damages sustained, it became doubtful, even when a definite sum was named, whether the parties intended it for that purpose, or whether it was meant as liquidated damages, behind which the courts could not go; and on this subject various cases have been decided.[1]

CLASSIFICATION OF THE SUBJECT.—It is proper, however, before we examine these cases, to notice a distinction as to the way in which the question presents itself, growing out of the form of the contract, from want of a constant attention to which part of the confusion has arisen.

First. The agreement may, in the first place, be to do or refrain from doing some particular act, or, in default thereof, to pay a given sum of money; and this was well known to the Roman law. So the imperial legislator advises his subjects, in making contracts for the doing of anything, to fix the amount of damages by inserting a precise stipulation to that effect: *Non solum res in stipulationem deduci possunt, sed etiam facta: ut si stipulemur aliquid fieri vel non fieri. Et in hujusmodi stipulationibus optimum erit pœnam subjicere, ne quantitas stipulationis in incerto sit, ac necesse sit actori probare quid ejus intersit. Itaque si quis, ut fiat aliquid, stipuletur ita adjici pœna debet: si ita factum non erit, tunc pœnæ nomine decem aureos dare spondes.*† This, as Lord Kaims clearly

* The word *penalty* is in this contradistinction not very correct or significant; the word designates a sum absolutely due in case of the non-performance of an agreement, quite as clearly as the phrase *liquidated damages*. But the term has now acquired a fixed and well-settled technical meaning.

† Inst. lib. iii, tit. xlv, de Verb. Oblig. section 7. Vinnius, in his commentary on this section, discusses the subject of the measure of damages, and its necessary uncertainty in many cases: *Est vero id quod interest incertum duplici ratione, ab eventu ipsius rei, et a probatione.* Vinn. Comm. p. 606.

[1] Fraud, which vitiates all contracts, cannot be sheltered under a stipulation for damages. So, where, in a contract for the sale of land, the damages were liquidated at what was said by the vendor to be their cost, but was in fact ten times as much, the rule fixing the damages according to the agreement of the parties was not allowed to prevail. Wambaugh *v.* Bimer, 25 Ind. 368.

Although the parties have agreed upon a sum as liquidated damages, yet if it appears that the agreement contemplated only a *total* failure to perform, and there has been a *partial* performance by defendant, he is liable only for the damages resulting from the partial failure. Lampman *v.* Cochran, 16 N. Y. 275; affirming 19 Barb. (N. Y.) 388.

By extending the time of performance, neither party loses the right to insist on the recovery of *liquidated damages*. Esmond *v.* Van Benschoten, 12 Barb. (N. Y.) 366.

points out,* is properly an alternative obligation, and the sum stated cannot be correctly termed a penalty.

Secondly, the agreement may assume the technical form of the bond, containing a declaration of an absolute indebtedness in a given sum, conditioned to become void on the pay-
[399] ment of a less sum, or the performance of some particular act. Here there is no express promise or undertaking to do anything. The indebtedness declared in the prior part of the instrument is not intended to be binding. The promise relied on is contained in or implied from the condition, and that is sanctioned by the penalty.

Thirdly, the agreement may bind the party absolutely to do, or refrain from doing, the particular act, and then proceed to declare that if the promise is not performed, the party stipulating shall pay a given sum of money as a *penalty*.

And *lastly*, the agreement may in all respects resemble the last, except that the fixed sum may be declared payable as *liquidated or stated damages*, or as a *forfeiture*.[1]

Before proceeding to examine the cases, some few general observations may be of use to serve by way of introduction and illustration. Whenever questions of the nature we are now considering present themselves, the attention of the courts is mainly fixed on three different points: First, the language employed; second, the subject-matter of the contract; and third, the intention of the parties. These are, indeed, the great elements of interpretation of all contracts. But in the case we are now examining, the courts, especially in this country, have generally shown a marked desire to lean towards that construction which excludes the idea of liquidated damages, and permits the party to recover only the damage which he has actually sustained. The language of the contract is not controlling. If, indeed, the word "*penalty*" is used, as we shall see hereafter, it will never be construed as a sum absolutely fixed. But the reverse is by no means the case; and the phrase "*liquidated damages*" has often been made to read "*penalty*."[2]

And such, it seems, was the disposition of the civil law in the somewhat analogous case of the *stipulatio duplex: Quæ scrupulositates et differentiæ procedunt propter odiositatem strictamque naturam stipulationis duplæ, quæ stricti juris est, contra quam etiam in dubio fit interpretatio. Contra, vero,*

* Kaim's Equity, book iii, ch. ii, p. 277.

[1] The fourfold classification of the text was approved and followed in Esmond *v.* Van Benschoten, 12 Barb. (N. Y.) 365.

[2] Thoroughgood *v.* Walker, 2 Jones (N. C.) L. 15; Burrage *v.* Crump, 3 *Ibid.* 330.

*actio ex empto bonæ fidei est, et etiam favorabilis, cum non competat ad veram pœnam, sed subsistere et probari oportet, verum et justum interesse, merito in eâ plenior fit interpretatio.**

THE SUBJECT-MATTER AND INTENT OF PARTIES THE MAIN GUIDES.—The subject-matter of the contract, and the intention of the parties, are the controlling guides.[1] If from the nature of the agreement, it is clear that any attempt to [400] get at the actual damage would be difficult, if not vain, then the courts will incline to give the relief which the parties have agreed on. But if, on the other hand, the contract is such that the strict construction of the phraseology would work absurdity or oppression, the use of the term liquidated damages will not prevent the courts from inquiring into the actual injury sustained, and doing justice between the parties.

USURY.—We may remark, in the first place, that it is well settled that no damages for the mere non-payment of money can ever be so liquidated between the parties as to evade the provisions of law which fix the rate of interest.[2] So, in a case,†

* Dumoulin, de Eo quod Int. § 123. † Orr *v.* Churchill, 1 H. Black. 232.

[1] See Chase *v.* Allen, 13 Gray, 42.

[2] See Clark *v.* Kay, 26 Geo. 403; Brown *v.* Maulsby, 17 Ind. 10. This principle was adhered to in Minnesota, where prior to the revision of the laws in 1866, a statute permitted parties to agree in writing on any rate of interest, establishing, however, where no rate is thus agreed on, the legal rate at seven per cent., which was accordingly held to be the measure of the damages for the breach of a contract to pay money. So in the case of a promissory note bearing one agreed rate of interest up to maturity, and another higher rate after maturity, the higher rate is considered to be in the nature of a penalty only. And in an early case it was held that on default in the payment of such a note at maturity, the rate to be paid after default was that which the note bore up to maturity, which was three per cent. a month, instead of that expressed to be paid after default, which was five per cent. a month. Mason *v.* Callender, 2 Minn. 350. In the later cases of Talcott *v.* Marston, 3 Minn. 339, and Daniels *v.* Ward, 4 Minn. 168, the court went still further and declared the rule to be seven per cent. only after the default, to that extent overruling the prior decisions. A similar construction of the former statute was adopted by the Supreme Court of the United States. Brewster *v.* Wakefield, 22 How. 118. In the State of Kansas, also, under a similar provision of law, a note bearing five per cent. interest a month up to maturity, was held to bear after maturity only the rate fixed by statute, where none was agreed on by the parties. Robinson *v.* Kinney, 2 Kansas, 184. So in Illinois, where the legal interest, in the absence of a stipulation, is six per cent., but any rate up to ten per cent. may be agreed on, when a debt bearing the higher rate becomes merged in a judgment or decree, the interest is held to be thenceforward limited to six per cent. Wayman *v.* Cochrane, 35 Ill. 152; Wayman *v.* Crozier, 35 Ill. 156. But these decisions, though doubtless correct constructions of the statutes to which they refer, perhaps tend to discourage that good faith in dealing, which it should be the sedulous endeavor of jurisprudence to promote. They allow the debtor, by a breach of his contract, to obtain for a time the use of his creditor's money, at a rate less than he agreed to pay, and one which may be far less than it could be had for in the market, and which no degree of good faith would have enabled him to obtain. And by the present law of Minnesota, it is provided that interest shall be at the rate of seven per cent. unless a different rate is contracted for, and all contracts shall bear the same rate as before, if it clearly appears therefrom that such was the intention of the parties, the rate being restricted in any case to twelve per cent. Minnesota Gen. Stat. Rev. of 1866, ed. 1872, p. 226, ch. 23 § 1. And in Connecticut, where a railroad company, by special act of the legislature of that State, was authorized to issue bonds at seven per cent. when the legal rate was

where a bond was given that if certain bills were not accepted, the obligors would pay the amount of them, with interest at ten per cent. by way of penalty, it was insisted that the damages were liquidated. But Lord Loughborough said, "There can only be an agreement for liquidated damages where there is an agreement—for the *performance of certain acts* the not doing of which would be injurious to one of the parties, or to guard *against the performance of acts* which if done would also be injurious. But in cases like the present, the law, having by positive rules fixed the rate of interest, has bounded the measure of damages." And it was held that the amount of the bills, with legal interest only, could be recovered. And in a similar case, this language was held by the Supreme Court of New York: "Such facts constitute no right to recover beyond the money actually due. Liquidated damages are not applicable to such a case. If they were, they might afford a sure protection for usury, and countenance oppression under the form of law."*[1]

English Cases.—The earliest notice of the general subject appears to be in Sir Baptiste Hixts' case,† which is as follows:

[401] In an action of covenant, if the plaintiff counts that in an agreement for certain lands between plaintiff and defendant, the defendant covenanted that if on measurement there were not found as many acres as the defendant had stated to the plaintiff at the time of sale, he would repay for each acre wanting £11 per acre, and avers that on measurement, so many acres were wanting as would, at £11 per acre, amount to £700; and issue being joined whether they were

* Gray *v.* Crosby, 18 J. R. 219 and 226. In Galsworthy *v.* Strutt, 1 Exch. Rep. 659, Parke, B., is reported to have said, with, perhaps, less than his usual care and discrimination, "I take it that it would be competent for the parties to make a stipulation to pay a certain sum on the non-performance of a covenant to pay a smaller sum; but they must do so in express terms; and if that be done, I do not see how the court can avoid giving effect to such a contract."

† 2 Rolles Abr. 703, tit. Trial.

but six, and the bonds were not paid at maturity, the holders were adjudged to be entitled to interest as damages estimated by the contract, and not merely the legal rate. The court said that there was no equity in favor of one rate of interest rather than another where both legal, and that the defendants ought not to complain, as long as it was in their power, by paying the principal, to protect themselves from paying what they thought a reasonable rate when they borrowed the money. Beckwith *v.* The Trustees of the Hartford, Providence, and Fishkill R. R. 29 Conn. 268. And in Kansas, where, by the terms of a note maturing at a specified time, it bears the higher rate of interest *until paid*, it continues at such rate after maturity. Dudley *v.* Reynolds, 1 Kansas, 285; Small *v.* Douthitt, 1 Kansas, 335; Young *v.* Thompson, 2 Kansas, 83.

[1] But in Illinois, an agreement in a promissory note made in good faith, without design to evade the usury laws, in case the note is not paid at maturity, to pay thereafter a rate exceeding the legal rate until paid, is not usurious. Gould *v.* The Bishop Hill Colony, 35 Ill. 324; Lawrence *v.* Cowles, 13 Ill. 577.

wanting, and the jury find for the plaintiff, and give £400 damages, this issue is well found for the plaintiff; for although it were found that all the acres were wanting, still *they are chancellors*, and may give such damages as the case requires in equity, inasmuch as the whole consists in giving damages.* To this decision I have already referred, as being strikingly illustrative of the laxity of all the early cases on the subject of compensation.†

In the next case in which the subject was discussed,‡ the plaintiff had executed a bond in £100 penalty to the Duke of Beaufort, that his son should not poach on the duke's grounds without leave from the game-keeper, or unless in company with a qualified person. The son afterwards fished; the bond was put in suit, the penalty of £100 recovered, and paid by the plaintiff, with £40 costs of suit. This bill was filed for relief. It was insisted that the bond was only given as a security that the son should not poach; but Lord Chancellor Hardwicke said, "It is most absurd to think that bonds of this kind were intended merely as a security," and asked, "In what respect is the gentleman who has such a bond in a better [402] condition than he was before, if after obtaining judgment at law, a court of equity will give him no other satisfaction than the bare value of the price of the game that is killed?"

In a case before the same great judge,‖ Aylet had charged certain lands by his will with an amount of ten pounds for the maintenance of a school-master, to be paid half-yearly; and if in arrear forty-two days after due, 5*s.* per week mere allotted, by way of *nomine pœnæ*. A commission of charitable uses issued from chancery summoned the owner of the land, who was in default, and awarded the arrears and the *nomine pœnæ*. Exception was taken that in a court of equity, the *nomine pœnæ*

* The original is as follows: En un action de covenant, si le plaintife count que sur un bargain pur certein terres enter le plaintife et defendant, le defendant covenant que si ne fueront tant acres sur le measure come le defendant ad dit al plaintife sur le vendition que le terre vend fuit, que il repareroit pur chescun acre que deesset del number £11, et allege que sur le measure tant acres en certain defueront que amount, solonque £11 l'acre, al £700; et l'issue est an defueront, &c. Et le jurie trove pur plaintife, et done £400 damages. Cest issue est bien trove pur le plaintife; car coment que soit trove per ceo que touts les acres defueront, uncore ils sont chancellors, et poient doner tant dammages come le case require en equitie, en tant que tout est d'estre done en dammages.

† In a subsequent case, Lowe *v.* Peers, 4 Burr. 2225 and 2229, Lord Mansfield said, "As to the case mentioned by Mr. Mansfield, from Rolles Abr., it is impossible to support it; for it cannot be that a man should be obliged to take less than the liquidated sum. And the writ of error in that case was plainly brought by the defendant. Besides, the damages could never be taken advantage of upon a writ of error. How could the *quantum* of damages found by the *jury* be the subject of a *writ of error?*"

‡ Roy *v.* The Duke of Beaufort, 2 Atk. 190, decided in 1741. But on the ground that an ill use had been made of the bond, the chancellor relieved the plaintiff against the verdict, and decreed the duke to refund the £100 and £40 damages.

‖ Aylet *v.* Dodd, 2 Atk. 238, decided in the same year.

would be relieved against on payment of the actual arrears. Lord Chancellor Hardwicke said that the *nomine pœnæ* should stand, according to the *intention of the parties, as a security for the legal interest.* But he went on to say, that where there is a *nomine pœnæ* in a lease to prevent the tenant from breaking up pasture ground, it is otherwise; for the intention there is, to give the landlord compensation for the damage sustained, and in such case the whole *nomine pœnæ* shall be paid.

And so in a subsequent case* where an increased rent was declared payable, provided land should be plowed up, the agreement was held conclusive on the quantum of damages.†

Again,‡ where a bond had been given by the plaintiff Benson, to the defendant, a hair merchant, as a security for his services in Flanders as an agent to buy hair, the plaintiff was to stay abroad a certain time; and as security for his performance he deposited £100 with the defendant. The plaintiff bought but five pounds' worth of hair, and returned to England before the time agreed on. The bill was filed for £50 per annum agreed to be paid by the defendant to the plaintiff, and also to recover back the deposit. It was insisted that the [403] plaintiff had committed a breach, that the £100 was stated damages; and the previous cases, of the *nomine pœnæ* in leases and the poaching bond, were cited; but Lord Hardwicke said that this was a bond for services only, and refused to decree the penalty, but directed an issue of *quantum damnificatus.*

In a subsequent case,‖ the plaintiff demised certain lands in Ireland, for three lives, at the yearly rent of £125, with a condition, that if the tenant should not live on the premises, the rent should be raised to £150. The tenant violated the condition by non-residence. The landlord distrained; the tenant replevied; the landlord avowed; and while the proceedings at law were going on, the tenant filed his bill for a perpetual injunction. The Irish court granted an injunction. An appeal was taken to the House of Lords, where it was insisted that the covenant was only inserted for the sake of improvement, and that it was admitted by the pleadings that the lands had been kept well stocked, and that the agreement had been substantially performed. But the bill was dismissed. No reason being

* Farrant *v.* Olmius, 3 B. & Ald. 692.

† But in Wilbeam *v.* Ashton, 1 Camp. 78, where assumpsit was brought on an agreement to serve the plaintiff as a leather dresser, under a penalty of £50, Lord Ellenborough, at Nisi Prius, said, "The legal construction of such an agreement is this: *beyond* the penalty you shall not go; *within* it, you are to give the party any compensation which he can prove himself entitled to."

‡ Benson *v.* Gibson, 3 Atk. 395 (1746).

‖ Ponsonby *v.* Adams, 2 Bro. P. C. 431, case 35 (anno 1770).

assigned, the case is altogether unsatisfactory; and if it was intended to decide that the covenant should be considered as one for stipulated damages, it would seem incorrect.

Again,* where the appellant Rolfe demised certain lands, with a covenant on the part of the lessee, that if he, during the term, should convert into tillage any part of the ancient meadow ground that had not been in tillage within twenty years, or if he should plow or sow out of course any of the arable lands, then for such lands converted or sown out of course a further rent of £5 should be paid. There were other covenants against cutting trees, etc. The tenant converted certain furze land, which had not been tilled within twenty years, into tillage, and committed breaches of the other covenants; upon which the landlord brought an action of covenant, and, default being made, on a writ of inquiry recovered £300. The respondent (the tenant) filed a bill for relief against the judgment; and Lord Chancellor Camden directed an issue of *quantum damnificatus*, holding that the plaintiff was entitled to [404] relief against the judgment, on making a just and adequate satisfaction for the damages sustained by breach of the covenant. On appeal to the House of Lords, the main question was whether, on an action of covenant by landlord against lessee, and damages assessed by a jury, a court of equity has jurisdiction to direct an issue for reassessing those damages. It was insisted that the estate had been really benefited by the conversion of the furze land into tillage, and that the £300 verdict was outrageous; but the Lords reversed the decree, and dismissed the bill, no reason, however, being assigned. The decision plainly turned on the jurisdiction of chancery, and so far seems evidently right. The true construction of the contract, whether to be regarded as a penalty or liquidated damages, was not passed upon.

Again,† where the plaintiff and defendant were partners, and the plaintiff had given the defendant a bond in a penalty of £500 that he, the defendant, should have the use of a particular room, the use of it being refused, the defendant brought suit on the bond. This bill was thereupon filed, praying an injunction, and an issue of *quantum damnificatus;* and the only question, on a motion to dissolve the injunction before hearing, was whether the penalty was merely intended as a security for the use of the room, or in the nature of assessed damages. Lord Chancellor

* Rolfe *v.* Peterson, 2 Bro. C. P. 436, case 42 (anno 1772).

† Sloman *v.* Walter, 1 W. Brown's Rep. 419 (1784).

Thurlow held that it belonged to the former class, and the injunction was retained.*

In a case already referred to,† the defendant had made a contract, under seal, not to marry any person besides the plaintiff; and if he did, to pay her £1,000 within three months thereafter. The defendant married another woman, and this suit was brought. Under the direction of Lord Mansfield, the jury found a verdict for the £1,000. On motion for a new trial, the question was raised, whether the jury could give more or less damages than the £1,000; and it was insisted for the defendant that they might, if they saw fit, give less. But Lord Mansfield remarked on the difference between covenants in general,
[405] and covenants secured by a penalty or forfeiture, and said, "In the latter case the obligee has his election. He may either bring an action of debt for the penalty, and recover the penalty, after which recovery he cannot refer to the covenant, because the penalty is to be a satisfaction for the whole; or if he do not choose to go for the penalty, he may proceed upon the covenant, and recover more or less than the penalty, *toties quoties*; and upon this distinction they proceed in courts of equity." That, in the former, to which this case belonged, even equity would not interfere. "The £1,000 is the particular liquidated sum fixed and agreed upon between the parties, and is therefore the proper quantum of damages." But the judgment was arrested on account of the invalidity and illegality of the instrument. The doctrine of this decision has been very recently recognized in the English Court of Exchequer, in an action on a covenant not to lop trees, under a given penalty for each tree.‡ The case seems, however, rather that of an agreement to pay a certain sum on a contingency, which contingency is itself dependent on the choice of the party himself, and belongs more properly to a class of alternative obligations of which I have already had occasion to speak.

Where‖ a bond had been given by the plaintiff to the defendant in £236, conditioned that certain iron-work should be done by himself and another party for £118 18*s.* within six weeks, and if not, they would "*forfeit and pay*"¶ £10 for

* In the case of Hardy *v.* Martin, cited in notes to this case, the same course was pursued in regard to a bond given by one partner, on the dissolution of a partnership, not to trade; and very rightly. In Astley *v.* Weldon, 2 Bos. & Pul. 346, this latter case was referred to by Chambre, J., who said that he was concerned in it, and that Lord Mansfield, at the trial at law, inclined to think it a case of stipulated damages.

† Lowe *v.* Peers, 4 Burr. 2225 (1768).

‡ Hurst *v.* Hurst, 4 Exch. 571.

‖ Fletcher *v.* Dyche, 2 T. R. 32 (1787).

¶ In Taylor *v.* Sandifore, 7 Wheat. 13, Marshall, C. J., commented on these words, and said, they were not so strongly indicative of a penalty as the word "*penalty*" itself. But in Horner *v.* Flintoff, 9 Mees. & Wels. 678, where an agreement was entered into binding the parties in the sum of £100 "as

every week, till it was finished, the plaintiff brought an action for work and labor against the defendant; and the latter pleaded the bond in question, averred that the work had not been performed within the time limited, nor until [406] four weeks thereafter, and insisted on a set-off of £40. Upon demurrer, it was contended that the £10 was a mere penalty, and could not be set off. But the court said that the sums offered to be set off were liquidated damages, which a court of equity could not relieve against; and Buller, J., said, "It is as strongly a case of liquidated damages as can possibly exist, and is *like the case of demurrage;*" and the demurrer was overruled. It seems, however, to be rather like the case last cited, a conditional agreement, where the party had his election to do the act or pay the money, and not having done the act, he is to be held as having made his election to pay the money.

Again, where* an agreement was entered into by the defendant to perform for the plaintiff at his theatre, and attend all rehearsals, or pay the established fines for all forfeitures of any kind whatsoever, with a clause that either of the parties neglecting to perform the agreement should pay the other £200, the declaration averred a refusal to perform; plea, non-assumpsit. On trial, a verdict was had for £20, with leave to the plaintiff to enter a verdict for £200 if the court should consider the agreement one in the nature of liquidated damages. Here it will be noticed that the phrase *liquidated damages* was not used, and that if the sum of £200 was not construed as a penalty merely, the non-payment of any one of the fines would have forfeited the whole amount. Lord Eldon, then Lord Chief Justice of the Common Pleas, in delivering the judgment of the court, said that he had felt much embarrassment in ascertaining the principle of the decisions, and that "this appeared to him the clearest principle, that where a doubt is stated whether the sum inserted be intended as a penalty or not, *if a certain damage, less than that sum, is made payable upon the face of the same instrument in case the act intended to be prohibited be done,* that sum shall be construed to be a penalty, though the mere fact of the sum being apparently enormous and excessive, would not

liquidated and settled damages, to be paid and *forfeited,*" the Court of Exchequer [Parke, B.] said that the case came within that of Kemble *v.* Farren, hereafter cited, but was rather stronger; "as the word '*forfeited*' was used, which points to a penalty." And in Cheddick's Ex'rs *v.* Marsh, 1 Zabriskie, 463, the S. C. of New Jersey said, "Where a contracting party stipulates upon a given event to *forfeit and pay* a specified sum, the natural and plain import of the language is, that upon the happening of the contingency he will pay that precise sum, not that it shall stand by way of penalty or surety for damages incurred."

* Astley *v.* Weldon, 2 Bos. & Pul. 346 (1801).

prevent it from being considered as liquidated damages." He went on to say, "*Primâ facie*, this certainly is contract, and not penalty, but we must look to the whole instrument;" and it was held a penalty.

This case of Astley *v.* Weldon was subsequently [407] cited with approbation*; and there is no doubt, according to the suggestion of Lord Eldon, that the form of the instrument may make some difference; as if it be a bond, the presumption will be that the greater sum is intended merely as a penalty. This is not, however, the necessary construction of such an instrument.

The doctrine laid down in Astley *v.* Weldon, was applied in a subsequent case,† to a very similar state of facts. The defendant had agreed with the plaintiff to act as principal comedian at Covent Garden, and to conform to its rules; the plaintiff was to pay £3 6*s.* 8*d.* every night that the theatre should be open; and the agreement contained a clause, that if either party failed to fulfil his agreement, or any part thereof, or any stipulation therein contained, such party should pay the other the sum of £1,000; to which sum it was agreed that the damages should amount, and which sum was declared by the parties to be *liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof.* The breach alleged was a refusal to act during the second season, and the jury gave a verdict for £750. A motion was made to increase this verdict to £1,000, on the ground that that sum was the amount liquidated by the parties; but it was denied, and Tindal, C. J., said:—

"It is undoubtedly difficult to suppose any words more precise or explicit than those used in the agreement; the same declaring not only affirmatively that the sum of £1,000 should be taken as liquidated damages, but negatively also that it should not be considered as a penalty or in the nature thereof. And if the clause had been limited to breaches which were of an uncertain nature and amount, we should have thought it would have had the effect of ascertaining the damages upon any such breach at £1,000. For we see nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum upon which they may agree. In many cases such an agreement fixes that which is almost impossible to be accurately ascertained, and in all cases it saves the expense and difficulty of bringing a witness to that point. But in the present case, the clause is not so confined; it extends to the breach of any stipulation by either party. If, therefore, on the one hand, the plaintiff had neglected to make a single payment of £3 6*s.* 8*d.* per day, or on the other hand, the defendant had refused to conform to any usual regulation

* Street *v.* Rigby, 6 Ves. 815. † Kemble *v.* Farren, 6 Bing. 141.

of the theatre, however minute or unimportant, it must have been contended that the clause in question, in either case, would have given the [408] stipulated damages of £1,000. But that a very large sum should become immediately payable in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms; the case being precisely that in which courts of equity have always relieved, and against which courts of law have, in modern times, endeavored to relieve by directing juries to assess the real damages sustained by the breach of the agreement. It has been argued at the bar, that the liquidated damages applied to those breaches of the agreement only which are in their nature uncertain, leaving those which are certain to a distinct remedy, by the verdict of a jury; but we can only say, if such is the intention of the parties, they have not expressed it, but have made the clause relate, by express and positive terms, to all breaches of every kind. We cannot, therefore, distinguish this case in principle from that of Astley *v.* Weldon, in which it was stipulated that either of the parties neglecting to perform the agreement should pay to the other of them the full sum of £200, to be recovered in his Majesty's courts at Westminster."

The authority of this case has been repeatedly recognized.[1]

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[1] So in the following recent cases: Lampman *v.* Cochran, 16 N. Y. 275; Foley *v.* McKeegan, 4 Iowa, 1; Lord *v.* Gaddis, 9 Iowa, 265; Hallock *v.* Slater, 9 Iowa, 599; Higginson *v.* Weld, 14 Gray, 165; Hanmer *v.* Breidenbach, 31 Mo. 49; Basye *v.* Ambrose, 28 Mo. 39; Nash *v.* Hermosilla, 9 Cal. 584; Daily *v.* Litchfield, 10 Mich. 29; Mills *v.* Fox, 4 E. D. S. 220; Beale *v.* Hayes, 5 Sandf. 640; Carpenter *v.* Lockhart, 1 Ind. 434; Berry *v.* Wisdom, 3 Ohio St. 241.

In a contract for the sale of land for $8,000, payable, $5,000 on the 1st of January following, and the rest in three annual instalments, a clause stating that "in further confirmation of the said agreement, the parties bind themselves each to the other in the penal sum of $1,000," is not to be considered as liquidated damages for the breach of this agreement, but as a penalty superadded. Robinson *v.* Cathcart, 2 Cranch, C. C. R. 590.

The distinction observed by Tyndal, C. J., in Kemble *v.* Farren, in saying in reference to the clause there considered, that if it "had been limited to breaches which were of uncertain nature and amount, we should have thought it would have had the effect of ascertaining the damages upon any such breach," has been frequently lost sight of, and the rule broadly laid down that the agreement in all cases where it contains various stipulations of different importance, to all of which the damages named apply, must be construed as importing a penalty. To make this rule precisely correct, it requires the qualification that one of the stipulations must be for the payment of a sum of money less than the amount named as the damages. In this case the fourth canon of construction given by the author (page 421) governs. The larger sum is regarded as a penalty in reference to the breach of such a stipulation, and as a consequence to the breach also of all the stipulations in the agreement. The contradiction remarked on by the same eminent judge in the decision last cited, which exists in the case where a large sum is made to "become immediately payable in consequence of the non-payment of a very small sum," does not arise where none of the stipulations provide for the payment of a specified amount. This distinction was pointed out by the Court of Appeals of New York in the case of Cotheal *v.* Talmage, 9 N. Y. 551, and again carefully stated by the same tribunal after reconsideration, in Clement *v.* Cash, 21 N. Y. 253. See also Thoroughgood *v.* Walker, 2 Jones (Law), N. C. 15. Where a case arises not within this qualification of the rule, but the sum fixed is evidently disproportioned to the actual damage, to an extent even which, in Lord Eldon's language in Astley *v.* Weldon, is "enormous and excessive," the remedy, if the language liquidating the damages is free from doubt, is in equity only. See Clement *v.* Cash, *supra*. It should seem, however, where the distinction between legal and equitable procedure is abolished, that in all cases within the general rule under consideration where the defendant is entitled to equitable relief, he should receive it in the plaintiff's action, and that the measure of the plaintiff's damages should in such cases uniformly be, not the sum named in the contract, but the amount actually sustained by its breach.

So in a case in the Court of Exchequer, where the sum named was held a penalty only, Parke, B., said:

"The rule laid down in Kemble *v.* Farren was, that when an agreement contained several stipulations of various degrees of importance and value, the sum agreed to be paid by way of damages for the breach of any of them shall be construed as a penalty, and not as liquidated damages, even though the parties have in express terms stated the contrary. . . . . When parties say that the same ascertained sum shall be paid for the breach of any article of the agreement, however minute and unimportant, they must be considered as not meaning exactly what they say, and a contrary intention may be collected from the other parts of the agreement." *

But the principle contained in Kemble *v.* Farren has been since explained and modified. So in a recent case, where the defendant on retiring from business had covenanted that he would not reside within the distance of two and a half miles from his then residence, and that if he did, he would pay £1,000, as liquidated damages, and not as penalty; and he unfortunately fixed his new residence a few feet within the distance, it was held that the whole sum was recoverable;
[409] Parke, B., saying that Kemble *v.* Farren was "somewhat stretched," and that "if a party agrees to pay £1,000 on several events, all of which are capable of accurate valuation, the sum must be construed as a penalty, and not as liquidated damages. But if there be a contract consisting of one or more stipulations the breach of which cannot be measured, then the parties must be taken to have meant that the sum agreed on was to be liquidated damages, and not a penalty."†

So, again, where the defendant had contracted not to practice as a performer within a certain district, he bound himself to the plaintiff in the sum of £5,000, "as and by way of liquidated damages, and not of penalty;" the authority of Kemble *v.* Farren was invoked for the defendant; but the court said:—

"Where the deed contains several stipulations of various degrees of importance as to some of which the damages might be considered liquidated, whilst for others they may be deemed unliquidated, and a sum of money is made payable on a breach of any of them, the courts have held it to be a penalty only, and not liquidated damages. But when the damage is altogether uncertain, and yet a definite sum of money is expressly made payable in respect of it by way of liqui-

* Horner *v.* Flintoff, 9 Mees. & Wels. 678. See also, Boys *v.* Ancell, 5 Bing. (N. C.) 390; Beckham *v.* Drake, 8 Mees. & Wels. 846;[1] Edwards *v.* Williams, 5 Taunt. 247.

† Atkyns *v.* Kinnier, 4 Exch. 776. See also, Galsworthey *v.* Strutt, 1 Exchequer, 659.

[1] Reversed on another ground. 11 Mees. & Wels. 315, and 2 C. & F.'s H. of L. Cases, 597.

dated damages, those words must be read in the ordinary sense, and cannot be construed to import a penalty." * [1]

Where suit was brought on an agreement made between two coach proprietors, that in consideration of a certain sum of money, the defendant would withdraw his stage-coach, and not concern himself in driving any other coach on that road, and the agreement contained a clause that for its due and punctual performance, each of the parties bound himself to the other "in the sum of £500, to be considered and taken as liquidated damages, or sum of money forfeited or due from the one party to the other, who shall neglect or refuse to perform his part of the agreement;" it was held not a penalty, but liquidated damages, from which the court would not depart.† [2]

And the same point was decided in a very analogous case, at an early day, ‡ by the Supreme Court of Massa- [410] chusetts, where the opinion was delivered by Mr. Justice Sedgwick.

A good deal of stress has been in different cases laid on the words of the contract. At Nisi Prius, Abbott, C. J., is reported to have said,‖ "that whatever the expressions, and in whatever mode the agreement be made, whether the stipulation is for liquidated damages or for a penalty, the plaintiff shall recover such damages as, upon a view of the whole case, the jury shall think fit to give," excepting, at the same time, contracts under

* Green, Ex'r, *v.* Price, 13 Mees. & Wels. 695, and Price *v.* Green, 16 M. & W. 346. For another recent case in England, on the subject of liquidated damages, under an agreement not to practice as surgeon, etc., see Rawlinson *v.* Clark, 14 M. & Wels. 187, where the doctrine of Green *v.* Price was affirmed.

† Barton *v.* Glover, at Nisi Prius, 1 Holt's N. P. Cases, 43.

‡ Pierce *v.* Fuller, 8 Mass. R. 223.

‖ Randall *v.* Everest, 2 Car. & Payne, 577; s. c. 1 Mood. & Malk. In Longridge *v.* Dorville, 5 B. & Ald. 117, it was held, that the giving up of a suit instituted for the purpose of trying a doubtful question, and consenting to deliver up a ship which might otherwise have been detained until the security required was given, was a good consideration to support a promise to pay damages not to exceed a certain sum, the actual damages to be afterwards ascertained.

[1] See Mercer *v.* Irving, 1 E. B. & E. 563; Shreve *v.* Brereton, 51 Penn. St. 175.

[2] So, also, in Sainter *v.* Ferguson, 62 Eng. Com. Law R. (7 C. B.) 716, and Duffy *v.* Shockey, 11 Ind. 70. So, where one having sued the owner of a laboratory in the neighborhood for damages to his real estate from the operations of the laboratory, the parties, pending the suit, entered into an agreement by which the plaintiff discontinued it, and the defendant agreed to stop the laboratory business within five years, or pay $3,000 as liquidated damages, and the defendant did not close the business within the time, the court held that the $3,000 were liquidated damages, refusing to consider the fact alleged by the defendant that the mode of conducting the business had been so changed that it was thereby rendered entirely harmless and unobjectionable, as affecting the question. Grasselli *v.* Lowden, 11 Ohio St. 349. And see, to the same purpose, Streeter *v.* Rush, 25 Cal. 67; also, Jaquith *v.* Hudson, 5 Mich. 123; Dunlop *v.* Gregory, 10 N. Y. 241. So, in general, where a certain sum has been agreed upon as damages for the violation of an agreement restraining a party from the use of a trade or profession, it is considered as liquidated damages. Mott *v.* Mott, 11 Barb. (N. Y.) 127, and cases cited; see, also, Reynolds *v.* Bridge, 6 Ellis & B. 528. But compare Smith *v.* Wainwright, 24 Vt. 97. See *ante* 363, n.

seal. It is difficult, however, to believe that any such language was used by a judge so able as Lord Tenterden. At all events, this case has been distinctly overruled,* and is opposed to the whole current of authorities.

WHERE THE WORD "PENALTY" IS USED, IT IS USUALLY CONCLUSIVE.—Though the intention of the parties is the great guide of inquiry, still, in one respect, the language may be conclusive; and it seems to be settled if the word *penalty* or *penal* be used (subject to a single exception hereafter stated),† no construction shall convert the agreement into one for liquidated damages; though the reverse is far from being the case.‡

Where ‖ a sum fixed on by the parties was held conclusive, Park, J., in giving judgment, referred to the case of Astley *v.* Weldon, and laid stress on the fact, that the term *liquidated damages* had not been there used.

But what if both expressions be used? In a case,¶ where an agreement had been entered into, not to carry on the business of a surgeon, in consideration of the purchase of the goodwill, with a clause that both parties were bound to each other *in the penal sum of* £500, *as and by way of liquidated damages;* the plaintiff agreeing on his part to pay a bill of £170, [411] —it was held a penalty. It is plain that this case came within the principle of Astley *v.* Weldon, as £500 might become the damages for not paying £170.

But in a subsequent case,** a somewhat similar agreement was entered into, *under a penal sum of* £500, *to be recovered as and for liquidated damages;* and it was held the latter. Best, C. J., at Nisi Prius, said,—

"The law relative to liquidated damages has always been in a state of great uncertainty. This has been occasioned by judges endeavoring to make better contracts for parties than they have made for themselves. I think that the parties to contracts, from knowing exactly their own situations and objects, can better appreciate the consequences of their failing to obtain those objects, than either judges or juries. Whether a contract be under seal or not, if it clearly states what shall be paid by the party who breaks it to the party to whose prejudice it is broken, the verdict in an action for the breach of it should be for the stipulated sum. A court of justice has no more authority to put a different construction on the part of an instrument ascertaining the amount of damages, than it has to decide contrary to any other of its clauses. Our office is to

* Crisdee *v.* Bolton, 3 Car. & P. 240.

† *Ne exeat* bonds, and other bonds of a like character.

‡ See Smith *v.* Dickenson, 3 B. & Pull. 630 and 632.

‖ Reilly *v.* Jones, 1 Bing. 302.

¶ Davies *v.* Penton, 6 B. & Cres. 216.

** Crisdee *v.* Bolton, 3 Car. & P. 240.

ascertain the intent of the parties, and if not contrary to law, to carry their intent into execution. In the present case, no evidence has been adduced of the amount of damage sustained by the plaintiff. In this, and in most other cases of this sort, it would be impossible to give such evidence as would enable juries to do complete justice. The claim for damages must depend not only on things which have been done, but on what may be done, which it is impossible to prove; on the value of the customers which the conduct of the vendor of the lease has attached to him, and what numbers his future conduct in the house that he has taken is likely to draw to him. We can have no safer guide to go by in deciding on the amount of compensation for breach of contract in such cases, than that estimate which the parties, each knowing all the circumstances of the case, and anxiously taking care of their respective interests, have agreed on.

"I cannot subscribe to the doctrine attributed to Lord Tenterden in Randall *v.* Everest. If it be doubtful, from the terms of the contract, whether the parties mean that the sum mentioned in it shall be a penalty or liquidated damages, then I should incline to consider the clause as creating a penalty, and not giving stipulated damages.

"In this case the sum of £500 is to be paid for the doing of one thing only, namely, setting up a victualing-house within one mile of the house transferred to the plaintiff. It is called a penal sum; and I will admit that the parties considered it as something more than compensation; but they have expressly agreed that this penal sum shall be recovered as and for stipulated damages. When the defendant has so unequivocally agreed, that if he ever did what it has been proved that he did, he would pay £500, what right has he now to say that the verdict against him ought not to be of this amount?"

American Decisions.—The decisions in this country [412] are now to be examined. Our courts will be found generally to be inclined to treat a fixed sum as a penalty, and to hold that the real damages are to be inquired into. Thus,* where the plaintiff had agreed to convey to the defendant seven hundred acres of land in exchange for a farm, valued at $3,750, with a further covenant that in case of failing, the party not fulfilling the covenant "should pay to the other party the sum of $2,000 damages," the Supreme Court of New York held this to be a penalty; and stress was laid on the great discrepancy between the value of the property to be exchanged, and the damages for not fulfilling the contract.[1]

* Dennis *v.* Cummins, 3 J. Cases, 297.

[1] So in Pennsylvania, a bond in a specified sum conditioned that the obligor convey certain lands in exchange for others conveyed to him by the obligee, is not in the nature of stipulated damages. The measure of the damages is the value of the lands which should have been conveyed. Burr *v.* Todd, 41 Penn. 206.

Where an action* was brought on an agreement, by which the defendant, in consideration of $500 received in full for fifty acres of land, agreed to convey the land in one year, or in lieu thereof to pay $800; in this case, the words of the contract were held to be too express to be questioned, and the land not having been conveyed, the sum was treated as liquidated damages. This case, however, properly belongs to the class of alternative contracts, which I have already noticed; and the distinction has been well pointed out by a learned and very able judge.† Where, in consideration of the conveyance of certain city lots for $21,000 *only*, the defendant covenanted that he would erect, on before the 1st of May, 1836, within two years, two brick houses thereon, or in default thereof, pay $4,000 after the 1st of May, 1836, and Bronson, J., said,—

"This does not belong to the class of cases in which the question of liquidated damages has usually arisen. It will be found in most, if not all of those cases, that there was an absolute agreement to do or not to do a particular act, followed by a stipulation in relation to the amount of damages in case of a breach. But here there is no absolute engagement to build the houses. It was optional with the defendant whether he would build them or not."

And mainly on the ground that the defendant had made his election not to build, but to pay, and that the court would not modify or reform the agreement between the parties, the sum of $4,000 was held to be the measure of damages.‡

[413] Where an agreement had been made ‖ by which the defendant covenanted, on the first of January then next, to convey certain lands, and the plaintiff agreed to pay the price, $1,250, on the delivery of the deed, and in case of failure, they bound themselves each to the other in the sum of $500, which they consented to fix and liquidate as the amount of damages to be paid by the failing party; in this case it was held to be too clear for question; and the sum of $500 was to be regarded as liquidated damages. The plaintiff having by parol enlarged the time for the delivery of the deeds (although to no fixed day), it was insisted that such extension was a waiver of the liquidated damages, and that the plaintiff could only recover

* Slosson *v.* Beadle, 7 J. R. 72.

† Bronson, J., in Pearson *v.* Williams' Adm'r, 24 Wend. 244; s. c. in Error, 26 Wend. 630.

‡ When this case came into the Court of Errors, Mr. Senator Ely moved to reverse the judgment, on the ground that the doctrine of liquidated damages ought never to apply to a case which admitted of partial performance, as here where the house might have been half built, but only where the contract must be wholly performed, or left wholly unperformed. It is plain that this consideration did not apply to this case. But there may be instances where the suggestion will be found not without weight.

‖ Hasbrouck *v.* Tappen, 15 J. R. 200.

his actual loss; but the court held otherwise, and that the stated sum was still to be the measure of compensation.

In all cases where a party relies on the payment of liquidated damages as a discharge, it must clearly appear from the contract that they were to be paid and received absolutely in lieu of performance; and it is also settled here, as we have seen in England,* that a covenant on a certain contingency to pay to another person a sum of money, with a provision that if he fails, then to pay a larger sum as liquidated damages, would be wholly incompatible with our laws in restraint of usury.[1]

Both these points were ruled in a case† already referred to, where the plaintiff had made a bond and mortgage to a third party in the sum of $5,000, which had been assigned to the defendant, and a covenant was then entered into between them, that three several farms belonging to the plaintiff and covered by the mortgage, should be appraised by arbitration; that if their value fell short of the defendant's claim he should have them (*i. e.* the three farms); if they exceeded his demands, he should pay the balance, with a stipulation that either party failing should forfeit to the other $500 as liquidated damages. The farms were assessed, a balance found in favor of the plaintiff, and the defendant refused to pay. The sum of [414] $500 was claimed; and the defendant admitted that he was bound to pay that sum as liquidated damages, but insisted that on such payment, the whole agreement was to be rescinded; and as his $5,000 bond remained due, he offered to offset the $500 against the $5,000 due on the bond, and asked that the balance should be certified in his favor. But the jury, under the charge of the court, found a verdict for the plaintiff for the balance fixed by the appraisers; and on a motion for a new trial, this was held right. It was held, so far as the defendant was concerned, that the stipulated damages were not intended in lieu of a "performance of anything to be done, nor as an extinguishment of the appraisement itself; and that as to the plaintiff, he could only recover the exact balance due him."

In the same State,‡ a contract to pay three hundred and sixty dollars for twelve cows and twelve calves, in four years, was held to be in the natnre of a penalty merely, and that the plaintiff

* In Orr *v.* Churchill, 1 H. Black. 232; *supra*, 420.

† Gray *v.* Crosby, 18 J. R. 219; *supra*, 420.

‡ Spencer *v.* Tilden, 5 Cowen, 144.

[1] So a bond in a given sum conditioned that certain incumbrances on real estate shall be removed (within a certain time), is not in the nature of liquidated damages. A breach of its condition is compensated by damages equal to the injury. Robeson *v.* Whitesides, 16 Serg. & R. 320; Robinson *v.* Bakewell, 25 Penn. 424.

could only recover the value of the cows and calves. And this on the same grounds as in the last two cases.*

In a subsequent case,† the following facts were presented: By articles of dissolution between the plaintiff's intestate and the defendant, the defendant agreed to pay $3,000 in various instalments, of which the last was one of $750, on the 1st of December, 1812. The articles then recited, that the object was for the intestate entirely to quit the business, and for the defendant to continue it, and that such intention was the basis of allowing the $3,000, and then declared, that in case the intestate should be concerned in or carry on the same kind of business within twenty miles from the present stand, the last instalment should not be paid. The action was for the last instalment; in answer to which the defendant proved that the plaintiff's intestate had recommenced the partnership business within four miles. It was insisted that the contract was in the nature of a penalty; but the court said, "A more [415] suitable case for the liquidation of damages by the parties themselves can hardly be imagined;" and the nonsuit which was directed at the trial was sustained.[1]

The rule laid down in Astley *v.* Weldon, and already stated that when the agreement contains formal distinct covenants on which there may be divers breaches, some of an uncertain nature, and others certain, with one entire sum specified to be paid on breach of performance, then the contract will be treated as one for a penalty and not liquidated damages, was approved in New York,‡ where a bond was given in the penal sum of $10,000 conditioned that the defendant would not practice as a physician, and if he did, that he should pay $500 for every month that he so practiced. Here the $10,000 was held to be penalty, and the $500 stipulated damages. And the same rule has been laid down in New Jersey.‖ [2]

In a case ¶ where the plaintiff had entered into an agreement with the defendants to sell them two lots of ground on certain terms, upon compliance with which the plaintiff was to give a deed, and to this a clause was added, "that if the parties of the second part should fail to perform this contract, or any part therein specified, they will pay the said party of the first part $25, *as liquidated damages*, and give immediate pos-

* In Nobles *v.* Bates, 7 Cowen, 307, this decision was said to go on the oppressiveness of the contract.

† Nobles *v.* Bates, 7 Cowen, 307. See a similar English case, *ante*, 410, 411.

‡ Smith *v.* Smith, 4 Wend. 468. See also Spear *v.* Smith, 1 Denio, 464.

‖ Cheddick's Ex'r *v.* Marsh, 1 Zabriskie R. 463.

¶ Ayres *v.* Peas, 12 Wend. 393.

[1] See *ante*, 409, note 2.

[2] See Niver *v.* Rossman, 18 Barb. 50.

session to the said party of the first part," the plaintiff brought an action of covenant for breach of the condition. The defendant pleaded tender of $25. But the Supreme Court of New York said, "There is nothing in this case which authorizes us to say that it was in the contemplation of the parties that the defendants might relieve themselves from their covenants to pay the price of the land by paying the sum agreed upon as stipulated damages, and surrendering possession;" and the plea was, for this as well as for other reasons, held bad.

Again,* where the defendant covenanted to assign to the plaintiff a lease, and to deliver possession thereof, with the following provision: "And I further covenant that, in case of non-performance of any or either of the above covenants, I will forfeit the sum of five hundred dollars, as the liquidated damages to the said Knapp," the same court said, "It is [416] a clear case of liquidated damages, if it is in the power of parties to liquidate them."

The subject was much considered in a subsequent case:† the defendant Williams, for $3,000, sold to the plaintiff a newspaper establishment, called the "Utica Sentinel," and all his interest in the subscription, good-will, and patronage of the paper, together with the types, etc., for $500. In consideration of this the plaintiffs on their part covenanted to pay to Williams $3,500, namely, $3,000 for the patronage and good-will, etc., and $500 for the types, etc. And then followed a covenant, by which the defendants agreed that they would not establish any paper in the city of Utica, nor suffer any paper to be established in any building owned by them, nor aid nor assist in such publication; and to this was added a clause binding the defendants to the strict and faithful performance of this covenant, and every part thereof, in the sum of $3,000; and declaring that the said sum of $3,000 should be, and was thereby fixed and settled as liquidated damages, and not as a penal sum for any violation of the preceding covenant, or any of its terms or conditions. The breach alleged was the publication of another paper. The cases which we have been considering were reviewed, and the $3,000 was held to be liquidated damages, both by the Supreme Court and Court of Errors. The Supreme Court held that—

"It was only the province of the court to inquire into the intent of the parties, and that whether the bargain was wise or foolish was not for them to decide;" and went on to say: "In the case of Astley *v.* Weldon, Lord Eldon repudiates

* Knapp *v.* Maltby, 13 Wendell, 587.

† Dakin *v.* Williams, 17 Wendell, 447; and s. c. in Error, 22 Wend. 201.

the idea that had been thrown out in some of the previous cases, that if the sum would be enormous and excessive, considered as liquidated damages, it should then be taken as a penalty: and maintains the ability of the party to make a contract for himself in fixing the amount of damages, as well as in respect to any other matter. All the judges adopt the position that the question must be determined upon the meaning and intent of the parties. A principle is stated in that case which has since been frequently applied, and upon which the case was finally disposed of, namely, that where a doubt appears whether the sum inserted be intended as a penalty or not, if a certain damage, less than this sum, be made payable upon the face of the instrument in case the breach occurs, the same shall be construed to be a penalty. It then partakes of the character of a common money bond, where the payment of a small sum is secured [417] by the forfeiture of a large one in case of default. In that case there were several stipulations in the articles of agreement; and then, on either neglecting to perform on his part, the sum of £200, to be recovered in any of his Majesty's courts of record, was to be paid. Some of the breaches were in their nature uncertain, while others were certain; and as the £200 were given to secure the fulfilment of all of them, upon the principle above stated, the court concluded it was to be deemed in the light of a penalty."

Chambre, J., observed: "That there was one case in which the sum agreed for must always be considered as a penalty: and that is where the payment of a smaller sum is secured by a larger;" and he held that the court could not garble the covenants, and hold that in respect to those *certain* the larger sum was to be deemed a penalty, but damages liquidated as to those *uncertain*, as the concluding clause applied equally to all of them. The decision of the case of Kemble *v.* Farren, the strongest one in the books for the defendants, was put upon this principle by Chief Justice Tindal. There, some of the strongest stipulations were *certain*, such as the one in which the plaintiff had agreed to pay the defendant £3 6*s.* 8*d.* every night in which the theatre would be open during the season; others were *uncertain*. The language of the parties in fixing the sum in case of neglect to fulfill the agreement or any of the stipulations was as particular and specific as in the case under consideration, using affirmative and negative terms to exclude the idea of a penalty; but as it extended to the breach of every stipulation, those certain as well as those uncertain, the case was supposed to be brought directly within the principle of Astley *v.* Weldon. The chief justice concedes that it was difficult to suppose words more precise or explicit, and admitted that if the clause had been limited to breaches which were of an uncertain nature and amount, the court would have considered it as having the effect of ascertaining the damages of any such breach at the £1,000; and he adds: "For we see nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages uncertain in their nature at any sum upon which they may agree." The case under consideration falls directly within the above distinction; for the concluding clause here, securing the fulfilment of the preceding covenant, applies to stipulations wholly uncertain; and it may be added that, from the nature of the case, it would be impossible for a court and jury to ascertain with any degree of

accuracy the amount of damages actually arising out of the breach of them to the prejudiced party; and it was, therefore, a very fit and proper case for the liquidation of the amount by the parties themselves. They have adopted the precise sum which the plaintiffs were to receive for the *good-will* and *patronage* of the press—the very benefit which this clause was intended more effectually to secure to the purchasers.*

And in the Court of Errors, the chancellor, in pronouncing his opinion,† laid stress on the fact that, without the stipulation, the damages were wholly uncertain, and incapable of estimation otherwise than by conjecture. In a recent case in [418] the same State,‡ the preference of the law to construe the stated sum as a penalty, was very strongly declared:

"I do not think that penalties like this (for they are seldom anything other than penalties) should be favored. I yielded my opinion, in Dakin *v.* Williams, for the reason which there governed the chief justice, namely, because, on the whole contract, we could not *doubt* the parties intended that the damages should be paid for violating the stipulation in question; and because it was difficult, not to say impossible, from its nature, that the damages for a breach could be ascertained by a jury. The latter may be said here of failing to give the five days' notice; but we want the clear intent of the parties, that such an omission was to be punished by such a disproportionate fine. It is evidently upon that clear intent that Dakin *v.* Williams went, and that could the chief justice have brought himself to doubt, he would never have consented to apply the penalty. It is commonly hard enough in such cases that we should be bound by the letter, though such is the result of the cases where liquidation is impossible. The creditor is a very apt apprentice in the art of enlarging any opening which the law leaves him for encroachment, while the debtor, especially if he be poor or embarrassed, is most complying; and, could he have his way, would prove his own worst enemy. Hence our usury laws, and the system of equitable relief against penalties. To allow the use of penalties as damages, at the unlimited discretion of the parties, would lead to the most terrible oppression in pecuniary dealings. The fair and just rights of the creditor are worthy of all protection, but no more than the debtor's right to exemption from what is beyond an honest compensation to his creditor."

The subject has been considered by the Supreme Court of the United States.‖ A written contract was entered into, by which the defendants in error, T. & S. Sandiford, agreed to build for the plaintiff three houses on the Pennsylvania Avenue, in Washington. A subsequent contract, under seal, was entered into

* See the doctrine of this case again adopted by Mr. Ch. Walworth, in Shiel *v.* M'Nitt, 9 Paige, 101.

† 22 Wendell, 210.

‡ Hoag *v.* M'Ginnis, 25 Wend. 163, per Cowen, J.

‖ Tayloe *v.* Sandiford, 7 Wheaton, 13.

between the same parties, for the building of three additional houses, "the same to be completely finished on or before the 24th day of December next, *under a penalty of one thousand dollars*, in case of failure." The three houses were not finished at the day. The plaintiff in error retained the sum of $1,000, as stipulated damages, out of the money due the defendants in error. This suit was brought; and on the trial the plaintiff in error (the defendant below) offered to set off the $1,000 [419] as stipulated damages, which was not allowed; and the Supreme Court held the charge on this point right, though a new trial was ordered on other grounds. Marshall, C. J., said:

"In general, a sum of money in gross to be paid for the non-performance of an agreement, is considered as a penalty. It will not of course be considered as liquidated damages. Much stronger is the inference in favor of its being a penalty, when it is expressly reserved as one. The parties themselves denominate it a penalty, and it would require very strong evidence to authorize the court to say that their own words do not express their own intention." *

The courts of the various States seem to have substantially adhered to the rules laid down in the courts of England and New York.†

* And the court referred to Smith *v.* Dickinson, 3 Bos. & Pull. 630; and Fletcher *v.* Dyche, 2 T. R. 32.

† Lawrence *v.* Parker, 1 Mass. 191; White *v.* Dingley, 4 Mass. 433; Upham *v.* Smith, 7 Mass. 265; Pierce *v.* Fuller, 8 Mass. 223; Perkins *v.* Lyman, 11 Mass. 76; Merrill *v.* Merrill, 15 Mass. 488; Stearns *v.* Barrett, 1 Pick. 443; Kellogg *v.* Curtis, 9 Pick. 534; Curtis *v.* Brewer, 17 Pick. 513. For other American cases, see Dyer *v.* Dorsey, 1 Gill & J. 440; Martin *v.* Taylor, 1 Wash. C. C. R. 1; see also, Clark *v.* Jones. 1 Denio, 516.

In Heard *v.* Bowers (23 Pick. 455), the Supreme Court of Massachusetts reviewed the cases of Astley *v.* Weldon, 2 Bos. & P. 346, and Kemble *v.* Farren, 6 Bing. 141, and adhered to the rule as there settled.

The case of Hodges *v.* King, 7 Metcalf, 583, was that of a bond with a penalty, conditioned to procure the assignment of a certain bond and mortgage, or to pay a given sum of money. The Supreme Court of Massachusetts said that the true construction of the agreement was to be deduced from all the circumstances—that the adoption of the form of a bond was not conclusive, and they held the sum named to be *liquidated damages*. Here it will be observed, however, that the undertaking was in the alternative.

In the case of Shute *v.* Taylor, 5 Met. 61, the Supreme Court of Massachusetts, after stating it to be "the tendency and preference of the law to regard a sum stated to be payable if a contract is not fulfilled, as a penalty, and not as liquidated damages," held it decisive against the latter construction, that in the case before them, there has been a part performance, and an acceptance of such part performance. *Vide ante*, 412, note (‡).

In Alabama, also, similar decisions have been made. Thus, it has been held there to be correct, as a general rule, that the obligation to pay a sum of money which may be discharged by the payment of a lesser sum, is to be considered as a penal obligation, and that the lesser sum is recoverable only, with interest. But where the payment is to be made at a different and distant place, it is otherwise. Plummer *v.* M'Kean, 2 Stewart, 423.

A note for a sum certain at a future day, which may be discharged by the payment of a lesser sum any earlier day, is valid, and the larger sum is not a penalty. Jordan *v.* Lewis, 2 Stewart, 426.

Where articles covenant for the performance of several things, and stipulate for the payment of a sum in gross in the event of a breach, the sum expressed will be regarded as a penalty; and if the parties would stipulate the damages in such a case, they should express the sum to be paid on each distinct breach. Watts' Ex'rs *v.* Sheppard, 2 Ala. 425. See a case in Vermont, Sawyer *v.* M'Intyre, 18 Verm. 27.

THE TERM "PENALTY" NOT INVARIABLY CONCLUSIVE.—We have seen that the form of the instrument is [420] usually conclusive where the term *penalty* is employed; but this is not absolutely universal; and even bonds are sometimes held obligatory for the penalty as liquidated damages. Thus the Supreme Court of New York * held a *ne exeat* bond conditioned, in the usual form, that the defendant in the chancery suit should not leave the State, binding for the full amount of the penalty, without any examination into the real loss sustained by the plaintiff. But this was on the ground that the bond was given under the direction of the Court of Chancery.

BONDS TO RESIGN LIVINGS.—It has been held otherwise in England, in regard to bonds to resign livings. Debt was brought † on a bond, the condition of which was that the defendant should resign a rectory (to which he had been presented by the plaintiff) when either of two persons named should be capable of taking it. The breach alleged was a refusal to resign. The net annual value of the living was £700; the life interest of the defendant was worth ten years' purchase; and the life interest of one of the persons named in the bond was worth fourteen years' purchase. The jury found a verdict for the latter and larger amount. The solicitor-general, on behalf of the defendant, moved for a new trial, on the ground that the value of the defendant's life interest was the true rule of damages, and that the gross receipts did not furnish the true rule, but that the yearly stipend to the curate should have been deducted. But the court said, "We are not prepared to say that the jury in this case have formed a wrong estimate of the damages; for the defendant, having entered into a bond to do a particular thing, which he has refused to do, *is a wrong-doer*, and he is not permitted to estimate the value of the living, as if he were the purchaser of it." We have already had occasion to consider ‡ the propriety of the suggestion here made, that in an action *ex contractu*, the motives of the defendant can be taken into consideration. ‖

* Harris *v.* Hardy, 3 Hill, 393.

† Lord Sondes *v.* Fletcher, 5 Barn. & Ald. 835.

‡ *Ante*, 203, *et seq.*

‖ In coming to this conclusion, however, the court seems to have been somewhat influenced by an offer made by the plaintiff to relinquish all claim to damages, if the defendant would resign the living; for they also said, "Besides, it appeared at the trial that the defendant had it in his power to relieve himself from this verdict, by resigning the living; and if he does not do that, it is clear that he considers the damages found by the jury as less than the value of the living to him." When this case came on error to the House of Lords, the bond was held to be void. Fletcher *v.* Sondes, 3 Bing. 591. In the previous case of Bishop of London *v.* Ffytche, 1 East, 487, the validity of a bond

[421] On a review of the cases, the following principles seem deducible from them, as those which are to govern whenever a question of the kind considered in this chapter is presented:—[1]

given to *resign a living* came in question, and was sustained by all the judges, Lord Mansfield presiding. See remarks on the subject in Lord Campbell's Life of Lord Thurlow, in "Lives of the Chancellors," vol. v, p. 521; and see also, Dwarris on Statutes, ed. of 1848, Errata and Addenda, lvi.

But again, in a subsequent case, Legh *v.* Lewis, 3 East, 398, an action was brought on a bond given to *resign the mastership of a school*, the bond was held good at law; and it was said that the decision of the House of Lords, in Fletcher *v.* Sondes, turned upon the ground of the bond in that case being simoniacal and against the statute, and not as contrary to the general principles of the common law.

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[1] The question whether a sum named in a contract to be paid for a breach is to be regarded as a penalty or as stipulated damages, has been much discussed since the third edition of this work, but the discussion has confirmed rather than modified the author's views. The law permits the ascertainment of such damages in advance, provided no other legal principle is violated or evaded, as for instance the law against usury; and in considering these contracts, the question depends not so much on their form or language as on their subject-matter and the nature of the covenant. See Chase *v.* Allen, 13 Gray, 42.

In the recent English case of Betts *v.* Burch, decided by the Court of Exchequer (4 H. & N. 506), the plaintiff agreed to sell and the defendant to purchase the household furniture, fixtures, and stock in trade in or upon the premises at the King's Head by valuation, the agreement providing as follows: "The goods to be valued and possession given on or before October 13, 1858, and in the event of either of the parties not complying in every particular" with "the agreement, he shall forfeit and pay the sum of £50 and all expenses attending the same." The defendant having failed to take possession, the plaintiff some months after sold the stock. The defendant paid £5 into court, and the jury having found that this satisfied the plaintiff's actual damages, the court refused leave to enter the verdict for £45, Martin, B., saying, "If I were not embarrassed by the cases, I should be prepared to hold that parties are at liberty to enter into any bargain they please, and that we have nothing to do except to ascertain their meaning and carry it out." But the learned judge felt himself "bound by the cases," and declared the agreement for the damages a penalty. Bramwell, Baron, in concurring, placed his decision on the ground that the agreement was within the statute 8 and 9 William III, c. 11, sec. 8, considering that at common law the plaintiff would be entitled to the £50. This statute provided that no more than the actual damages should be recoverable at law in actions "upon any bond or on any penal sum for non-performance of any covenant or agreement contained in any indenture, deed, or writing." (*Ante*, 395.)

But in the late case of Streeper *v.* Williams, 48 Penn. State, 450, which arose under very similar circumstances, the Supreme Court of Pennsylvania arrived at an opposite conclusion. In that case the owner of a hotel had agreed to sell it for $14,000, of which $3,000 were to be paid on a specified day, when the deed was to be signed. Possession of the bar-room was to be given immediately. The parties mutually agreed to forfeit $500 in case of failure to keep the agreement. The $500 was held to be liquidated damages, and not a penalty. The court, per Agnew, J., in reference to the question under consideration, say: "Upon no question have courts doubted or differed more. It is unnecessary to examine the numerous authorities in detail, for they are neither uniform nor consistent. No definite rule to determine the question is furnished by them, each being determined more in reference to its own facts than to any general rule. In the earlier cases the courts gave more weight to the language of the clause designating the sum as a penalty or as liquidated damages. The modern authorities attach greater importance to the meaning and intention of the parties; yet the intention is not all-controlling, for in some cases the subject-matter and surroundings of the contract will control the intention where equity absolutely demands it. A sum expressly stipulated as liquidated damages will be relieved from, if it is obviously to secure the payment of another sum capable of being compensated by interest. On the other hand, a sum denominated a penalty or forfeiture will be considered liquidated damages where it is fixed upon by the parties as the measure of the damages, because the nature of the case, the uncertainty of the proof, or the difficulty of reaching the damages by proof, have induced them in some cases to make the damages a subject of previous adjustment. In some cases, the magnitude of the sum, and its proportion to the probable consequence of a breach, will cause it to looked upon as minatory only. Upon the whole, the only general observation we can make is, that in each case we must look

First. That the language of the agreement is not conclusive, and that the effort of the tribunal will be to get at the true

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at the language of the contract, the intention of the parties as gathered from all its provisions, the subject of the contract and its surroundings—the ease or difficulty of measuring the breach in damages and the sum stipulated—and from the whole gather the view which good conscience and equity ought to take of the case. Equity lies at the foundation of relief in the case of forfeiture and penalties, and hence the difficulty of reaching any general rule to govern all cases." He refers to the following authorities in addition to those here cited: Chamberlain *v.* Bagley, 11 N. H. 234; Gammon *v.* Howe, 2 Shep. (14 Me.) 250; Mead *v.* Wheeler, 13 N. H. 351; Maine *v.* King, 10 Barb. N. Y. 59.

In the case of Bagley *v.* Peddie (5 Sand. 192, and 16 N. Y. 469), the subject was very thoroughly discussed both by the court below and on appeal. The defendant in that case had entered into sealed articles of agreement with the plaintiff, by which he covenanted to abide with the plaintiff four years, and serve him during that time according to his best ability, keep the secrets of the business, not misappropriate any money or property of the plaintiff, keep just accounts of the business, and render such accounts when required.

The Superior Court, in their opinion, stated the following tests for distinguishing between liquidated damages and a penalty:—

1. Where it is doubtful, on the face of the instrument, whether the sum mentioned was intended to be stipulated damages or a penalty to cover actual damages, the courts hold it to be the latter. [See in support of this canon, Bearden *v.* Smith, 11 S. C. Law R. 554.]

2. On the contrary, where the language used is clear and explicit to that effect, the amount is to be deemed liquidated damages, however extravagant it may appear, unless the instrument be qualified by some of the circumstances hereinafter mentioned.

3. If the instrument provide that a larger sum shall be paid on the failure of the party to pay a less sum in the manner prescribed, the larger sum is a penalty whatever may be the language used. [See Fish *v.* Gray, 11 Allen (Mass.) 132.]

4. When the covenant is for the performance of a single act or several acts, or for the abstaining from doing some particular act or acts which are not measurable by any exact pecuniary standard, and it is agreed that the party covenanting shall pay a stipulated sum as damages for a violation of any of such covenants, that sum is to be deemed liquidated damages and not a penalty. [In accordance with this canon are the following cases: Chase *v.* Allen, 13 Gray, 42; Lynde *v.* Thompson, 2 Allen, 456; Leary *v.* Laflin, 101 Mass. 334; Hall *v.* Crowley, 5 Allen, 304; Tingley *v.* Cutler, 7 Conn. 291; Brinkerhoff *v.* Olp, 35 Barb. (N. Y.) 27; Studabaker *v.* White, 31 Ind. 211.]

5. Where the agreement secures the performance or omission of various acts of the kind mentioned in the last proposition, together with one or more acts in respect of which the damages on a breach of the covenant are certain or readily ascertainable by a jury, and there is a sum stipulated as damages to be paid by each party to the other for a breach of any one of the covenants, such sum is held to be a penalty merely. [See the cases cited in note 1, p. 408. Those of Durst *v.* Swift, 11 Tex. 273; Williams *v.* Green, 14 Barb. (Ark.) 315; Reynolds *v.* Bridge, 6 Ellis & B. 528; Bridges *v.* Hyatt, 2 Abb. (N. Y.) Pr. R. 449; Long *v.* Towle, 42 Mo. 545, also accord with this canon.]

But the court below considered that two of the covenants in the agreement, one against wrongfully detaining the plaintiff's moneys or property, and one requiring the defendant to give a true account of things committed to his management, were clearly certain in their nature, and that damages for their breach might be readily ascertained by a jury. They held, therefore, that the sum payable by the agreement was a penalty. Without apparently disapproving the principles relied on by the Superior Court, the Court of Appeals did not consider these covenants as having the certainty necessary to avoid the stipulation liquidating the damages, but held that the damages to result from a breach of any of the covenants were "uncertain and conjectural," and therefore, maintaining the stipulation as to the damages, reversed the decision because of the erroneous application of a sound principle.

The appellate court, in their opinion in this case, say that certain artificial rules of construction of these contracts have been the result of the reluctance of the courts to enforce them against the plain language of the parties. Seven of these rules are enumerated by the learned court, of which the first six, with some difference of arrangement and phraseology, are substantially included in the five canons of the text, and therefore need not be repeated. The seventh is as follows: "If the language of the parties evince a clear and undoubted intention to fix the sum mentioned as liquidated damages in case of a default of performance of some act agreed to be done, then the court will enforce the contract if legal in other respects." This conforms with the English doctrine, and with the author's opinion as stated in relation with the first canon of the text. The rules collated by the appellate court in this case are generally recognized as correct. See Basye *v.* Ambrose, 28 Mo. (7 Jones) 39

intent of the parties, and to do justice between them.[1] In England there seems to be a readier disposition to uphold the liquidation of the damages than in this country; and I cannot but express my opinion that the courts of the United States have shown an unwise reluctance to admit the agreement as conclusive on this point. If the purpose is clear, there seems no reason to hesitate in giving it full effect.

Second. That when the agreement is in the alternative to do some particular thing or pay a given sum of money, the court will hold the party failing to have had his election, and compel him to pay the money.[2]

Third. That in case of an agreement to do some act, and upon failure to pay a sum of money, the court will look into the intent of the parties; that no particular phraseology will be held to govern absolutely; but that although the term "liquidated damages" will not be conclusive, the phrase "penalty" is generally so, unless controlled by some other very strong consideration.[3]

And we think that the "unwise reluctance" to give effect to an agreement fairly liquidating the damages, observed by the author in the earlier American decisions, has been since overcome. See cases cited in next note.

[1] Paine *v.* Weber, 47 Ill. 41; Foley *v.* McKeegan, 4 Iowa, 1; Davis *v.* Freeman, 10 Mich. 188; Bearden *v.* Smith, 11 S. C. Law R. (Rich.) 554; Hosmer *v.* True, 19 Barb. (N. Y.) 106; Low *v.* Nolte, 16 Ill. 475; Durst *v.* Swift, 11 Tex. 273. But where there is a reasonable doubt arising on the face of the instrument as to the intent of the parties, it is to be construed as a penalty. Smith *v.* Wainwright, 24 Vt. 97; Low *v.* Nolte, 16 Ill. 475. And the party who claims that the damages were liquidated, has the burden of proof that they were so intended. Moore *v.* Anderson, 30 Tex. 224.

[2] But see Burrage *v.* Crump, 3 Jones (N. C.) L. 330.

[3] Higginson *v.* Weld, 14 Gray (Mass.) 165; Richards *v.* Edick, 17 Barb. (N. Y.) 260; Leggett *v.* Mutual Life Insurance Company of New York, 50 Barb. 616; Powell *v.* Burroughs, 54 Penn. St. 329; Smith *v.* Wainwright, 24 Vt. 97. In case the agreement assumes the form of a bond, or the sum reserved is denominated a penalty, the *prima facie* presumption is that the larger sum is intended merely as security and not as liquidated damages. On the contrary, if the sum specified be declared affirmatively to be *liquidated* damages, and negatively also, that it should not be considered as a penalty or in the nature of a penalty, although the inference is that the parties meant what they expressed, yet there are certain rules of law which may control the meaning and convert the sum so mentioned into a penalty. Esmond *v.* Van Benschoten, 12 Barb. (N. Y.) 366. See Burr *v.* Todd, 41 Penn. 206 (*ante*, 412, note); Robeson *v.* Whitesides, 16 S. & R. 320; Robinson *v.* Blackwell, 25 Penn. 424 (*ante*, 413, note). See Ricketson *v.* Richardson, 19 Cal. 330 (*ante*, 396, note).

Where the provision for the payment of a fixed sum on the breach of an agreement is found in the *condition* of a *penal bond*, the presumption is that the sum named in the condition was not designed as a penalty. Cotheal *v.* Talmage, 5 Seld. (N. Y.) 551. Where an assignor of a mortgage agreed with his assignee, that a decree foreclosing a prior mortgage on the same and other premises should provide that the others be first sold, and their proceeds applied to the prior mortgage, stipulating in the agreement that if it were not performed, he should pay the assignee a specific sum (equal to the amount of the assigned mortgage), this stipulation was held, by the New York Court of Appeals, to liquidate the damages, and not to be a penalty. Cowdrey *v.* Carpenter, 1 Abb. Ct. App. Decisions, 445.

Where the master of a vessel hired a chronometer, under the following agreement: "Received of N. and Co., on account of vessel and owners, a chronometer value $240 on hire, at the rate of $6 a month, till the chronometer shall be returned to them at the expiration of the voyage, or within fourteen months from date." The master "has the privilege of buying the chronometer within six months from date, for $240 cash," the court

Fourth. That if the sum be evidently fixed to evade the usury laws or any other statutory provisions, or to cloak oppression, the courts will relieve by treating it as a penalty.[1] Consequently, whenever the sum stipulated is to be paid on the non-payment of a less sum made payable by the same instrument, it will always be held a penalty.[2]

Fifth. That where independently of the stipulation the damages would be wholly uncertain, and incapable [422] or very difficult of being ascertained except by mere conjecture, there the damages will be usually considered liquidated, if they are so denominated in the instrument.*[3]

The consequences resulting from the construction of agreements in this point of view, are complex and curious. On one hand, it may be in many cases desirable to get rid of the stipulated damages, and to require an examination into the real loss sustained. But, on the other, a specific performance may be desirable; and this cannot be had if the damages are to be considered as liquidated, the parties having in that case provided their own redress. Equity will only interfere where the sum is clearly meant as a penalty. So† where articles were executed for the purchase of an estate, with a provision that if either should break the agreement, he should pay £100, Lord Hardwicke treated this as a mere penalty, and decreed a specific performance.‡

* In addition to this summary, we may call the attention of the reader to the comments on the cases contained in Evans' Pothier on Obligations, Appendix, No. 12, vol. ii, 65; in the note to Barton *v.* Glover, Holt N. P. R. 43; and the note to Spencer *v.* Tilden, 5 Cowen, 144, 150. The court will not set aside or refer back an award for an objection in point of law, not apparent on the face of it; as upon a suggestion that the arbitrator improperly treated as a penalty that which by the express contract of the parties was stipulated damages. Fuller *v.* Fenwick, 3 Man. Gr. & Scott. 705.

† Howard *v.* Hopkins, 2 Atkyns, 371.

‡ But, on the other hand, where defendant had underlet a church lease to the complainant, with a covenant to renew under a penalty of £70, it was held in the Irish Exchequer, and on appeal by the House of Lords, that this was not a covenant to renew, but that the party was at liberty to renew or

in an action for failing to return the chronometer, did not hold the memorandum of value as conclusive on the parties, and the measure of the damages was held to be the stipulated hire of the chronometer for fourteen months, with the value of the instrument at the end of that time, and interest on the whole amount. Negus *v.* Simpson, 99 Mass. 388.

[1] And where the contract is such that it can be separated as to performance so as to admit of an assessment of damages for a breach of one part and not of the other, a party should not for a trifling omission be made responsible for the whole amount of damages specified. Colwell *v.* Lawrence, 38 Barb. 643; Fitzpatrick *v.* Cottingham, 14 Wis. 219.

[2] Beale *v.* Hayes, 5 Sandf. (N. Y.) 640; Tiernan *v.* Hinman, 16 Ill. 400; Haldeman *v.* Jennings, 14 Ark. (1 Barb.) 329.

[3] People *v.* Love, 19 Cal. 676; Fisk *v.* Fowler, 10 Cal. 512; Cal. Steam Nav. Co. *v.* Wright, 6 Cal. 252; Williams *v.* Dakin, 22 Wend. 201; Ryan *v.* Martin, 16 Wis. 57; Pierce *v.* Jung, 10 Wis. 30; Holmes *v.* Holmes, 12 Barb. (N. Y.) 137; Esmond *v.* Van Benschoten, *Ibid.* 366; Mundy *v.* Culver, 18 *Ibid.* 336; Williams *v.* Green, 14 Barb. (Ark.) 315; Lange *v.* Werk, 2 Ohio St. 519; Dwinel *v.* Brown, 54 Me. 468; and see Hussey *v.* Roquemore, 27 Ala. 281; Reynolds *v.* Bridge, 6 Ellis & B. 528.

Another consequence flowing from the distinction between stipulated damages and a penalty, under the original English law of arrest, was, that for the former the defendant might be held to bail, but not for the latter; and therefore an affidavit to hold to bail which did not show what the agreement was, nor in what respects it was broken, but merely alleged an obligation to pay £50 in case of non-performance, and charged such non-performance, was held insufficient, and the defendant was released from custody.*

The French Code, like our law, enables the parties to liquidate the damages for the non-performance of the contract; and the tribunal cannot depart from the sum thus fixed.†

[423] DAMAGES BEYOND PENALTY.—We have thus far seen that in the actions both of debt and covenant, if the damages are not fixed the plaintiff is limited to the recovery of compensation for his real loss; and that for the purpose of obtaining these, he is obliged to assign breaches, thus destroying even the *primâ facie* force of the penalty; and we have also considered the cases in which the sum named in the contract is treated either as a penalty or as liquidated damages. We have now to examine the further question, whether in contracts secured by a penalty, the plaintiff can recover for damages actually sustained beyond the penalty.‡

pay the penalty. Unless the agreement was in the alternative, the decision may perhaps be questioned. Magrane *v.* Archbold, 1 Dow, 107.

* Wildey *v.* Thornton, 2 East, 409; Edwards *v.* Williams, 5 Taunt. 247.

† Lorsque la convention porte que celui qui manquera de l'exécuter paiera une certaine somme, à titre de dommages intérêts, il ne peut être alloué à l'autre partie une somme plus forte ni moindre. Code Civil, § 1152.

The commissioners charged with preparing the codes, proposed to retain the former jurisprudence in this respect, which permitted the judge to moderate the penalty in behalf of the debtor, if it, evidently exceeded the damage sustained, but gave him no power to augment it in favor of the creditor, although it might be far short of the injury suffered. These views were, however, overruled. Toullier, vol. vi, 812, des Obligations, ou Clauses Pénales; see Domat, part i, book 3, tit. v, sec. 2, § 15.

‡ The cases bearing on this subject are the following, in England: Love *v.* Peers, 4 Burr, 2225, which was covenant on a sealed contract not to marry; Winter *v* Trimmer, 1 W. Bl. Rep. 395; Bird *v.* Randall, 1 W. Bl. Rep. 373 and 387; 3 Burr. 1345; Brangwin *v.* Perrot, 2 W. Bl. Rep. 1190, on an indemnity bond against the maintenance of a bastard; Knight *v.* Maclean, 3 Br. Ch. R. 496; Tew *v.* Earl of Winterton, 3 Br. Ch. R. 490; White *v.* Sealey, Doug. 49, on a bond conditioned for the payment of rent; Lonsdale *v.* Church, 2 T. R. 388, overruled by Wilde *v.* Clarkson, 6 T. R. 303, and M'Clure *v.* Dunkin, 1 East, 436; Harrison *v.* Wright, 13 East, 342; Hefford *v.* Alger, 1 Taunt. 218; Evans *v.* Brander, 2 H. B. 547; Paul *v.* Goodluck, 2 Bing. N. C. 220; Hellen *v.* Ardley, 3 Car. & Payne, 12; and also the cases collected in a note thereto, 20 Law J. 187. In Hellen *v.* Ardley, it was held at Nisi Prius, that in debt on bond for payment of money with interest, the plaintiff could only recover to the amount of the penalty, with one shilling for detention of the debt. Buller's N. P. 178; 1 Chitty's Pleadings, 371. And in America, Tunison *v.* Cramer, South. R. 498; Graham *v.* Bickham, 4 Dall. 149; s. c. 2 Yeates' R. 32; Harris *v.* Clap, 1 Mass. R. 308; Payne *v.* Ellzey, 2 Wash. R. 143; United States *v.* Arnold, 1 Gall. R. 348, 360; s. c. 9 Cranch, 104; Perkins *v.* Lyman, 11 Mass. 76; Smedes *v.* Hooghtaling, 3 Caines, 48; Fairlie *v.* Lawson, 5 Cowen, 424; Clark *v.* Bush, 3 Cowen, 151; Cook *v.* Tousey, 3 Wend. 444. In Bank of the United States *v.* Magill, Paine's C. C. R. 661, 669, in an action of debt on bond in the penalty of $50,000 given by Magill and two sureties, conditioned for the faithful discharge of Magill's duties as cashier, Thompson J.,

RECOVERY OF PENALTY ENDS THE CLAIM.—Where there is a contract to do a specific act, secured by a penalty, if the penalty is not regarded as liquidated damages, the party [424] may either demand the penalty or bring action on the covenant, and in such case recover beyond the penalty. But if this be not done, and if the penalty is recovered, it puts an end to all claim for breach of contract, and whether the penalty be paid before or after the commencement of a suit for the breach of the contract, makes no difference; and so said Lord Mansfield, in Love *v.* Peers: "There is a difference between covenants in general, and covenants secured by a penalty or forfeiture. In the latter case, the obligee has his election; he may either bring an action of debt and recover the penalty, after which recovery of the penalty he cannot resort to the covenant; or if he does not choose to go for the penalty, he can proceed upon the covenant, and recover more or less than the penalty, *toties quoties*." * [1]

THE PLAINTIFF MAY DISREGARD THE STIPULATION FOR DAMAGES UNLESS THEY ARE TO BE ABSOLUTELY IN LIEU OF PERFORMANCE.—The same principle, that unless the stipulated damages are to be absolutely in lieu of performance,[2] the plaintiff may

said, "I am inclined to adopt as the better opinion, that where a bond with a penalty is given for the performance of covenants, although damages may have been sustained to a greater amount, yet the recovery must be limited to the penalty. I the more readily adopt this rule in the present instance, because it is a case of sureties. In such cases, it is peculiarly fit and proper that they should not be made liable for damages beyond the penalty. If the *responsibility was without limitation, prudent and discreet men* would be unwilling to become security and expose themselves to such hazard. No judgment could be formed as to the extent of the risk, nor any calculation made as to the indemnity, or counter-security necessary for their protection. I do not mean to be understood as extending this rule to bonds where the condition is for the payment of money only. Such cases might, probably, require the application of a different rule, and depend on different principles." In the United States *v.* Arnold, 1 Gallison, 348, Story, J., said, "Notwithstanding some contrariety in the books, I think the true principle, supported by the better authorities, is that the court cannot go beyond the penalty and interest thereon from the time it becomes due by the breach."

In a case in the Queen's Bench it was said, that a replevin bond is no exception to the general rule, that on a bond the plaintiff cannot recover beyond the penalty and costs of suit. Branscombe *v.* Scarborough, 6 Q. B. 13. In a recent case in Pennsylvania, the subject was examined, and it was held that a surety in a replevin bond is not liable beyond the penalty. Balsley *v.* Hoffman *et al.* 13 Penn. State, 603.

* 4 Burr. 2225. See also, Bird *v.* Randall, 1 W. Black. 373 and 387; Winter *v.* Trimmer, 1 W. Black. 395; Harrison *v.* Wright, 13 East, 342.

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[1] The lessor for years of a part of a steam-mill having covenanted with the lessee to furnish him with a certain amount of steam power during every working day in the year, and that if at any time he should fail to do so, the rent should cease during the time of such failure; it was held that the suspension of the rent was not a liquidation of the lessee's damages for a breach of the lessor's covenant to furnish steam power. Fisher *v.* Barrett, 4 Cush. (Mass.) R. 381.

Where an undertaking to perform certain work was entered into, with a stipulation that the undertaking might be discharged by the payment of $75 before a certain date previous to the stipulated time for performing the work, it was held that the $75 was not liquidated damages, and that the measure of damages, on breach of the contract, was the value of the work at the time it should have been performed. Wilson *v.* Graham, 14 Tex. 222.

[2] See Richards *v.* Edick, 17 Barb. (N. Y.) 260.

disregard them and sue for the actual damages sustained, was laid down in Pennsylvania,* where the defendant had agreed to pay $22,318.49 for certain stock, and bound himself for the performance of the agreement in the sum of $1,000; here it was held that this was not stipulated damages, but a penalty merely: and the plaintiff recovered £1,798 17*s.* 6*d.* "The plaintiff," said the court, "is entitled, notwithstanding the penalty, to recover damages commensurate with the injury suffered by a non-performance." So again in New York, in a case on a building agreement, it was said, "As the articles contained a penalty and an express covenant by the defendant to pay the instalment for which the action was brought, the plaintiffs could at their election, sue for either." †

Distinction between Covenant Secured by Penalty and Bond.—There is a clear distinction between a covenant in which the party, affirmatively stipulating to do or to refrain from [425] doing some particular act, proceeds to secure his agreement by a penalty,‡ and the common bond, which merely stipulates for the payment of a sum of money, and makes its payment depend on a condition; for the performance of that condition there is no promise, unless one can be implied from the joint effect of the condition and penalty. And hence results the inquiry, whether in the action of *debt on bond* the damages can be carried beyond the penalty.[1]

The question has been much agitated as to damages in gross, and also as to interest, and both as against a principal and against a surety. The American rule to be deduced from all the cases seems to be, that against a surety in *debt on bond*, nothing shall be recovered beyond the penalty; ‖ that against the principal in that form of action, interest may be recovered beyond the penalty. While in England the penalty appears in all cases, except perhaps in equity, to be the absolute limit. But in neither country can damages in gross be recovered, against either principal or surety, beyond the penalty.[2]

* Graham *v.* Bickham, 4 Dall. 149.

† Haggart *v.* Morgan, 1 Seld. 432.

‡ So Lord C. J. Tenterden, in his treatise on Shipping, assumes that as to charter-parties, damages may be recovered beyond the amount of the penalty and costs. Abbott on Shipping, part iv, ch. ii, of the ship-owner's lien for profits, etc.

‖ Clark *v.* Bush, 3 Cowan, 151; Rayner *v.* Clark, 7 Barb. S. C. R. 581.

[1] See Byrd *v.* The State, 15 (Ark.) Barb. 175; Trice *v.* Turrentine, 13 Ired. (N. C.) L. 212.

[2] Fraser *v.* Little, 13 Mich. 195. But although as far as interest is payable by the contract it is limited by the penalty, yet after the default of a surety in a bond for the payment of money, interest from the time of the breach may be recovered as damages, although the amount paid by the surety is thereby made to exceed the penalty of the bond. Brainard *v.* Jones, 18

If, on the other hand, the action of *covenant* be brought on an absolute and not a conditional undertaking, then the penalty is merely a security, and the party, whether principal or surety, may be sued as often as damage is sustained. But the question what is an absolute and what a conditional undertaking, still remains. Does an ordinary bond imply an agreement to do the thing, on condition of the performance of which the penalty is to become void; and can an action of covenant be brought on it? This is an embarrassing and vexed question. Mr. Chitty says,* "It seems that covenant lies on a bond, for it proves an agreement." It is doubtful what is the purport of this language. A bond undoubtedly proves an agreement; but is the agreement proved, the one stated in the penalty—to pay the money for which the obligee declares himself bound—or in the condition? † The matter is of importance, and [426] it seems impossible, on any just construction of the instrument, to imply from the condition an absolute agreement. This is not the proper place for a more elaborate discussion of the matter, but it could not with propriety be altogether overlooked. I cannot, however, say that the opinion here advanced is supported by any judicial authority; on the contrary, in New

* Chitty on Pleading, vol. i, p. 132.

† Mr. Chitty cites several cases; Hill *v.* Carr, 1 Ch. Cases, 294; Holles *v.* Carr, 3 Swanst. 648, which is in fact the same; Norrice's case, Hardress, 178, and Com. Dig. Covenant, A. 2. The two first cases (in fact one) contain the *obiter dictum*, that "*covenant lies upon a bond.*" The third was covenant, on a covenant proper; the word *oblige* only being used instead of the usual phrase; and Lord C. B. Comyns, with his usual precision, says, "Covenant lies, *if an agreement appear*, in an obligation." This is unquestionably true—"*if the agreement appear.*" But in the condition of a bond to do or refrain from doing any particular act secured by a given penalty, does any agreement appear, absolutely to do the act or to respond in indefinite damages? Practically, we well know that it is not so understood; the obligor always considers the penalty as limiting the extent of his obligation.

N. Y. 35. On the same principle, where the stockholders of a corporation are by statute severally individually liable to the creditors of the company in which they are stockholders to an amount equal to the amount of stock held by them respectively, this liability, from the time of the commencement of a suit for a debt exceeding the principal of the defendant's stock, brought to enforce it, is fixed for the specific sum equal to the amount of the stock, and the debt carries interest, although the amount of the creditor's recovery thereby exceeds the stockholder's original liability. Burr *v.* Wilcox, 22 N Y. 551.

In an action on a bond, in which the obligor bound himself to procure the conveyance of a tract of land to the obligee in a penalty less than the value of the land, the Supreme Court of Iowa set aside a verdict for the value, saying that in the absence of bad faith, fraud, or wilfully culpable neglect of the defendant, a recovery beyond the penalty of the bond ought not to be had. Sweem *v.* Steel, 10 Iowa, 374.

Where a railroad company executed a bond to nine persons, according to their relative and respective several interests, in the penal sum of $3,000 as follows: "On this express condition that the said railroad company shall, on the assessment of damages to be made to secure the right of way for said railroad, pay to the obligees relatively and respectively, damages which may be assessed as aforesaid, then this bond to be void," which was a several instrument, on which each obligee might sue, it was held that no one could recover more than his *pro rata* share of the penalty. If the damages assessed in favor of all exceeded the penalty, each obligee could recover only his relative share of it. St. Louis, Alton, and Rock Island Railroad Company *v.* Coultas, 33 Ill. 188.

York, the Supreme Court has clearly intimated an opinion that an action of covenant will lie on a bond to enforce the condition.*

OTHER CASES.—There may be other cases besides those which we have been just considering, where although a penalty is provided, damages at large may be demanded. So it has been held, where by the contract of sale of certain premises a deposit was to be made, and to be forfeited as liquidated damages, provided the agreement was not entirely carried out by the purchaser, that the plaintiff was not limited to the deposit, but might recover at large.†

* Clark *v.* Bush, 3 Cowen, 151.

In Martin *v.* Taylor (1 Wash. C. C. R. 1), in an action of covenant on an agreement secured by a penalty, Washington, J., said, that "where there is a penalty in an agreement under seal, the party injured may at common law sue for the whole penalty, and must be satisfied with it; or he may bring covenant, and recover in damages more or less than the penalty."

It is to be remarked here that the agreement contained an express covenant to do the act for the non-performance of which the action was brought. The case, therefore, decides nothing as to the main point, whether covenant can be brought on a bond upon an agreement contained in the condition, and whether in such suit damages can be assessed beyond the penalty.

† Icely *v.* Grew, 6 Nev. & Man. 467.

CHAPTER XVII.

SET-OFF AND RECOUPMENT OF DAMAGES.

No Set-off at Common Law.—Introduced by the Courts of Equity.—Statutes on the Subject.—Original meaning of Recoupment.—Cases in England.—Where Suit brought on the Original Contract; or on a Bill or Note given under it.—Where Fraud set up.—Necessity of Notice.—American Signification of the Term.—Cases in this Country.—Payment after Suit brought.

Before we leave the examination of compensation in actions of contract, we have to consider the principles upon which an acknowledged right for redress or remuneration is reduced in its amount by the establishment of an adverse or cross-claim, which is taken into consideration in the same suit, to use technical language, by way of set-off, or recoupment, or counter-claim. An analogous rule exists in regard to actions of tort, where, however, it is known by the term mitigation.

No Set-off at Common Law.—The doctrine of set-off is so fully treated in the various treatises devoted to that particular subject, that it would be improper to do more than allude to it here. It is sufficient to say, that at common law no right of set-off existed, it being the object of the system to confine every suit to the particular subject of litigation which gave rise to it. The courts of equity, however, in this, as in many other cases, lent a ready ear to the appeals made to them from the narrow remedies and harsh doctrines of the common law; and to prevent circuity of action and multiplicity of litigation, introduced the principle of set-off, a principle well known to the civil law by the name of compensation.

This doctrine, which is nothing more than a system of settling cross-demands in one suit, finally appeared so equitable that legislation was resorted to, to get rid of the necessity of applying to a court of equity; and the principle of set-off is now fully established in both American and English leg- [428] islation. It is unnecessary here to enter upon an examination of the various statutes of set-off; it is sufficient to say, that as a general rule, where adverse or cross-claims of a pecuniary

character exist between the same parties, and the demands are liquidated, the principle is applied.[1]

OBJECT OF STATUTES OF SET-OFF.—But the object of the statutes of set-off is to settle mutual accounts and debts.[2] Wrongs or torts done, and unliquidated damages claimed have never been permitted to be set off.* And unliquidated damages have been defined as follows: "Unliquidated damages are such as rest in opinion only, and must be ascertained by a jury, the verdict being regulated by the peculiar circumstances of each particular case, which cannot be ascertained by computation or calculation, as damage for not using a farm in a workmanlike manner, for not building a house in a good and sufficient manner, on warranty in the sale of a horse, for not skilfully amputating a limb, and other cases of like character."† In Illinois, however, unliquidated damages arising out of contract, express or implied, may be set off in actions *ex contractu*, unless they are totally disconnected with the plaintiff's cause of action.‡

RECOUPMENT.—The same reasons which operated to introduce

* Butts *v.* Collins, 13 Wend. 139, 156; McDonald *v.* Neilson, 2 Cowen, 140; Heck *v.* Sheener, 4 Serg. & R. 249; 10 S. & R. 14; U. S. *v.* Robson, 9 Pet. 319, 325; U. S. *v.* Buchanan, 8 Howard, 83; Howlet *v.* Strickland, Cowp. 56; Freeman *v.* Hyatt, 1 W. Black. 394.

† Butts *v.* Collins, 13 Wend. 156.

‡ Sargeant *v.* Kellogg, 5 Gilman, 273; Kaskaskia Bridge Co. *v.* Shannon, 1 Gilman, 15.

[1] This principle is now extended in many of the States, so far as to declare that "an *unliquidated* cross-demand arising from a distinct and *independent* contract from that on which suit is brought, is the subject of set-off." Ellmaker *v.* Franklin Fire Insurance Co. 6 Watts & Serg. 439; Carman *v.* Same, 6 W. & S. 155; Fessler *v.* Love, 43 Penn. 313; N. Y. Code of Procedure, § 150; Morrison *v.* Lovejoy, 6 Minn. 319; *post*, 452, note. See, however, Keyes *v.* Western Vt. Slate Co. 34 Vt. 81; *post*, 442 note; also *post*, 446, note.

In an action to recover a sum stipulated as damages for breach of an agreement in consideration of a certain sum not to carry on a particular business in a particular place, where the whole consideration has not been paid, the defendant may offset against the stipulated damages the unpaid portion of the consideration money. Baker *v.* Connell, 1 Daly, 469.

[2] In answer to a bill filed by the State of Maryland for the sale of a railroad under a mortgage of the property of the railroad company given to secure the payment of an annuity to the State, the Court of Appeals, affirming the judgment below, refused to allow the company to set off or recoup damages sustained by the destruction of certain bridges of the railroad, made by the authorities of the city of Baltimore in the beginning of the late war, for the purpose of destroying communication between Baltimore and Pennsylvania, which act was approved by the governor and ratified by the legislature of the State, saying that there was no principle of discount, set-off, or recouper known to the court which would enable it to recognize the claim "as a debt, obligation, or liability for damages liquidated or unliquidated." The State of Maryland *v.* The Northern Central Railway Co. 18 Md. 193.

Again, that which was originally offered by the defendant and received by the plaintiff as a gratuity, cannot be set off against the plaintiff's demand. Thus where it appeared in an action to recover damages for the breach of the condition of a bond to remove a barn standing on the defendant's premises to a greater distance from the plaintiff's house, that the plaintiff had used the barn for a season by the defendant's assent, rent free—it was held that to set off the plaintiff's benefit from this occupation against his claim, would be not only contrary to the original agreement of the parties, but a violation of good faith. Prentiss *v.* Barnes, 6 Allen (Mass.), 410.

the original doctrine of set-off, have tended to enlarge it; and the severity of the statute has introduced the practice of *Recoupment.* Recoupment, or as it was originally called, Recouper, is a very ancient term of our law, but had at one period fallen into considerable disuse. It has been recently revived in this country, with, however, a material modification of its meaning. As far back as the reign of Henry VIII,* we find it laid down, "If a man disseise me of land, out of which a rent charge is issuant which has been in arrear for several years, and the disseisor pay it, if the disseisee recover in an assize, the rent that the disseisor has paid shall be *recouped in damages.*" [429] Lord Coke also says,† "If a man makes a lease for life rendering rent, or if there be lord and tenant by fealty and rent, and the rent is behind two years, and afterward the lessor, or the lord, disseises the terre-tenant, and afterwards the tenant recovers against him in an assize, and the rent which incurred during the disseisin is *recouped* in damages, yet the lord or lessor shall recover in the assize the arrearages before the disseisin, and the bar of the later years is no bar of the arrearages before." And so he again says,‡ "And as to the case of *recouper in damages* in the case of rent service, charge, or seck, it was resolved that the reason of the recouper in such case is, because otherwise, when the disseisee re-enters, the arrearages of the rent service, charge, or seck would be revived; and therefore to avoid circuity of action—and *circuitus est evitandus, et boni judicis est lites dirimere, ne lis ex lite oriatur*—the arrearages during the disseisin shall be *recouped in damages.*" ‖ So, again, ¶ where an appeal of mayhem was brought, and for the defence it was urged that the plaintiff had recovered in a previous action of trespass in assault and battery, and it was held a good bar, it is cited in the index as a case "where *recouper* of damages shall lie, because the plaintiff recovered in another action before." ** And again †† if the feoffee or lessee of the second disseisor sows the land, or cuts down trees or grass, etc., and carries away, yet after the regress of the disseisee, he may take as well the corn

* Dyer's Reports, 2, b.

† Pennant's case, Rep. part iii, p. 65.

‡ Coulter's case, Rep. part v, p. 30.

‖ And in this case it was held, that an executor *of his own wrong* could not recoup or retain out of goods in his own hands the amount of a debt due him by the decedent. In the case, however, above cited from Dyer, it was held that executors might pay the debts of the testator out of their own money, and retain so much of the effects of the testator as would be necessary to satisfy them; and this was held good under a plea of *plene administraverunt.*

Other cases of recouper or retention will be found referred to in this (Coulter's) case, chiefly from the Year Books. See also, as to Recouper, a note to the case of Icely *v.* Grew, 6 Nev. & Man. 467; 36 E. C. L. R. 440.

¶ Part iv, p. 43. Cases of Appeal, etc.

** So, again, in Slade's case, part iv, pp. 92, 94. But this is not a case of former recovery.

†† Richard Liford's case, part xi, pp. 48, 51, and 52.

as the trees, etc., to what place soever they are carried; and if the disseisee takes them, they shall be *recouped in damages* against the disseisor.*

[430] In this same sense the phrase is used in a modern English case, where † suit was brought upon a policy on the life of Mr. Pitt. The plaintiffs had been creditors of Mr. Pitt, and insured his life for their own protection. After his death, however, the debt was paid by his executors out of moneys voted by Parliament to relieve his estate, and it was held that the plaintiffs could not recover, having received no damage; and in the case next cited, Lord Ellenborough likened this to a case of recoupment. ‡

So, where an action ‖ was brought on a policy of insurance to Russia, with a provision that if the cargo were denied permission to be landed, the master should, on his return, receive in London, £2,500; the outward cargo was denied landing, but the master, instead of returning direct, went by Stockholm and earned freight. The plaintiff claimed to recover the £2,500; but it was held that the freight earned was to be *recouped;* and the principle of this case has been recognized in this country. ¶

Again, in a case of assumpsit by underwriters ** on freight, after abandonment and payment of total loss, to recover freight earned after the abandonment, it was insisted by counsel *arguendo*, that whether entitled under the abandonment or not, the plaintiff ought to have his damages *recouped pro tanto*, out of the freight earned by the defendants on the homeward voyage.††

* And in the same sense the maxim of the civil law is applied: *nemo locupletior faciendus est ex aliena jactura.* So Grotius, *Minus autem quis habere ac proinde damnum fecisse intelligetur, non in re tantum, sed in fructibus qui propriæ rei fructus sunt, sive illi percepti sunt sive non, si tamen ipse eos percepturus fuerat, deductis impensis quibus res melior facta est aut quæ ad fructus percipiendos fuerunt necessariæ, ex regula quæ nos velat locupletiores fieri cum aliena jactura.* De Jur. Bel. et Pac. lib. ii, c. cxvii, § 4; Rutherforth's Institutes, book i, ch. 17.

† Godsall *v.* Boldero, 9 East, 72. See this case cited with approbation in the Court of Errors in New York, Tyler *v.* Ætna Fire Ins. Co. 12 Wend. 507. It has been overruled in England. See Dalby *v.* India and London Life Assurance Company, 15 C. B. (6 J. Scott) 365, and *supra*, 271, on the ground that a contract of life assurance is not a contract of *indemnity*.

‡ Mr. Ellis says (Insurance, 126), that notwithstanding this decision, the office paid the amount before leaving court. It does not appear, but it may be supposed that the suit was brought for the benefit of the estate.

‖ Puller *v.* Staniforth, 11 East, 232.

¶ Hecksher *v.* M'Crea, 24 Wend. 304. See also, Costigan *v.* Mohawk and Hudson R. R. Co. 2 Denio, 610.

** Barclay *v.* Stirling, 5 M. & Sel. 6 and 10.

†† See also, Richardson *arguendo*, in Williams *v.* London Ass. Co. 1 M. & Sel. 318 and 323. And such is the definition given of the word in the Lexicons; "Recoup," says Jacobs (*in voc.*), "from the French *Recouper*, signifies the keeping back or stopping something which is due, and in our law we use it for *defaulk or discount*." The term *defaulk* is obsolete, and is only known now through the substantive *defalcation*, used in promissory notes in Pennsylvania to signify deduction; and discount has become appropriated almost exclusively to banking operations. [Defalk, however, as a verb, is also still used in legal parlance in the same State. Owens *v.* Salter, 38 Penn. St. 211; Norcross *v.* Benton, *Ibid.* 517; Deen *v.* Herrold, 37 Penn. St. 150.—ED.]

RECOUPMENT ORIGINALLY A MERE RIGHT OF DEDUCTION FROM PLAINTIFF'S CLAIM.—Thus, it is evident that [431] *recouper* or *recoupment*, in its original sense, was a mere right of deduction from the amount of the plaintiff's recovery, on the ground that his damages were not really as high as he alleged.*

IN ITS MODERN SENSE IT EMBRACES THE DEFENDANT'S COUNTER-CLAIM.—But this is not the sense in which the phrase has been lately used with us in this country. In Mr. Barbour's valuable compilation on the law of Set-off, he says, p. 26: "Before entering upon the subject of set-off more minutely, it will be proper to notice a species of defence somewhat analogous to it in character, which a defendant is in some cases allowed to make, and which is called *recoupment*. This is where the defence is not presented as a matter of set-off arising on an independent contract, but for the purpose of reducing the plaintiff's damages, for the reason that he himself has not complied with the cross-obligations arising under the same contract. Thus, in an action to recover compensation for services rendered, the employer is entitled to show, by way of *recoupment* of damages, loss sustained by him through the negligence of the person employed; and so in regard to a breach of warranty." Mr. Barbour is unquestionably right in the fact he states, that *recoupment* is thus used; but it is equally certain that this is an entirely new application of the word, and that while it originally merely implied a deduction from the plaintiff's demand, arising from payment in whole or in part, or from recovery, or some analogous fact, it is now understood to embrace counter-claims of the defendant, and to be, in short, a kind of irregular and unliquidated set-off, which has crept in notwithstanding the rigorous terms of the statute.[1] It is always desirable to use technical terms in their strict signification; but leaving this to those who alone are competent to set us right in the matter, I propose now to consider the law of recoupment in its broader, and, as I must think, less correct interpretation.[2] It will be better understood from a careful examination of the cases.

* And so, too, it appears from Viner's Abridgment, where various uses of the term, in its ancient sense, will be found under the head of Discount; Pl. 3, 4, 9, and 10.

[1] Compare Barber *v.* Chapin, 28 Vt. 413.

[2] Recoupment will be allowed whenever an action for damages can be maintained. In order to avoid circuity of action, the courts will favor it. Houston *v.* Young, 7 Ind. 200. But the right only exists where a cross-action could be maintained. Clark *v.* Wildridge, 5 *Ibid.* 176. Where the plaintiff, in an action of right, waives all but nominal damages, the

EARLY ENGLISH RULE.—It was originally held in
[432] England, that in actions for work and labor, negligence, or badness of materials, constituted no defence to an action for the stipulated sum; that the plaintiff was entitled to his contract price, and that the defendant must resort to his cross-action for the damages resulting from the negligence.* But this law was very soon overruled.

REVERSAL OF THE EARLY RULE.—In an action of assumpsit for work and labor,† the plaintiff, a carpenter, had been employed by the defendant, a farmer, to do some work to his farm buildings; no particular sum had been agreed on. The defendant offered to prove that the work had been done in an improper and insufficient manner; to which it was replied on behalf of the plaintiff, that this was no answer to the present action, but the subject of a cross suit; and at Nisi Prius it was so ruled, and the plaintiff had a verdict for his full demand. But on motion for a new trial, this was held wrong; and Lord Ellenborough, C. J., said:

"Where a *specific* sum has been agreed to be paid by the defendant, the plaintiff may have some ground to complain of surprise if evidence be admitted to show the work and materials provided were not worth so much as was contracted to be paid, because he may only come prepared to prove the agreement for the specified sum and the work done, unless notice be given to him that the payment is disputed on the ground of inadequacy of the work done. But where a plaintiff comes into court upon a *quantum meruit*, he must come prepared to show that the work done was worth so much, and therefore there can be no injustice in suffering the defence to be entered into, even without notice."

Lawrence, J., said, "If even a *specific sum* had been agreed to be paid, and notice given, then the defendant should be let into the defence. For after all, considering the matter fairly, if the work stipulated for at a certain price were not properly executed, the plaintiff would not have done that which he engaged

* Broom *v.* Davis; Duffit *v.* James; Cormack *v.* Gillis; and Morgan *v.* Richardson, cited in Basten *v.* Butter, 7 East, 479.

† Basten *v.* Butter, 7 East, 479 and 483 (1806).

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defendant cannot introduce evidence of a set-off for improvements. Daniels *v.* Bates, 2 Greene (Iowa), 151.

The pendency of another action, in favor of the defendant against the plaintiff, for the recovery of damages for breach of contract, will not prevent a recoupment of the same damages by way of defence to a subsequent action, brought by the plaintiff against such defendant, upon the same contract. Naylor *v.* Schenck, 5 E. D. Smith's (N. Y.) C. P. R. 135.

The damages permissible by way of recoupment, in reduction of plaintiff's recovery, must be capable of computation with reasonable certainty, and such as the defendant might recover in a cross-action. Pettee *v.* The Tennessee Manufacturing Co. 1 Sneed (Tenn.) 381.

In Massachusetts, where certain animals in a drove were sold, under a warranty or fraudulent representation of soundness, and some of them were at the time of the sale unsound, and by their diseased condition afterwards infected others, the purchaser, in an action for the price, was allowed to recoup in damages the whole loss occasioned by the presence of the disease. Bradley *v.* Rea, 14 Allen, 20.

to do, the doing which would be the consideration of the defendant's promise to pay, and the foundation on which his claim to the price stipulated for would rest; and therefore, especially if he should have notice that the defendant resists payment on that ground, he ought to come prepared with proof that the work was executed properly;" and the rule for a new trial was made absolute.

Shortly afterwards, in an action* of assumpsit for work and labor, plea non-assumpsit, the defendant showed that the work (the rebuilding the front of a house) was ill done; to which it was insisted that the only remedy was by cross- [433] action. But Lord Ellenborough said, "The plaintiff is to recover what he deserves. . . . . I have had a conference with the judges; and I consider this as the correct rule, that if there has been no beneficial service, there shall be no pay; but if some benefit has been derived, though not to the extent expected, this shall go to the amount of the plaintiff's demand, leaving the defendant to his action for negligence;" and there was a verdict for defendant.

Again,† where the plaintiff declared on a contract by which the defendants were to furnish beer to be shipped for Gibraltar; and alleged by way of breach, that the beer was bad and wholly unfit for shipment, it appeared that the defendants had previously paid the plaintiffs for the price of the beer, in a suit in which judgment had been allowed to go by default. Lord Ellenborough said, "It appears to me that you should have made your defence to the original action, and given in evidence the bad quality of the article supplied, either as an answer to the whole demand, or in abatement of the damages. There was formerly an opportunity to do final justice between the parties, and why should there now be a second litigation?" ‡

Distinction in England between Actions for the Price, and on Notes Given for the Price.—A distinction was originally taken in England between actions brought for the original contract price, and suits founded on a note and bill given for the price, as we have seen above in Basten *v.* Butter. So in two cases at Nisi Prius,‖ Lord Ellenborough refused to admit evidence in actions on bills of exchange to show that the considera-

* Farnsworth *v* Garrard, 1 Camp. 38 (1807).

† Fisher *v.* Samuda *et al.* 1 Camp. 190 (1808).

‡ The cause was allowed to go on, but turned on another point. In Lewis *v.* Cosgrave, 2 Taunt. 2 (1809), the ingredient of fraud was superadded. It was a suit brought on a check for £15, which had been given for a horse warranted sound, and which the plaintiff knew to be unsound. At the trial, Heath, J., held that the defendant was bound to pay the bill, and bring his action for the deceit; but on a motion for a new trial, the court held, "that it was clearly a fraud; and as a man cannot recover the price of goods sold under a fraud, the rule for a new trial should be made absolute."

‖ Morgan *v.* Richardson, 1 Camp. 40, *in notis;* and Tye *v.* Gwynne, 2 Camp. 346.

tion had partially failed, the provisions for which the bills were given being very inferior to what they should have been. In the latter case, he said, "A bill of exchange cannot be accepted on a *quantum meruit*. There is a difference between want of consideration and failure of consideration. The former may [434] be given in evidence to reduce the damages; the latter cannot, but furnishes a distinct and independent cause of action;" and he cited with approbation, the opinion of Mr. Justice Denison, in Robinson *v.* Bland:* "There is a distinction between the contract and the security. If part of the contract arises on a good consideration, and part on a bad one, it is divisible. But it is otherwise as to the security, that being entire." This distinction, however, we shall see, has been disregarded in the State of New York.

Conflict in English Cases.—In other respects, also, the earlier English decisions were inharmonious. In an action† brought to recover the amount of a surgeon's bill, Lord Kenyon permitted the defendant to give evidence of unskilful treatment of him by the plaintiff, taking the distinction between a demand for skill, where the question might be whether the plaintiff was entitled to anything or nothing, and where the action was for goods sold and delivered, or other certain thing of value, not depending on skill; and considering the case before him as a mixed question, where the demand was in part for skill and part for medicine.[1]

But the Court of Common Pleas held,‡ that in an action on an attorney's bill, negligence could not be set up as a defence, unless possibly it was such as to deprive the defendant of all possible benefit. The negligence consisted in neglecting to oppose the justification of bail. The bail had been proceeded against, but fruitlessly. Sir James Mansfield, C. J., said,—

"In declaring that the plaintiff is entitled to recover, I do not go the length of saying that in no case of this kind can negligence in the party suing be used as a defence to the action; though I think it can only be used when the negligence has been such, that the party for whom the work was done has thereby

* 2 Burr. 1082.

† Duffit *v.* James, cited in Basten *v.* Butter 7 East, 479 (1788).

‡ Templer *v.* McLachlan, 5 Bos. & Pull. 136 (1806).

[1] So, as early as 1791, it was held by Lord Kenyon, at *nisi prius*, that if there were no consideration for part of the sum contained in a bill of exchange, the jury might apportion the damages. Mr. Law, the plaintiff's counsel, said he would look into the cases, and take the opinion of the court if he found them favorable to him. He never moved for a new trial, and afterwards expressed himself satisfied with the decision. Barber *v.* Backhouse, Peake, 86. See also, Ledger *v.* Ewer, Peake, 283; Wiffen *v.* Roberts, 1 Esp. 261.

lost all possibility of benefit from such work. That cannot be said in the present case." And final judgment was given for the plaintiff.[1]

American Rule.—In this country the subject has been much considered, and mainly with reference to three points: where the defence is mere failure of consideration; where it reaches a charge of fraud; and where notice of the proposed defence will be required. In New York, the question seems first to have been agitated in a case * where the plaintiff below, Scriven, sued the defendant Jones, in a justice's court, in [435] an action of deceit and warranty on the sale of the art of manufacturing potashes in a new and improved mode. The defendant offered in evidence a former judgment † rendered in favor of Jones in a suit by him against Scriven, on a note given by Scriven for the art in question, after evidence on the point as to the value of the patent. On this proof of the judgment in the former suit, the defendant below moved for a nonsuit, which was overruled, and a verdict found for the plaintiff. This judgment being brought up by *certiorari* to the Supreme Court, was reversed on the ground that the very question between the parties, namely, the value of the patent, was decided in the first suit; and the court by implication held, that in the first suit on the note, the evidence to show the want of consideration was admissible.

Notice of the Defence.—Again,‡ where the same question that had been agitated in Templer *v.* McLachlan, came up before the Supreme Court of New York, the testimony showing the negligence of the plaintiff, as attorney, was admitted in the Common Pleas, and a verdict found and judgment rendered for the defendant. When the case came up on error, the court expressed doubts as to the general rule, but thought the judgment below should be reversed on another ground, that of want of notice. They said, "The defendant neither pleaded nor gave notice of this defence; and it must have been a complete surprise upon the plaintiff, as he cannot be presumed to have come prepared to meet it at the trial." ‖

* Jones *v.* Scriven, 8 J. R. 353.

† The text uses the word "trial," but the marginal note has the words "trial and judgment," and so it should evidently be.

‡ Runyan *v.* Nichols, 11 J. R. 547.

‖ In Hopping *v.* Quinn (12 Wend. 517), it was held, without any reference to the question of notice attached to the plea, that an attorney could not recover in an action of assumpsit for his fees, when the suit which he had been retained to bring, had been so negligently managed that his services were worth nothing. But in The People *ex rel.* Fleming *v.* Niagara C. P. (12 Wendell, 246), the necessity of notice in case of a partial failure of consideration was insisted on.

[1] In England, unliquidated damages cannot be set off at law: nor can they, until the amount is ascertained, even form an equitable set-off. Best *v.* Hill, L. R. 8 C. P. 10. See, also, as to the latter point, Rawson *v.* Samuel, 1 Cranch P. 161, 172.

Where* suit was brought on two notes given for the purchase money of land conveyed with warranty, but the title to which had proved bad, the court held that the con-
[436] sideration had totally failed, and that this was a good defence to the suit.

FRAUD.—The question came up again in a case which resembled Lewis *v.* Cosgrave, in so far as it involved a fraud.† It was an action of assumpsit for the price of a mare, represented by the plaintiff to be sound, but which, the defendant offered to prove, he knew to be diseased. The defendant gave notice of the defence, but the Common Pleas rejected the evidence, and the plaintiff had judgment. The Supreme Court, however, held the defence improperly excluded :—

"The defendant below apprised the plaintiff of his intention to rely for his defence at the trial *upon the fraud;* and the established rule now appears to be that, in cases like the present, fraud may be given in evidence as a defence, and will be an answer to the whole demand, or in abatement of the damages, according to the circumstances of the case. This is the true, as well as a salutary rule, and well calculated to do full and complete justice between the parties, most expeditiously and least expensively."

And the judgment was reversed.‡

OTHER CASES.—Where Clark,‖ as administrator of A.

* Frisbee *v.* Hoffnagle, 11 J. R. 50. But in Whitney *v.* Lewis, 12 Wend. 131, and Batterman *v.* Pierce, 3 Hill, 171, it has been said that Frisbee *v.* Hoffnagle, is overruled. See also, Lamerson *v.* Marvin, 8 Barbour (S. C. R.), 9.

† Beecker and Beecker *v.* Vrooman, 13 J. R. 302.

‡ So again, in another case of fraud, Sill *v.* Rood, 15 J. R. 230. It was an action of assumpsit on two notes given in payment for a shearing machine. The general issue was pleaded. The defendant offered to prove that the plaintiff falsely represented the machine to be of great value, when in fact it was worth nothing, and also a breach of warranty as to the value and utility of the machine. Mr. J. Spencer, before whom the cause was tried, excluded the evidence, on the ground that neither fraud nor breach of warranty, although they went to take away the whole cause of action, could be given in evidence under the general issue of non-assumpsit, without notice. Verdict for the plaintiffs. On motion for a new trial, the court held the evidence improperly excluded, and a new trial was granted.

In Hills *v.* Bannister, 8 Cow. 31, the question as to the admissibility of proof of a partial failure of consideration without fraud, was mooted, but not decided. It was an action of assumpsit on a promissory note. Plea, the general issue only. The defendant offered to prove that the note was given for a church bell purchased of the plaintiffs, which they covenanted in writing not to crack for one year, and to recast it if it should crack in that time; that it did crack within the year, and that the plaintiffs had not recast it, having removed, and the defendant not being able to find them. The plaintiffs objected to the evidence, on the ground that no notice accompanied the plea, and it was excluded. A verdict was found for the plaintiffs, subject to the opinion of the court. The Supreme Court held the evidence of a refusal to recast the bell insufficient, and on this ground gave judgment for the plaintiffs, and in giving judgment said, "It seems that if the unsoundness of an article merely produced a partial diminution of value, it may be shown in mitigation of damages *provided there was a fraudulent misrepresentation.* If the plaintiffs had refused to cast the bell, I incline to think that the partial failure of consideration might also be a defence in mitigation, *although there be no fraud.*" But the point was left undecided.

‖ Gleason & Viele *v.* Clark, Adm'r of Clark, 9 Cowen, 57.

Clark, sued the defendants in a justice's court for fees due the intestate as attorney and counsellor, the justice nonsuited the plaintiff, and he appealed to the Common Pleas. The intestate, A. Clark, was employed to prosecute two suits, in which judgment was given as in case of nonsuit for not [437] proceeding to trial. The defendants below insisted that the nonsuit was produced by the negligence of the intestate, which went of course to the whole cause of action; but the Common Pleas decided that the evidence of negligence could not be received under the plea of the general issue, and thereupon gave judgment for the plaintiff below. On error, the Supreme Court held the decision erroneous as to the evidence of negligence, and said, "That under the plea of the general issue the defendant may show that the plaintiff never had any cause of action; if this species of defence goes to destroy the plaintiff's claim entirely, it is proper under the general issue; if merely to reduce the damages, notice should be given." But, on the ground that the plaintiff's evidence could not show a joint retainer by the defendants, the judgment was reversed.

In an action* of assumpsit on a promissory note, the defendant pleaded the general issue, with notice that the consideration of the note was the making of a quantity of provision barrels under an agreement to manufacture them according to the inspection law, relative to beef and pork, and that a portion of the barrels were manufactured in an unskilful manner, whereby damage had accrued. The circuit judge excluded the evidence; and a verdict was given for the plaintiff, for the amount claimed; but the Supreme Court held the exclusion improper, and a new trial was ordered.

False Representations.—So in another case of [438] fraud.†[1] It was an action of assumpsit on a promissory note. Plea, the general issue. The defendants proved that the note was given for the price of a mare sold them by the plaintiff, and that the plaintiff was guilty of deceit, falsely representing her to be sound, when in fact she had a disease of which she afterwards died. The judge received the testimony, deciding that if the mare *was entirely without value*, the evidence was admissible, but if she was of some value the evidence was not proper; and the question of value he submitted to the jury. The jury found for the plaintiff the amount of the note. The Supreme

* Spaulding *v.* Vandercook, 2 Wend. 431.

† Burton *v.* Stewart, 3 Wend. 236 (1829), and Spaulding *v.* Vandercook, 2 Wend. 431.

[1] See Frenzet *v.* Miller, 37 Ind. 1.

Court upon the argument of exceptions to the charge, held that the defendants could not say that the horse was valueless, nor treat the sale as void, because they had retained the property; that in order to put themselves in a situation to do that, they should have returned the mare when they discovered the falsity of the representation; and a new trial was denied.[1]

In New York the Doctrine applies to Actions on Sealed Instruments.—Again, recently, the general doctrine has been repeatedly reaffirmed, in cases of contract,* [2] and also in cases of fraud. In a case of fraud in the sale of land,† the general doctrine was thus laid down. The case was an action of debt on bond. The defendant offered to prove that it was given in part purchase for land which the plaintiff had fraudulently and falsely represented to be very different from what it was. Bronson, J., said, that under the statute (2 R. S. p. 406, § 77) which declares, "that a seal shall only be presumptive evidence of a sufficient consideration, which may be rebutted in the same manner and to the same extent as if the instrument were not sealed," the defendant would be allowed to recoup damages in an action upon a sealed as well as on an unsealed instrument.‡

Defence of Bad Workmanship.—Again, where Button sued Grant,‖ for not doing work, as a carpenter, in a workmanlike manner. The defendant pleaded the general issue, and a former action by him as plaintiff, for his pay for the same work.

* The Mayor of Albany *v.* Trowbridge, 5 Hill, 71; affirmed in error, 7 Hill, 429. Barber *v.* Rose, *ibid.* 76; Whitbeck *v.* Skinner, 7 Hill, 53; and see also, Judd *v.* Denison, 10 Wend. 512.

† Van Epps *v.* Harrison, 5 Hill, 63. See also, M'Cullough *v.* Cox, 6 Barb. S. C. R. 386.

‡ And see to same point, Lamerson *v.* Marvin, 8 Barb. S. C. R. 9.

‖ Grant *v.* Button, 14 J. R. 377.

[1] In an action brought upon promissory notes, the consideration of which was work and labor done by the plaintiff for the defendants, the defence was that while the plaintiff was in the employ of the defendants, as their servant, they were possessed of drawings, plans, models, and patterns of steam engines, etc., which had names, numbers, and marks inscribed on them, so as to identify them; and that the plaintiff, contrary to his duty as such servant, destroyed the drawings and plans, and obliterated the names, numbers, and marks, of the plans, models, and patterns. Held, that the defendants might give evidence of such wrongful acts of the plaintiff, for the purpose of reducing the amount of the recovery; it not appearing that the damages sustained by the defendants, by means of such acts, were known to them or were taken into the account on liquidating the amount due to the plaintiff and giving the notes therefor. The damages to be allowed in such a case, by way of recoupment, being such only as arise from breach of the plaintiff's contract, the deduction was to be limited to such damages, and nothing could be allowed on account of the *malice* with which the wrongful acts were done. The Allaire Works *v.* Guion, 10 Barb. (N. Y.) 55.

[2] Where on an entire contract of sale, the vendor delivers part only, the unpaid contract price of the goods delivered may, at least in equity, be recouped against the purchaser's claim for damage for non-delivery of the remainder. Taylor *v.* Read, 4 Paige, 561. The severer doctrine announced in Stephens *v.* Beard (4 Wend. 604), which would not permit the damages sustained by a partial non-performance to be reduced by proof of partial performance, is there disapproved.

It was proved that on the former action the plaintiff in this suit offered evidence that the work was unskilfully done, but that the justice excluded the evidence, and gave judgment for the then plaintiff, on the ground that the defendant was bound by his bargain. On this evidence judgment was given by the justice in this suit for the defendant in error (the plaintiff below, Button). But on *certiorari*, the Supreme Court said that the plaintiff was barred by the former judgment, and that the justice erred in refusing to admit the evidence in the former suit;[1] and the judgment was reversed.[2]

So where covenant * was brought on a sealed agreement to build a certain wall for $1,500, the defendant offered to show that the work was not equal in quality to what the contract required. The referees rejected the evidence, and for that reason the report was set aside. The court said, "The offer came under the category of recoupment. Recoup is synonymous with defaulk or discount. It is now uniformly applied where a man brings an action for a breach of contract between him and the defendant, and the latter can show that some stipulation in the same contract was made by the plaintiff, which he has violated: the defendant may, if he choose, instead of suing in his turn, recoup his damages arising from the breach committed by the plaintiff, whether liquidated or not."

By the New York Rule two Suits are not Permitted when Justice can be had by one.—Soon after, in the same State, the subject we are now considering was largely discussed, † and the rule definitively settled.

The plaintiff, a stove dealer, sued the defendant for the price of a patent cooking-stove, and sundry other articles. The defendant gave notice with his plea, that he would prove that the plaintiff warranted the stove to draw and cook well; that it did not answer the warranty; that he had offered to return it; but that the plaintiff refused to take back. It was

* Ives *v.* Van Epps, 22 Wend. 155.

† M'Allister *v.* Reab, 4 Wend. 483, and Reab *v.* M'Allister, 8 Wend. 109, in Error.

[1] In a contract for finishing a building, a party sustaining damage by the use of poor materials and workmanship, may recoup under the general issue, by way of reducing the recovery under the *quantum meruit* or *valebat* counts; the damages so recouped, to be deducted from the value of the labor and materials proportionately, as fixed by the contract. Higgins *v.* Lee, 16 Ill. 495. To a like effect is Robinson *v.* Mace, 16 Ark. 97. But see 2 Greene (Iowa), 257.

[2] So damages for not finishing a building by the time agreed, may be recouped in an action by the contractor for payment. Abbott *v.* Gatch, 13 Md. 314. So in California, damages actually suffered from a breach of a vendor's covenant may be set off in an equitable action for the price. Walker *v.* Sedgwick, 8 Cal. 398.

not pretended that there was any fraud. This evidence was rejected, on the ground that unliquidated damages for a breach of warranty cannot be set off (no fraud being shown) in an action of assumpsit. The jury found for the plaintiff his whole demand. Judgment, and error. It was contended in the Supreme Court, for the defendant in error, that a [439] partial failure of consideration, unless occasioned *by the fraud* of the plaintiff, could not be given in evidence in reduction of the damages. But Mr. J. Marcy, in delivering the opinion of the court, said (p. 492):—

"From an examination of the cases, I am satisfied that in those where the damages arising from a breach of warranty in the sale of chattels have been allowed to be given in evidence by the defendant to reduce the amount of recovery below the stipulated price, the decisions of the court have not proceeded on the ground that the express contracts were *void* by reason of fraud, and that the recovery was had upon a *quantum meruit*, or *quantum valebat*, upon implied contracts, but upon a principle somewhat different from either of those adverted to in this case by the court below—upon a principle which has of late years been gaining favor with courts, and extending the range of its operations. Such defence is permitted, to avoid *circuity of action*. A second litigation on the same matter should not be tolerated when a fair opportunity can be afforded by the first to do final and complete justice to the parties. If a defence resting on such a principle is allowed, as I think it is, in a case of warranty *mala fide*, I see no good reason for not allowing it in a case of warranty *bona fide*. The effect would be as salutary, and the inconveniences arising therefrom would be as few, in the one case as in the other. The distinction contended for on the part of the defendant here is recognized, I admit, in many cases, and some of high authority; but in others, and those mostly of a more recent date, it seems to me to have been disregarded." . . . . "I am persuaded that if we should circumscribe the operation of the rule in the manner contended for by the defendant in error here, we should limit its usefulness; but by extending it to cases of sale on warranty without fraud, we shall thereby curtail litigation, without creating confusion by encroachments upon established principles of law. I am therefore of opinion that the court below erred in refusing the evidence offered by the defendants." And the judgment was reversed.

The same case came up before the Court of Errors;* when Mr. Chancellor Walworth, in giving his reasons for affirmance, said:—

"I consider the rule adopted on this subject perfectly just and equitable, when the plaintiff has notice of the defence intended to be set up, and calculated to do complete justice between the parties, without putting them to the expense of two suits when one is much more likely to effect the object

* Reab *v.* M'Allister, 8 Wend. 109 and 117.

of fair litigation. Indeed, if one of the parties is insolvent, and the other responsible, it is the only way in which justice can be done; at least as to small demands which will not bear the expense of a suit in [440] chancery to obtain an equitable set-off."

He also said that the distinction taken in England between a suit on the original contract and a suit upon a note or any other security taken for the contract price, had not been adopted by the courts of New York. The judgment was affirmed.*[1]

In a subsequent case† in the same court, where suit was brought for breach of warranty in a sale of a horse, it was shown that the plaintiff had given his note for the price of the same horse, and paid it after suit, and it was objected that the evidence of breach of warranty should have been urged in that suit; the court held that the evidence would have been admissible, but that the now plaintiff was not bound to use it, and that the fact of his not having availed himself of it was no bar to the present suit.

Actions for Use and Occupation and Rent.—And so in an action for use and occupation, if the defendant be entitled to damages on account of the tenement not being repaired, they may be set up by way of reducing or extinguishing [441] the rent.‡[2] And so, too, in the action of replevin after

* In Still *v.* Hall, 20 Wend. 51, the principle settled in Reab *v.* M'Allister, was applied to the case of a master of a sloop; and in an action of assumpsit, brought by such a master for his wages, it was held competent for the owners to "recoup" the damages sustained by them in consequence of the plaintiff's negligence, in laying the sloop in such a way that she was run into and sunk; and the referees having rejected the evidence, their report was set aside.

In Blanchard *v.* Ely, 21 Wend. 342, in an action brought to recover the price of a steamboat, the doctrine of Reab *v.* M'Allister, "that proof of any damages arising from a plaintiff's breach of the contract on which he sues, may be received to reduce his claim," was again recognized.

† Cook *v.* Mosely, 13 Wend. 277.

‡ Westlake *v.* Degraw, 25 Wend. 669. The landlord, however, is not bound to repair, except by virtue of an express covenant; and it has been repeatedly held that even a failure of the landlord to comply with his covenant furnishes no answer to the suit for the rent. Etheridge v. Osborn, 12 Wend. 529. But on principle this might be; as the bargain, though expressed in separate covenants, is contained in one instrument, and made at the same time. See Dorwin *v.* Potter, 5 Denio, 306, where, in assumpsit for rent, the defendant was allowed to recoup his damages for want of repairs. And it is worthy of attention, that in Tone *v.* Brace, 8 Paige, 597, the chancellor appeared to consider the doctrine of recoupment had reached far enough to cover in this way distinct covenants under seal.

[1] In a suit in Indiana, brought on promissory notes and to foreclose a mortgage, the defence was that the notes were given to secure the part payment of the price of a steam engine and boiler manufactured for the defendants to be used in a saw-mill, of which purpose the makers had knowledge. The engine and boiler were worthless in consequence of defects in materials and workmanship, by reason of which the boiler burst, and damaged the defendants' mill, and their other machinery was less valuable in consequence. This defence was held good on demurrer. Page *v.* Ford, 12 Ind. 46.

[2] In New York, in an action by a lessor for rent reserved, the lessee may recoup damages sustained by a breach of an *implied* covenant for quiet enjoyment. The Mayor, &c. of New

distress for rent. But not under a plea of eviction.* Nor can mere tortious acts of the landlord, wholly independent of the covenants of the respective parties, be set up as a defence.†

So, too, in an action for rent, fraud can be set up by way of recoupment. In a subsequent case in the Supreme Court of New York, where suit was brought for rent, it was shown the defendant was induced to sign the lease through the fraudulent representations of the plaintiff that the lot comprehended a certain parcel of land, which proved to belong to the corporation of the city of New York. It was held, that he had a right to recoup the damages resulting from the fraud, and that they were, at least, the rent which he had to pay for the corporation property.‡

RECOUPMENT IS ALLOWED THOUGH BOTH DEMANDS ARE UNLIQUIDATED.—The subject was recently considered in an action ‖ brought on a promissory note given for wood, which had been destroyed by reason of the payee of the note having burned over a piece of fallow ground adjacent to the lot where the wood lay, and against the consequences of which, at the time of the giving of the notes, he had undertaken to guaranty the defendants. At the trial, the circuit judge excluded the evidence which was offered as a defence to the note. But on a motion for a new trial, this was held erroneous, and Bronson, J., said, "It is not a question of set-off as the plaintiff's counsel seems to suppose, but of recoupment of damages. When
[442] the demands of both parties spring out of the same contract or transaction, the defendant may *recoup*, although

* Nichols *v.* Dusenbury, 2 Comstock, 363.
† Cram *v.* Dresser, 3 Sandford, S. C. 120.
‡ Allaire *v.* Whitney, 1 Hill, 484; and see also, Whitney *v.* Allaire, 4 Denio, 554.
‖ Batterman *v.* Pierce, 3 Hill, 171. See this case commented on in Cram *v.* Dresser, 2 Sandford, S. C. 120.

York *v.* Mabie, 3 Kern. 151, reversing s. c. 2 Duer, 401. But in an action by a lessor against his lessee for rent due for a portion of the term of a lease, damages sustained by the defendant from the breach by the plaintiff of a covenant contained in the lease that the subcellar of the premises should at *all times during the term* "be free from the percolation of water through the walls or floor thereof," cannot be set off. Benkard *v.* Babcock, 2 Robertson (N. Y. Superior Court), 175. And it has been held in the same State that acts on the part of a landlord, disturbing the tenant in the beneficial enjoyment of the demised premises, cannot be set up as a ground of recoupment unless such acts amount to an eviction. Edgerton *v.* Page, 5 Abbott's Pr. R. 1. In Georgia, where a party entered upon premises under a contract of purchase, and erected improvements thereon, and the landlord subsequently failed to make title; Held, in an action against the former, for use and occupation, that he could not plead, by way of set-off, the value of the improvements. Barnes *v.* Shinholster, 14 Ga. 131. But under the comprehensive counter-claims allowed by the modern Codes of Procedure, as in New York (N. Y. Code of Procedure, § 149, subd. 2), the landlord in his suit for rent is no longer exempt from a defence *pro tanto* founded on his own failure to comply with the covenants in a lease, provided the damages from such failure can be definitely ascertained. See Crane *v.* Hardman, 4 E. D. S. (N. Y.) 339.

the damages on both sides are unliquidated; but he can only *set off* when the demands of both parties are liquidated, or capable of being ascertained by calculation." It was further urged that the damages claimed by the defendant did not spring out of the contract of sale, but arose under the collateral agreement of the plaintiff to indemnify against the fire. But while the court admitted "that there could be no recoupment by setting up the breach of an independent contract on the part of the plaintiff," still, here the bargain was held to be one and the same.*[1]

So when a horse hired to perform a certain journey becomes disabled while on his return, without fault on the part of the hirer, so that he is unable to travel, and the hirer is thereby compelled to procure other means of returning home, and to incur expenses in consequence thereof,—those expenses may be recouped against the bailor in an action for the hire of the horse, even to the full extent of the price agreed for his hire.†

WRONGFUL SALE OF PLEDGE.—Where suit was brought‡ by a banking association, on a note secured by pledge of stock,

* "In two cases," said the court, "Tuttle *v.* Tompkins, 2 Wend. 407, and Sickles *v.* Fort, 15 Wend. 559, this doctrine has been lost sight of. The truth is, that the doctrine, although founded on the plainest principles of justice, is not of very long standing; but the principle is now too firmly settled to be shaken by a few straggling cases, or the occasional dicta which seem to look in the opposite direction.

† Harrington *v.* Snyder, 3 Barbour's S. C. R. 380.

‡ Willoughby *v.* Comstock, 3 Hill, 389.

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[1] So in Connecticut, the doctrine is well established. In the case of Avery *v.* Brown, 31 Conn. 398, the court answers the objection that the defendant's damages are unliquidated, by the maxim, *Id certum est quod certum reddi potest*, saying that witnesses who know the property and the state of the market will give the data by which the amount of damages to be deducted can be calculated. And the principle applies when the subject of the contract is real estate, as well as where it is personal property. There is no more difficulty in showing the defendant's damages by way of reducing the plaintiff's claim than in an independent action for the same damages.

In an action on promissory notes given in consideration of an agreement to convey real estate, which was afterwards recovered by the maker of the notes in an action of ejectment, the defendant having set up by way of set-off, and proved on the trial, the plaintiff's refusal to give him possession of the property, the measure of his damages was held to be "the amount of rent or profit that he might have derived from the property from the time when possession ought to have been delivered under the contract" until "it was obtained under the action of ejectment." Gilmore *v.* Hunt, 66 Penn. St. 321 (*ante*, 202 *n.*)

But in Vermont, on the contrary, the partial failure of the consideration of a promissory note unliquidated and subject to the estimation of a jury, cannot be received to reduce the amount of the recovery. Richardson *v.* Sanborn, 33 Vt. 75; Burton *v.* Schermerhorn, 21 Vt. 289.

And it is there denied that recoupment, in the broader and modern sense defined in the text, "has been extended far enough to enable a defendant to set up the violation of *distinct* and *independent* stipulations by the plaintiff in a contract, in answer to damages claimed by the plaintiff for the non-performance by the defendant of the stipulations of such contract on his part." "We do not think," says Mr. C. J. Poland, in delivering the opinion of the Supreme Court of that State in the case of Keyes *v.* Western Vt. Slate Co. (34 Vt. 81), in January, 1861, "the doctrine has ever been carried to that extent in this State; and we doubt if it is yet settled to that extreme in New York, where the courts have gone beyond all others in favor of what is there termed the *recoupment* of damages.

it was suggested that an irregular or prejudicial sale of the pledge might be taken advantage of under the doctrine of recoupment; but the point was not decided, and it would certainly be a great extension of the doctrine, and would occasion an inquiry often very embarrassing and entirely foreign [443] to the original cause of action.*

THE PARTY MUST ELECT BETWEEN RECOUPMENT AND A CROSS-ACTION.—Nor is the party entitled to recoup—as for instance the maker of a note given for the price of goods, who seeks redress for the non-delivery at the stipulated time—denied this relief because he has commenced a suit against the seller; but he will be obliged to elect between his own suit and the recoupment.† [1]

So in Alabama, defendant by electing to recoup the damages when sued for a breach of contract, thereby precludes himself from afterwards suing for damages.‡ [2]

REAL ESTATE.—The doctrine does not appear always applicable to real estate. Thus, where a promissory note was given in consideration of the conveyance of certain premises, and the defendant was let into possession, but the plaintiff refused to convey, the Court of King's Bench held the refusal to be no defence to an action on the note, saying that the consideration had not wholly failed.‖ And the same principle has been recognized in this country.¶ [3]

* In Taggard *v.* Curtenius, 15 Wendell, 155, a defence substantially of this character was overruled.

† Fabbricotti *v.* Launitz, 3 Sandf. S. C. R. 743

‡ McLane *v.* Miller, 12 Ala. (N. S.) 643.

‖ Moggridge *v.* Jones, 3 Camp. 38, and 14 East, 486.

¶ Freligh *v.* Platt, 5 Cowen, 494; and Greenleaf *v.* Cook, 2 Wheaton, 13.

[1] McKinney *v.* Springer, 3 Ind. 59; Epperly *v.* Baily, 3 Ind. 72; Rankin *v.* Harper, 4 Ind. 585.

[2] Accordingly in that State the damages to be recouped are not restricted to the time of bringing the suit, but may be estimated to the time of the trial. Martin *v.* Hill, 42 Ala. (N. S.) 275.

[3] But the principle is generally applied in the United States in actions on notes for the price of real estate. Christy *v.* Ogle, 33 Ill. 295. The defendant may recoup the damage sustained by him by reason of the misrepresentations of the plaintiff as to the value, quality, or quantity of the land. So in Indiana in such an action, the defendants were held entitled to an abatement from the note, the measure of which was "what the land not included in the deed, but included in the misrepresentation, would cost to obtain it under a writ of *ad quod damnum* or other means equally cheap and expeditious." Reynolds *v.* Cox, 11 Ind. 262. So in Missouri, House *v.* Marshall, 18 Mo. 369. So in an action upon bonds given for the purchase money of land, the defendant may set up by way of recoupment, damages for the removal and conversion of *fixtures*, without his knowledge or consent, after the contract of sale and before a formal transfer of the land and the execution of the bonds. Grand Lodge of Masons *v.* Knox, 20 Mo. 433. See, also, Hall *v.* Clark, 21 *Ibid.* 415.

The amount paid to discharge an incumbrance upon land conveyed with a warranty against incumbrances, may, if reasonable, and the least for which the incumbrance could be bought in, be set up as a defence (in the absence of any other controlling agreement between the grantor and grantee), by way of recoupment, to a suit by the assignee or payee of a note

CHATTELS.—In regard to chattels generally, this case cannot arise, because there is no evidence of title necessary. But in regard to vessels, where a bill of sale is requisite, the same question might present itself. As above presented, the decision just cited seems correct, because there was no allegation of damages sustained by the refusal to complete the transfer. But if such mischief as the loss of a good offer were the result, it would seem that it should constitute a defence *pro tanto.*

GENERAL RULE AS SETTLED IN NEW YORK.—I have reviewed the above cases somewhat in chronological order, because the doctrine is one of recent growth; and in New York it may now be safely said that, whether in cases of sales of chattels, contracts for labor and materials, or for pro- [444] fessional services, whether the action be for the original contract price, or on a security given therefor, and also in actions for rent, it is competent for the defendant to give in evidence in diminution or recoupment of damages, any fraud, breach of warranty, or negligence, by which he has been injured, growing out of and relating to the particular thing in question, and the whole matter is to be submitted to the jury.[1]

RECOUPMENT IS CONFINED TO THE SUBJECT-MATTER OF THE ACTION.—It is to be observed, however, that the right of recoupment is limited to damages resulting from the same subject-matter for which the action is brought.[2] So where there are distinct sales, they cannot be regarded as one transaction, so as to entitle the defendant, in an action for the price of the last parcel delivered, to recoup his damages growing out of the pre-

given for the last instalment, at least, of the purchase money. Baker *v.* Railsbasck, 4 Ind. 533.

In an action on a title bond by the vendee against the vendor of real estate after eviction by title paramount, the defendant cannot recoup for the rents and profits of the land received by the purchaser. Greene *v.* Allen, Adm'r, 32 Ala. (N. S.) 215.

[1] See Walker *v.* McCoy, 34 Ala. 659. And it may be said generally, without citation of particular cases and statutes, that this limitation is almost uniformly adopted in them. But it is sometimes otherwise with set-offs and counter-claims; *ante,* 428, note; *post,* 452, note. Titus *v.* Himrod, 39 Barb. (N. Y.) 581.

In North Carolina the old rule is adhered to, and where actions can be maintained on a special contract, the defendant cannot reduce the damages by showing the unsoundness of, or inferiority of, the articles purchased, or the imperfection of the work done. This can be done only when the plaintiff sues on a *quantum meruit* or *quantum valebat.* Hobbs *v.* Riddick, 5 Jones (N. C.) 80; McDugald *v.* McFadgin, 6 Jones (N. C.) 89.

[2] As recoupment is permitted only to avoid circuity of action, it was held inequitable in Massachusetts to allow a defendant to recoup damages on account of a misrepresentation of one of several plaintiffs, for which the others were not responsble. And in an action for freight brought by the owners of a vessel of whom the master was one, the consignee was not allowed to recoup his damages for the non-delivery of goods not actually shipped but which the master, without other authority than he had as master, had improperly receipted for. Sears *v.* Winsgate, 3 Allen, 103.

vious deliveries.*[1] So, too, for damages not arising out of the contract of the parties, and entirely independent of their respective covenants or agreements, there can be no recoupment; thus in an action for rent upon a lease which provided for the landlord's entering on the premises to make repairs during the term, the tenant cannot recoup damages occasioned by negligent and tortious behavior of the landlord and his servants in making such repairs.†[2] Nor can there be any recoupment of damages sustained subsequent to the commencement of the suit.‡[3]

NOTICE REQUIRED WHERE THE DEFENCE IS PARTIAL.—As to the way in which the defence of recoupment is to be set up, it is now settled that evidence to support it, if total and going to the whole action, will be received under the general issue, but that where it is only partial it cannot be pleaded, and notice must be given with the plea. In New York the courts hold "notice to be an essential part of the rule."‖[4]

This, too, appears decided in New Hampshire;¶ and in most of our sister States the general rule seems to be settling down as in New York, with, however, considerable fluctuation.[5]

RULINGS IN UNITED STATES CIRCUITS.—On the Massachusetts circuit, before Story, J., where suit** was brought on a special contract for keeping sheep at a stipulated price, the de-
[445] fendant offered to prove that the sheep were so negligently kept that many of them died. The court, however, refused to admit it, intimating that on a *quantum meruit*

* Seymour *v.* Davis, 2 Sandford, S. C. 240.

† Cram *v.* Dresser, 2 Sandf. S. C. 120.

‡ Harger *v.* Edmonds, 4 Barb. S. C. R. 256.

‖ The Mayor of Albany *v.* Trowbridge, 5 Hill, 71; affirmed in Error, 7 Hill, 429; Batterman *v.* Pierce, 3 Hill, 171; Barber *v.* Rose, 5 Hill, 76; Whitbeck *v.* Skinner, 7 Hill, 53; Stearns *v.* Marsh, 4 Denio, 227; McCullough *v.* Cox, 6 Barbour S. C. R. 38; Eldridge *v.* Mather, 2 Comstock R. 157.

¶ Britton *v.* Turner, 6 N. H. R. 497; *ante*, 230, *in notis*.

** Crowninshield *v.* Robinson, 1 Mason, 93 (1816).

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[1] Where under a parol contract for the future delivery of a fixed quantity of goods, at such times and in such parcels as might be required, separate deliveries are made and settled for as furnished, each delivery is to be considered as in its nature a separate and distinct contract; and in an action for the price of the parcel last furnished, the buyer cannot recoup for his damages growing out of the inferior quality of the goods previously delivered.

Damages cannot be recouped, unless they arise in the particular contract on which the action is founded. Deming *v.* Kemp, 4 Sandf. R. 147.

[2] Nor can the sureties for the payment of rent, in an action against them for the rent, recoup or set off a claim to damages in favor of their principal, although it would have been a defence in a suit against the principal by the landlord. La Farge *v.* Halsey, 1 Bosw. (N. Y.) 171.

[3] Bartlett *v.* Holmes, 13 C. B. 630; 17 Jur. 858; s. c. 20 Eng. L. & E. 277.

[4] Not so in Pennsylvania. Deen *v.* Herrold, 37 Penn. 150.

[5] See on the necessity of notice, Estep *v.* Morton, 6 Ind. 489; Heaston *v.* Colgrove, 3 *Ibid.* 265; Stever *v.* Lamoure, Hill & D. Supp. 352; Wellsville *v.* Geisse, 3 Ohio St. 333; Stearns *v.* Marsh, 4 Denio, 227.

the rule might be different, but that on a specific contract the defendant must be left to his cross-action.

But on the same circuit, in assumpsit for the price of goods, the defendant was allowed to prove that they were of a quality inferior to what they were represented to be at the sale.*

Supreme Court of the United States.—The Supreme Court of the United States at one time laid down the restricted rule.† It was an action of assumpsit brought to recover the amount of a note given for a race-horse, and which the defendant offered to prove was unsound at the time of sale. The judge held that the evidence was inadmissible, unless the plaintiff at the time of the sale knew of the unsoundness, or in other words, was guilty of fraud. This doctrine was held correct, and the court said:—

"The result of the cases is this: if upon sale with a warranty, or if by the special terms of the contract, the vendee is at liberty to return the article sold, an offer to return it is equivalent to an offer accepted by the vendor, and in that case, the contract is rescinded and at an end, which is a sufficient defence to an action brought by the vendor for the purchase money, or to enable the vendee to maintain an action for money had and received in case the purchase money has been paid. The consequences are the same where the sale is absolute and the vendor afterwards consents unconditionally to take back the property; because in both, the contract is rescinded by the agreement of the parties, and the vendee is well entitled to retain the purchase money in the one case, or to recover it back in the other. But if the sale be absolute, and there be no subsequent agreement or consent of the vendor to take back the article, the contract remains open, and the vendee is put to his action upon the warranty, unless it be proved that the vendor knew of the unsoundness of the article, and the vendee tendered a return of it within a reasonable time."

The whole subject has, however, recently been examined by the same high tribunal, in a case coming up from Alabama, in which, although it was decided upon the local law of that State, the reasonableness of the American doctrine, "that upon the principles of justice and convenience, and with a view to prevent litigation and expense, where fraud has occurred, or where there has been a failure of consideration, total [446] or partial, or a breach of warranty, fraudulent or otherwise, all or any of these facts may be relied on in defence by a party when sued on such contract, and that he shall not be driven to a cross-action," was ably and elaborately maintained.‡

* Miller *v.* Smith, 1 Mason, 437.

† Thornton *v.* Wynn, 12 Wheat. 183.

‡ Withers *v.* Greene, 9 Howard, 214; and same doctrine affirmed in Van Buren *v.* Digges, 11 Howard, 461.

RULE SANCTIONED IN MASSACHUSETTS.—The more liberal rule has also been recently adopted in Massachusetts. So in an action * brought by a factor to recover against his principal, the plaintiff's negligence in selling the defendant's goods being set up by way of diminution of damages, the previous cases were reviewed, and the court said, "The question for a time may have ranked in the class of legal uncertainties; but it appears to us at present to be settled on reasonable and satisfactory principles." †

* Dodge *v.* Tileston, 12 Pick. 328.

† And to this the courts of that State have adhered. In Harrington *v.* Stratton, 22 Pick. 510. in an action on a promissory note given on an exchange of horses, the defendant offered to prove false representations made by the plaintiff in reduction of damages; and the Supreme Court of Massachusetts, after reviewing the English and American cases, particularly those in New York, at length, distinctly disclaimed any distinction between a suit brought on the original contract, and on a security given for the price; and held that in either case the defendant might show a partial failure of consideration, to reduce the damages; but that notice would be necessary to let in the defence.

And again, in assumpsit on a promissory note for an ox, it was held by the same court, Perley *v.* Balch, 23 Pick. 284, that the purchaser might avail himself of a partial failure of consideration, or of deception in the quality or value of the chattel, to reduce the damages, and was not obliged to resort to a separate action for the deceit, or upon the warranty. In a recent case in the same State, the subject has been again considered. In a suit on a note given for a chaise warranted to be a *first-rate chaise*, the defendant offered evidence to show that there were defects in it, and contended that the difference between the amount agreed to be paid for the chaise and what the jury should deem its true value at the time of the sale, was the amount of deduction to which he was entitled. But the judge charged that if there were defects in the chaise at the time of the sale, the defendant was entitled to have so much deducted from the note, as the chaise was worth less on account of such defects; and this was held right on exception, the court saying, "There was no question before the jury as to the actual worth of the chaise, no question whether either party had made a good or bad bargain." Goodwin *v.* Morse, 9 Met. 278.

As to the defence of a judgment recovered in a former suit, where the same services have been credited, see Briggs *v.* Richmond, 10 Pick. 391. In Hunt *v.* The Otis Company, 4 Met. 464, where a plaintiff had entered into a manufactory with knowledge of a regulation adopted by the company, requiring all persons employed by them to give them four weeks' notice of an intention to quit their service, and quitted their service without giving such notice, he was held liable, in a suit brought against them for his wages, for all damages caused by his not giving the notice; and in such suit the amount of such damages may be deducted from his wages.

In Pennsylvania, damages arising from a breach of warranty of goods sold may be set off under the statute of that State in an action on a note given *in a different transaction.* Phillips *v.* Lawrence, 6 Watts & Serg. 150; Carman *v.* Franklin Fire Ins. Co. 6 Watts & Serg. 155. Where the plaintiff sold land to the defendant for $3,000, and took bonds for the price to the amount of $1,500; at the time of the sale, the land was incumbered by judgments to the amount of $750. Under these judgments the land was sold, and the defendant bought it in for this sum. The plaintiff sued on the bonds, and the defendant set this up as a total failure of consideration. But it was held that the defendant could only set off or deduct the amount paid by him on the incumbrances, and that the plaintiff was entitled to recover the balance. McGinnis *v.* Noble, 7 Watts & Serg. 454.

In Connecticut the rule appears unsettled. In McAlpin *v.* Lee, 12 Conn. 129, the Supreme Court of Connecticut recognized the doctrine of Reab *v.* M'Allister, and applied it to an action of book debt brought to recover the price of property sold under a special agreement, which proved inferior in quality to that contracted for, and allowed the defendant in the assessment of damages a deduction of the agreed price, and the value of the property sold, the court saying that the rule was the same whether the action was for goods sold and delivered, or upon a bill or note given for the stipulated price.

But in Pulcifer *v.* Hotchkiss, 12 Conn. 235, in an action on a note given for a patent, the same court held that the defendant could not show that the plaintiff had made false representations in regard to its value, and that the consideration had partially failed, but that he

MODERN ENGLISH RULE.—In England, the rule adopted in this country has been but partially recognized.* In an action of assumpsit for goods sold, brought to recover the price of some cinq foin seed, warranted by the plaintiff to be good, new-growing seed, it was held competent for the defendant to show that it did not correspond with the warranty. The plea was the general issue without [447] [448]

must resort to his action on the warranty.[1] In Delaware, see Draper *v.* Randolph, 4 Har. 454.

In Alabama the Supreme Court has recently, in a very learned and elaborate opinion, adopted the doctrine of recoupment, by that name, and applied it to the case of a warehouseman who had advanced on cotton deposited with him. In an action brought for these advances, it was held competent for the owner of the cotton to recoup the damages sustained by the destruction of the cotton through the plaintiff's negligence. Hatchett *v.* Gibson, 13 Ala. (N. S.) 587. See also, Robertson *v.* Davenport, 27 Ala. 574.

So in the same State, if an overseer employed at a stipulated price per annum is sick a part of the time, and thus unfitted for active service, the employer may recoup the damages sustained by the imperfect performance of the contract. Jones *v.* Deyer, 16 Ala. 221; Hunter *v.* Waldron, 7 Ala. 753; see also, McLane *v.* Miller, 12 Ala. 643.

So in Maine, in an action on a note given for the good-will of a business, a partial failure of consideration (growing out of the fact that the plaintiff had returned to practice), though unliquidated, may be given in evidence to mitigate the damages. Herbert *v.* Ford, 29 Maine, 546.

In Tennessee the doctrine has been introduced to but a limited extent. It has been declared applicable only to cases where a special contract has been partially executed, but not according to its terms. Here the defendant is liable to the plaintiff, not on the special contract, but on an *indebitatus assumpsit*, for so much as the defendant may be found liable *ex æquo et bono*, to pay for the partially or defectively executed contract; and in such case, in order to ascertain what the defendant does, *ex æquo et bono*, really owe, he shall be allowed by way of recoupment such damages as he has sustained by reason of the non-performance of the contract, as it was entered into by the plaintiff, and which he could recover by a cross-action. Porter *v.* Woods, 3 Humphreys, 60; Crouch *v.* Miller, 5 Humphreys, 586. But on an executed contract, as in debt or *indebitatus assumpsit*, for the price of a slave sold and delivered, the defendant cannot recoup the damages accruing by reason of a breach of warranty. Henning *v.* Van Hook, 8 Humphreys, 678. So where an engineer sues for his stipulated salary, damages sustained by his employer by reason of his unskilful performance of his duties, cannot be set off. N. & K. Turnpike Co. *v.* Harris, 8 Humph. 558; and see also, Allen *v.* McNew, 8 Humphreys, 46.[2]

In Mississippi (during the existence of slavery), fraud in the sale of a slave could be proved in an action on the note given for the purchase money, under the plea of non-assumpsit. Simmons *v.* Cutreer, 12 Smedes & M. 584.

In Kentucky, also, it has been held that in an action brought on the contract for the price of goods sold, the defendant may give in evidence the breach of any warranty, or any fraudulent representation in the sale, and thus recoup the damages he has sustained. Culver *v.* Blake, 6 B. Monroe, 528.

In Wisconsin it has been held by the Supreme Court, in accordance with the decisions in New York, that "matters in diminution of the plaintiff's demand, arising out of the same transaction, and not technically an offset," can be set off by way of recoupment, provided notice be given with the plea. Norton *v.* Rooker, Wisconsin Reports, by T. P. Burnett, 1844, 33.

* Poulton *v.* Lattimore, 9 Barn. & Cres. 259 (1829).

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[1] See also, Stacy *v.* Kemp, 97 Mass. 166. The rule in McAlpin *v.* Lee, *supra*, is now settled law in this State. Kellogg *v.* Denslow, 14 Conn. 411; Hitchcock *v.* Hunt, 28 Conn. 343.

[2] But in Overton *v.* Phelan, 2 Head (Tenn.), 445, the Supreme Court say: "It is well settled upon common-law principles, that when the defendant has sustained damages by reason of the plaintiff's non-performance of his part of the agreement sued on, such defendant has the right to abate the plaintiff's verdict, and recovery, by the amount of . . . . . the damages which he would be entitled to recover in a cross-action by him against the plaintiff for the non-performance of his portion of the agreement."

In Illinois, recoupment is allowed in cases of contracts to furnish an article of a special character, which turns out unfit for the use for which it was designed. Mears *v.* Nichols, 41 Ill. 207.

notice, but the defence went to the whole action.[1] And in assumpsit* for a horse sold, the plaintiff having warranted him, it was held that the defendant had a right to give the breach of warranty in evidence, in reduction of damages. Again,† where the work was imperfectly done, for an agreed sum, Vaughan, B., said, "I think the rule that there should be an abatement of price for the non-performance of any part of the contract by the plaintiff, is a convenient rule."

But, in other cases, the rule has not been adhered to.‡ It has been held, indeed, that an attorney cannot recover against his client for work which was useless towards accomplishing the object which the client had in view. ‖ But in a recent case,¶ the rule of Templar *v.* M'Lachlan, above cited,** was reaffirmed; and it was held that if the work was only partly useless, the client's remedy is by a cross-action. It is worthy of remark, however, that in none of these cases is the term *recoupment* applied to a defence growing out of the defendant's counter-claim. It is uniformly restricted in England, I believe, [449] to that limitation of the plaintiff's demand which shows that he has really not suffered the loss which he alleges.

In a recent case in the English Exchequer,†† the whole subject was considered by that court. The suit was special assumpsit on a contract to build a ship for the plaintiff according to certain specifications; and the breach charged, that the work was insufficiently done, by reason of which the plaintiff had been obliged to refasten and repair her. The defendant pleaded a former suit brought by himself for the contract price, in which the now plaintiff gave evidence of the same breach of contract as that alleged in the present declaration; and averred that the jury deducted the compensation due the now plaintiff in that suit. The plea was held bad, substantially on the ground that in the former action the plaintiff could only have been allowed a deduction of damages from the agreed price so far as the ship fell short of the contract at the time of delivery, and not for subsequent repairs. Parke, B., said—

"The ground on which it was endeavored to support the plea, in a very ingenious argument, was this: That a defendant in an action for the stipulated price of a chattel, which the plaintiff had contracted to make for the defendant

* Street *v.* Blay, 2 B. & Adol. 456 (1831).
† Allen *v.* Cameron, 3 Tyr. 907, 1 Cr. & Mees. 832 (1833).
‡ Hill *v.* Featherstonhaugh, 7 Bing. 569.
‖ See also, Bracey *v.* Carter, 12 Adol. & Ellis, 373, where the same principle was recognized.
¶ Shaw *v.* Arden, 9 Bing, 287.
** *Ante*, 434.
†† Mondel *v.* Steel, 8 M. & W. 858.

[1] See *ante*, 293, note.

of a particular quality, or of a specific chattel sold with a warranty, and delivered, had the option of setting up a counter-claim, for breach of the contract in the one instance or the warranty in the other, in the nature of a cross-action; and that if he exercised that option, he was in the same situation as if he had brought such an action, and consequently could not, after judgment in one action, bring another; and the case was likened to a set-off under the statutes. This argument was founded on no other authority than an expression of Lord Tenterden, in giving the judgment of the court in the case of Street *v.* Blay; his Lordship having said that a breach of warranty might be given in evidence in an action for the price of a specific article sold, in mitigation of damages, 'on the principle, it should seem, of avoiding circuity of action.' But we are all of opinion that no such inference is to be drawn from that expression. What was meant was, that the sum to be recovered for the price of the article might be reduced by so much as the article was diminished in value by reason of the non-compliance with the warranty; and that this abatement was allowed in order to save the necessity of a cross-action. Formerly, it was the practice where an action was brought for an agreed price of a specific chattel sold with a warranty, or of work which was to be performed according to contract, to allow the plaintiff to recover the stipulated sum, leaving the defendant to a cross-action for breach of the warranty or contract; in which action, as well as the difference between the price contracted for and the real value of the articles, or of the work done, as any consequential damage, might have been re- [450] covered; and this course was simple and consistent. In the one case, the performance of the warranty not being a condition precedent to the payment of the price, the defendant, who received the chattels warranted, has thereby the property vested in him indefeasibly, and is incapable of returning it back; he has all that he stipulates for as the condition of paying the price, and therefore it was held that he ought to pay it, and seek his remedy on the plaintiff's contract of warranty. In the other case, the law appears to have construed the contract as not importing that the performance of every portion of the work should be a condition precedent to the payment of the stipulated price, otherwise the least deviation would have deprived the plaintiff of the whole price; and therefore the defendant was obliged to pay it, and recover for any breach of contract on the other side. But after the case of Basten *v.* Butter, a different practice, which had been partially adopted before in the case of King *v.* Boston, began to prevail, and being attended with much practical convenience, has been since generally followed; and the defendant is now permitted to show that the chattel, by reason of the non-compliance with the warranty in the one case, and the work in consequence of the non-performance of the contract in the other, were diminished in value. (Kist *v.* Atkinson, Thornton *v.* Place, etc.) The same practice has not, however, extended to all cases of work and labor, as for instance that of an attorney (Templar *v.* M'Lachlan), unless no benefit whatever has been derived from it; nor in actions for freight (Sheels *v.* Davies). It is not so easy to reconcile these deviations from the ancient practice with principle in those particular cases above mentioned, as it is in those where an executory contract, such as this, is made for a chattel to be manufactured in a par-

ticular manner, or goods to be delivered according to a sample (Germaine *v.* Burton), where the party may refuse to receive, or may return in a reasonable time, if the article is not such as bargained for; for in these cases the acceptance, or non-return, affords evidence of a new contract on a *quantum valebat;* whereas, in a case of a delivery with a warranty of a specific chattel, there is no power of returning, and consequently no ground to imply a new contract; and in some cases of work performed there is difficulty in finding a reason for such presumption. It must, however, be considered that in all these cases, of goods sold and delivered with a warranty, and work and labor, as well as the case of goods agreed to be supplied according to contract, the rule which has been found so convenient is established; and that it is competent for the defendant, in all of those, not to set off by a proceeding in the nature of a cross-action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by showing how much less the subject-matter of the action was worth, by reason of the breach of contract; and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action to that extent, but no more.

"The opinion, therefore, attributed on this record to the learned judge is, we think, incorrect and not warranted by law; and all the plaintiff could by law be allowed in diminution of damages on the former trial, was a deduc-
[451] tion from the agreed price, according to the difference of the time of delivery between the ship as she was, and what she ought to have been according to the contract; but all claims for damages beyond that, on account of the subsequent necessity for more extensive repairs, could not have been allowed in the former action, and may now be recovered."*[1]

Freight.—A question analogous to those which we have been considering is presented in the case of conflicting claims for freight, and for damages resulting from bad stowage or other negligence of the carrier. In England the rule is, that the consignee who has received the goods must pay the freight without deduction and resort to his cross-action for the damage.†[2] But

* For other English cases, see Leggett *v.* Cooper, 2 Stark. 103; Kist *v.* Atkinson, 2 Camp. 63; Okell *v.* Smith, 1 Stark, 107 (86); White *v.* Chapman, *Ib.* 113 (91); Denew *v.* Davirell, 3 Camp, 451; Sheels *v.* Davies, 4 Camp. 119; Caswell *v.* Coare, 96; 1 Taunt. 566; 2 *Ib.* 107; Montriou *v.* Jefferys, 2 Car. & P. 113; Hammond *v.* Holiday, 1 C. & P. 384; Bamford *v.* Harris, 1 Stark. 384.

† Davidson *v.* Gwynne, 12 East, 381; Sheels *v.* Davies, 4 Camp. 119; and s. c. 6 Taunt. 65. And see Abbott on Shipping, part iv, ch. ix, p. 428.

[1] The doctrine of this case has been lately extended in England. In an action for damages for the non-performance and improper performance by the defendant of work for the plaintiff, it appeared that the plaintiff had settled an action previously brought against him by the defendant for the price of the same work by paying the whole amount sued for. It was held by the court of Queen's Bench that, although the plaintiff might have set up the non-performance and improper performance, in the previous action against him, he had not been *bound* to do so, and could maintain a separate action for these causes. Davis *v.* Hedges, L. R. 6 Q. B. 687.

[2] Meyer *v.* Dresser, 33 L. J. (N. S.) C. P. 289. And it is there held that neither a usage

the inclination of judicial opinion in this country seems to be to allow the injury done by the negligence of the carrier to be set off as an answer *pro tanto*, to his claim for compensation. It has been so decided in Illinois and Pennsylvania.* So, also, the consignee of property, a part of which is not delivered, may recoup the damage so sustained in an action against him for the freight.† The same principle has been applied to the case of an agreement to load a vessel with a stipulated freight, where the defendant failed to comply with his contract, but third persons offered to make up the deficiency. Here it was held that the master was bound to accept the offer of such third persons, and that the defendant was entitled to recoup the freight moneys that they would have paid.‡[1]

TORT.—Nor is the doctrine of recoupment confined exclusively to cases of contract. It is often applied in cases of tort.[2] Thus, it has been held applicable, in New York, to a lien for freight, where the goods were sued for in trover.‖

PAYMENT NOT PLEADED.—A question very analogous to this is, how far evidence of payments when not pleaded, or when made after the commencement of the suit, is ad- [452]

* Edwards *v.* Todd, 1 Scammon, 463; Leech *v.* Baldwin, 5 Watts, 446; Humphrey *v.* Reed, 6 Wharton, 435.

† Hinsdell *v.* Weed, 5 Denio, 172.

‡ Hecksher *v.* M'Crea, 24 Wend. 304; *ante*, 361, and also 430. And see, to same point, Costigan *v.* Mohawk & H. R. R. 2 Denio, 610.

‖ Everett *v.* Saltus, 20 Wend. 267 and 273.

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prevailing all over the world giving the consignee the right to deduct from the freight the value of the missing goods, nor the law of the country of the consignee's domicil giving him such right (which being a matter of set-off not amounting to an extinguishment of the claim is therefore governed by the *lex fori*), applies to an action brought in England for the freight. *Ibid.*

[1] In an action brought by a warehouseman who has received goods from a common carrier on store for the owner, and has advanced to the carrier his charges for transportation, to recover the amount of his advances from the owner, the defendant cannot recoup damages for injuries received by the goods while in the carrier's hands, if such injuries were not apparent nor known to the warehouseman. The owner must look to the carrier for such damages. Sage *v.* Gittner, 11 Barb. (N. Y.) 120.

But in an action by a *carrier* for his freight, damages for injury to the goods, for which the carrier is liable, may be recouped. Boggs *v.* Martin, 13 B. Monr. (Ky.) 239.

In Illinois, a claim originating in contract, may be set up, by way of recoupment, against one founded in tort, if the counter-claims arise out of the same subject-matter, and are susceptible of adjustment in one action. But the defendant cannot, as in set-off, recover any excess in his favor. His claim is used in mitigation of damages only. Stow *v.* Yarwood, 14 Ill. 424.

In Missouri, a set-off is not admissible, where the claim on either side is for mitigated damages. Johnson *v.* Jones, 16 Mo. 494; Mahan *v.* Ross, 18 *Ibid.* 121; Pratt *v.* Menkins, *Ibid.* 158; Brake v. Corning, 19 Mo. 125.

[2] See Coulter's Case, 5 Rep. 30; *ante*, 429, n. And in a late case in Massachusetts, where the plaintiff sued in tort for fraudulent representations of the defendant concerning a horse which the defendant had taken from the plaintiff in exchange for another horse, the defendant was allowed to recoup *his* damage from the fraudulent representations as to the horse delivered by the plaintiff. Carey *v.* Guillow, 105 Mass. 18.

missible in the reduction of damages;[1] and the more reasonable rule in the latter case would seem to be, that in such case proof of the payment is admissible to show that the plaintiff has not sustained the entire injury for which he claims compensation.*

PAYMENTS AFTER SUIT.—It is well settled, however, that after an action is brought and costs incurred, the defendant cannot bar the plaintiff's suit by paying the debt merely, without also paying the costs. And where such payment is made, the plaintiff will generally be entitled, if the costs are not paid, to take judgment for nominal damages and his costs.† But if the payment is made in satisfaction of the debt, damages, and costs, then the verdict will be for the defendant.‡ A plea of payment into court in full satisfaction of all the causes of action in the declaration contained is good, being an answer to the damages as well as the debt.‖ But a plea of payment into court in debt, stating that the defendant never was indebted to the plaintiff to a greater amount than the sum paid into court, is bad, as not answering the damage for the detention of the debt.¶[2]

WISDOM OF THE DOCTRINE.—I cannot omit here to say, that the doctrine of recoupment as generally adopted in the United States, appears to me settled on just and philosophical principles, while at the same time there is no doubt that it works a serious innovation in the ancient rules which seek to produce singleness of issues. Those rules are, however, so far modified by the practice of double pleading, set-off, and lastly, of recoupment, that it becomes a grave question whether they are now of any very considerable practical value; and it is at least quite doubtful whether the forms of action are of any great utility, so

* Shirly *v.* Jacobs, 2 Bing. (N. C.) 88; Lediard *v.* Boucher, 7 Car. & Payne, 1; Richardson *v.* Robertson, 1 Mees. & Wels. 463. Vide *ante*, 110.

† Belknap *v.* Godfrey, 22 Verm. 288.

‡ Thame *v.* Boast, 12 Q. B. R. 898.

‖ Triston *v.* Barrington, 16 M. & W. 61.

¶ Lowe *v.* Steele, 15 M. & W. 380.

[1] In an action on a note, a payment made on the note after suit brought, may be given in evidence to reduce the damages. Bischof *v.* Lucas, 6 Ind. R. 26. In New Hampshire, it is held that on the general issue evidence of payment since suit brought may be given in mitigation. And in such cases, it seems that the court has a discretion as to costs. Dana *v.* Sessions, 46 N. H. 509. This goes directly counter to the old principle, laid down in the text, p. 110.

[2] The *principle* of recoupment may be applied, in a proper case, *after* the plaintiff has obtained a verdict. For instance, where damages have been recovered in an action of tort, and the defendant has, in effect, satisfied them in part, the court will reduce the verdict *pro tanto*. And where the plaintiff had sued in trover for the value of goods in the defendants' possession, and after a verdict in his favor, the defendants had paid rent for the leasehold where the goods were, and which he was liable for, the court deducted the amount of the rent from the execution. Plevin *v.* Henshall, 10 Bing. 24.

far as they are supposed, or were originally intended, to produce a single issue.[1]

[1] COUNTER-CLAIMS.—The disposition to adjust all controversies between the same parties in one suit at law as well as in equity, so obviously increasing of late years in the United States, has resulted in New York in the legal sanction in the Code of Procedure as a part of the defendant's answer of "counter-claims" (Code of Procedure, § 149), which are thus defined (§ 150):—

The counter-claim must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action and arising out of one of the following causes of action:—

1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action.

2. In an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action.

The defendant may set forth by answer as many defences and counter-claims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both. See Peck *v.* Brown, 2 Robertson, 119.

These enactments have been substantially repeated in most of the other States which have adopted codes of practice (*vide* p. 41, head p. 38, n. 1), and under the provisions of law and rules of court requiring the different counter-claims to be separately and clearly stated, it is believed that the avoidance of circuity and variety of action has been found to more than counterbalance the advantage which lawyers have so long attached to the logical simplicity of issues which was the aim of the common-law practice.

The principle, however, of allowing as an offset to a claim on one contract, damages for breach of another contract, is not uniformly introduced into the codes of practice. In Ohio, such a counter-claim is not allowed. Loomis *v.* The Eagle Bank, 10 Ohio St. 327. And in New York, a breach of a contract with the plaintiff's assignor other than that sued on, cannot be allowed as a counter-claim, although in some cases it might come within the statute of set-off. McIlvaine *v.* Egerton, 2 Robertson (Superior Court, N. Y.) 422. See *ante*, 41, note 1. In Maryland, in an action of trover by the trustee of an insolvent, it was held that defendant might show, for the purpose of recouping, that the property in question came into his hands as security for a debt owed him by the insolvent. Dowler *v.* Cushwa, 27 Md. 354.

CHAPTER XVIII.

THE RULE OF DAMAGES IN ACTIONS FOR TORTS GENERALLY.

Forms of Action prescribed for Wrongs.—Trover.—Case.—Trespass.—Replevin.—Unless Aggravation is proved, the Measure of Damages in Actions of Tort is Matter of Law.—Where Aggravation is shown, the Jury have a Discretion to give Exemplary or Vindictive Damages beyond Compensation for Actual Loss.—Principles Controlling Exemplary Damages.—All the attendant Circumstances may be proved.—Rule where both Plaintiff and Defendant are in fault.—Collision.—Infants.—Cases of Felony.

HAVING thus disposed of the subject of contracts, we proceed now to the consideration of wrongs. The technical forms prescribed by the English law for the redress of wrongs, or as they are termed, actions *ex delicto*, are trover, case, trespass, replevin, and detinue.*[1]

ARBITRARY DIVISION OF ACTIONS.—The divisions of our system in this respect are arbitrary; for, as we have already had occasion to notice,† there are many actions nominally in tort, which, in respect to the measure of relief, are treated as virtually actions *ex contractu;* and in these cases a fixed rule of damages is adhered to.[2] So in an action of trespass without any circumstances of aggravation, the Supreme Court of the United States said that, the case not being one which called for vindictive or exemplary damages, the plaintiff was only entitled to recover for his actual injury.‡[3] So, there are many

* The old action of detinue is of comparatively rare occurrence, and in New York is abolished by statute.

Grotius thus begins his chapter: *De Damno. Supra diximus ejus quod nobis debetur fontes esse tres; pactionem—maleficium—legem. De pactionibus satis tractatum. Veniamus ad id quod ex maleficio naturaliter debetur.* Lib. ii, cap. 17, § 1, De Jure Belli et Pacis. Grotius treats only of Damnum, under this head of Maleficium. De Jur. Bell. et Pac. lib. ii, cap. 17; *vide*, also, *ante*, 10.

† *Ante*, 335 and 355.

‡ Conard *v.* The Pacific Ins. Co. 6 Peters, 262, 282. See also, Bell *v.* Cunningham, 3 Peters, 69; Tracy *v.* Swartwout, 10 Peters, 81, 95.

[1] As to the damages which may be awarded to a party injured by an act committed in contempt of court, in proceedings to punish for the contempt, see the People *v.* Compton, 1 Duer (N. Y.), 512.

[2] See Walrath *v.* Redfield, 18 N. Y. 457; Moody *v.* McDonald, 4 Cal. 297; Nickerson *v.* Harriman, 38 Maine, 277.

[3] Where the action is brought to recover the damages already sustained by a trespass, the fundamental rule is that actual compensation is given for actual loss only, as in the case

cases of tort where no question of fraud, malice, or oppression intervenes; and in those cases the measure of compensation is matter of law. So the Supreme Court of New [454] Jersey says, in an action of *trespass quare clausum fregit*, "In actions of trespass, where the plaintiff complains of no injury to his person or feelings; where no malice is shown; where no right is involved beyond a mere question of property; where there is a clear standard for the measure of damages, and no difficulty in applying it,—the measure of damages is a question of law, and is necessarily under the control of the court.* And so again in North Carolina, in an action of trespass for destroying a building by fire, the jury at Nisi Prius were directed that the measure of damages was not the value of the building, but the amount it would have taken to rebuild it if destroyed. But this, on review, was held wrong; and the court said, "The proper measure in actions of this kind is the real value of the property destroyed, unless the trespass is committed wantonly

* Berry *v.* Vreeland, 1 Zabriskie's N. J. R. 183.

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of contracts (*ante*, 200, 304). Thus in an action for false imprisonment, where the plaintiff claimed as special damage the costs of an attorney employed by him, and the proof showed he had employed the attorney but not paid his bill, it was held the damage was not proved. Pritchet *v.* Boevey, 1 C. & M. 775. So in an action of assault and battery, expenses incurred only and not paid are not recoverable. Ward *v.* Haws, 5 Minn. 440. See Witsell *v.* Riggs, 14 S. C. Law (Rich.), 186; Jones *v.* Lewis, 9 Dowl. 143.

This rule still leaves to be defined what is included in the "actual injury." See *post*, ch. xxii; and as to the damages for personal injuries see p. 552, note. See also, the observations of Mr. Justice Strong, in delivering the opinion of the Supreme Court of Pennsylvania, in Heil *v.* Glanding, 42 Penn. 493; Jefcoat *v.* Knotts, 13 Rich. (S. C.) L. R. 50; 11 Rich. (S. C.) L. R. 649; Ives *v.* Humphreys, 1 E. D. S. (N. Y.) 196; Shannon *v.* Burr, 1 Hilt. (N. Y.) 39; Grier *v.* Ward, 23 Geo. 145. No uniform test or rigid rule fixes the extent of compensation in actions in the nature either of trespass or case for injuries to property. Different measures of redress may be obtained for the same injury under different circumstances. What is compensation to the defendant; what would make his loss good to him, under the situation in which he was placed at the time the injury occurred, is the inquiry; and in determining it, all material and relevant circumstances should be considered. Thus in an action for injury to the plaintiff's well, from the defendant's gas works, it was held that it would be proper to ascertain the cost of furnishing a sufficient quantity of water, equally pure with that of the well before the injury happened. When that cost should be ascertained, and also the cost of keeping in repair the machinery necessary for supplying the water from the new source, the sum of which the annual interest would be equivalent to the expense of furnishing the water, and making the repairs, would be a fair measure of the damages. But if the supply, when thus obtained, were inferior in salubrity or taste to what the plaintiff had before, or if there were danger that it would not be permanent, these circumstances should also be taken into account. Still another mode would be to ascertain the depreciation of the property, by reason of the erection of the gas works, and in doing this, all the circumstances which might show its decrease in value should be considered. Ottawa Gas Light and Coke Co. *v.* Graham, 28 Ill. 73. The last mode suggested in the foregoing case is usually the true one; and in cases where the value of the property is known or ascertainable, and where there is no question as to the defendant's responsibility for the whole damage, the measure of the plaintiff's recovery is commonly the difference between the value of the property immediately before the harm was done, and its value in the condition produced by the injury. Exceptional cases, however, may arise, where the damage can be repaired at a less cost than the sum which equals the depreciation in the value of the property, and in such cases, the expense of the repairs only should be allowed.

or maliciously, when the jury may, if they think proper, give vindictive damages.[1] But whether they should have been given or not was a question which ought to have been submitted with proper instructions to the jury."*[2] But, on the other hand, where circumstances of aggravation are made apparent, where the motive of the defendant is grossly fraudulent, malicious, or oppressive, the amount of relief is left largely to the discretion of the jury.

EXEMPLARY DAMAGES.—In regard to these latter cases, we have already observed the general disregard of the principle of compensation by which they are marked.† And I have stated the rule to be, that where gross fraud, malice, or oppression appears, the jury are not bound to adhere to the strict line of compensation, but may, by a severer verdict, at once impose a punishment on the defendant and hold up an example to the community. I proceed now to a review of the cases in which this salutary doctrine has been maintained.

IN TORT THE DEFENDANT'S INTENT IS MATERIAL.—That [455] the intent of the defendant is material in regard to damages, has always been recognized in our law: "Damages are graduated by the intent of the party committing the wrong."‡ Indeed, the rule is, that if the rights of another party are invaded, although without evil design, and even if the act be purely accidental, the trespass must be answered for in damages.[3] The question of intention is only urged in mitigation or aggravation of damages. Thus in an early decision, a case of trespass *quare clausum fregit* is cited, where the defendant

* Wylie *v.* Smitherman, 8 Iredell, 236.

† *Ante*, 39. In addition to the cases cited in the text, others will be found bearing on the subject. Leland *v.* Stone, 10 Mass. 459; Weld *v.* Bartlett, 10 Mass. 470, 473; Stone *v.* Codman, 15 Pick. 297; Larned *v.* Buffington, 3 Mass. 546; Richards *v.* Farnham, 13 Pick. 451. And the doctrine of our law is supported by writers of more than mere judicial authority. Thus, says Mr. Rutherforth, "Indeed, in many instances of gross fault, it is so difficult to distinguish between a mere neglect and a malicious design, that besides the demand of reparation for damages done, some punishment may reasonably be inflicted upon the person so offending." Rutherforth's Institutes of National Law, book i, ch. 17, Reparation, p. 209.

‡ Kron *v.* Schoonmaker, 3 Barb. S. C. R. 647, 650.

[1] See Perkins *v.* Towle, 43 N. H. 220.

[2] Compare Carrell *v.* Municipality No. 2, 7 La. Ann. 632. The injured party is entitled to damages for the trespass itself, independently of the injury it may occasion. So where the plaintiff's hogs were wantonly shot, his use of the pork was held only to relieve the defendant from liability for its value, and neither to affect the plaintiff's right of action, nor diminish the damages to which he was entitled for the trespass. Champion *v.* Vincent, 20 Tex. 811.

[3] See Price *v.* Murray, 10 Bosw. (N. Y.) 243.

pleaded "he had an acre lying next the six acres (*locus in quo*), and on it a hedge of thorns; he cut the thorns, and they, *ipso invito*, fell upon the plaintiff's land; and the defendant took them off as soon as he could, which is the same trespass; and the plaintiff demurred, and it was adjudged for the plaintiff; for though a man do a lawful thing, yet if any damage do hereby befall another, he shall answer for it if he could have avoided it. As, if a man fell a tree, and the boughs fall on another, *ipso invito*, yet the action lies. If a man shoot at butts and hurt another unawares, an action lies. I have land through which a river runs to turn your mill, and I top the sallows growing on the river side, which accidentally stop the water so as your mill is hindered, an action lies. If I am building my own house, and a piece of timber fall on my neighbor's house and breaks part of it, an action lies."* So in a recent case in the Common Pleas, when in an affray the plaintiff was struck by accident, Bosanquet, J., said to the jury, "The plaintiff is entitled to your verdict, whether it was done intentionally or not. But the intention is material in considering the amount of damages."† So, also, in New York, in an action against a company for blasting negligently done by their agents.‡ The principle that in trespass the intent is not conclusive, is carried so far that a lunatic is held liable for his tortious acts, as, an insane justice in an action for false imprisonment.‖ On principle this should never have been permitted.[1] In the case of the *compos mentis*, although the intent be not decisive, [456] still, the act punished is that of a party competent to foresee and guard against the consequences of his conduct; and inevitable accident has always been held an excuse. In the case of the lunatic it may be urged, both that no good policy requires the interposition of the law, and that the act belongs to the class of cases which may well be termed inevitable accidents.

In some Cases Punishment of the Defendant is Added to or Substituted for Compensation to the Plaintiff.—It might be said, however, that the malicious or insolent intention does in fact increase the injury, and the doctrine of exemplary damages might thus be reconciled with the strict notion of compen-

* Lambert *v.* Bessey, Sir T. Raym. 421.
† James *v.* Campbell, 5 Car. & Payne, 372.
‡ Hay *v.* Cohoes Co. 3 Barb. S. C. R. 42.
‖ Krom *v.* Schoonmaker, 3 Barb. S. C. R. 647; Morse *v.* Crawford, 17 Verm. 499; Bush *v.* Pettibone, 4 Comstock, 300.

[1] But although an insane defendant should not be *punished* either civilly or criminally for his acts, yet a verdict to the extent of compensation for the actual loss sustained by the injured party in such a case appears to us right.

sation; but it will appear from the cases we now proceed to examine, that the idea of compensation is abandoned and that of punishment introduced.

English Cases.—So in an action of trespass, assault, and imprisonment, the act complained of being an arrest of the plaintiff as printer of the "North Briton," under a general warrant issued by Lord Halifax, then Secretary of State—no actual ill-treatment being alleged, the jury having found a verdict for £300, on a motion for a new trial on the ground of excessive damages, Lord Chief Justice Pratt, afterwards Lord Camden, said,—

"I cannot say what damages I should have given if I had been upon the jury; but I directed and told them they were not bound to any certain damages, against the solicitor-general's argument. The personal injury done to the plaintiff was very small; so that if the jury had been confined by their oath to consider the mere personal injury only, perhaps £20 damages would have been thought damages sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his rank and station in life, did not appear to the jury in that striking light in which the great point of law, touching the liberty of the subject, appeared to them at the trial; they saw a magistrate over all the king's subjects exercising arbitrary power, violating *magna charta*, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them; they heard the king's counsel, and saw the solicitor of the treasury endeavoring to support and maintain the legality of the warrant in a tyrannical and severe manner; these are the ideas which struck the jury on the trial; and I think they have done right in giving exemplary damages."*

And the motion for a new trial was denied.†

[457] So, in an action for trespass, for debauching the plaintiff's daughter, a verdict having been found for £50, on a motion for a new trial on the ground that the damages were excessive, Wilmot, Lord Chief Justice, said, "Actions of this sort are brought for example's sake; and although the plaintiff's loss in this case may not really amount to the value of twenty shillings, yet the jury have done right in giving liberal damages." ‡

* Huckle *v.* Money, 2 Wils. 205.

† Beardmore *v.* Carrington, 2 Wils. 244, was an action also growing out of these general warrants, where a verdict was found for the plaintiff in £1,000. As he had been imprisoned but six days, a motion was made for a new trial, on the ground of the excessiveness of the damages. But it was refused. Lord Campbell in his *Lives of the Chancellors*, vol. v, p. 249, reports Lord Chief Justice Pratt to have said, "As to the damages, I continue of opinion that the jury are not limited to the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, and as a proof of the detestation in which the wrongful act is held by the jury." But I cannot find this language in the case as reported by Wilson.

‡ Tullidge *v.* Wade, 3 Wils. 18.

In an action in the English Common Pleas, of trespass *quare clausum fregit*, it appeared that the plaintiff, a gentleman of fortune, was shooting on his own estate, when the defendant, a banker, magistrate, and member of Parliament, forced himself on the plaintiff's land, fired at game several times, and used very intemperate language. The jury found a verdict for £500; and on a motion to set it aside for excess, Gibbs, C. J., said,—

"I wish to know, in a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except damages? To be sure, one can hardly conceive worse conduct than this. What would be said to a person in a low station in life, who should behave himself in this manner? I do not know upon what principle we can grant a rule in this case, unless we were to lay it down that the jury are not justified in giving more than the absolute pecuniary damage that the plaintiff may sustain. Suppose a gentleman has a paved walk in his paddock, before his window, and that a man intrudes, and walks up and down before the window of his house, and looks in while the owner is at dinner, is the trespasser to be permitted to say, 'Here is a half-penny for you, which is the full extent of all the mischief I have done'? Would that be a compensation? I cannot say that it would be." And Heath, J., said, "I remember a case where the jury gave £500 damages for merely knocking a man's hat off; and the court refused a new trial. There was not one country gentleman in a hundred who would have behaved with the laudable and dignified coolness which this plaintiff did. It goes to prevent the practice of duelling, if juries are permitted to punish insult by exemplary damages."*

In a case in the King's Bench, which was trespass for breaking the plaintiff's close, and laying poison upon [458] it to destroy the plaintiff's poultry, the defendant contended that he was only liable for the value of the fowls destroyed; but Abbott, J., told the jury that they might consider not only the mere pecuniary damage, but also the intention, whether for insult or injury; and the verdict was £50.†

So, in a recent case,‡ the Court of Exchequer said, "In actions for malicious injuries, juries have been allowed to give what are called vindictive damages, and to take all the circumstances into consideration."

So in the Exchequer Chamber, Lord Denman recently said that the actions of trespass of real and personal property were an extension of that protection which the law throws around the person, and that substantial damages may be recovered in respect of such rights, though no loss or diminution in value of property may have occurred.‖

* Merest *v.* Harvey, 5 Taunt. 442.
† Sears *v.* Lyons, 2 Stark. 317.
‡ Doe *v.* Folliter, 13 Mees. & Wels. 47.
‖ Rogers *v.* Spence, 13 M. & Wels. 571. See also, Williams *v.* Currie, 1 Man. Gr. & Sc. 841.

American Cases.—In the United States generally, the power of the jury to give exemplary damages where circumstances of aggravation render it impossible to apply any fixed rule of law, has been steadily maintained.

So on the Pennsylvania circuit: "I admit," said Washington, J.,* "that in cases where merely vindictive damages are sued for, the jury act without control on the subject of damages; because there is no legal rule by which they can be measured; and unless they are so extravagant as to induce a suspicion of improper conduct, the court will not interfere."

The rule is well settled in New York. So in an action for libel, it was urged on a motion for a new trial, that the public character of the plaintiff as an officer of government, and the evil example of libels, were stated by the judge to the jury, as considerations with them for increasing the damages; but Kent, C. J., delivering the opinion of the Supreme Court, said, "Surely this is the true and salutary doctrine. The actual pecuniary damages in actions for defamation, as well as in other [459] actions for tort, can rarely be computed, and are never the sole rule of assessment." And after reviewing the English cases, the court proceeded: "But it cannot be requisite to multiply instances in which the doctrine contained in this part of the charge has received the sanction of English and American courts of justice. It is too well settled in practice, and is too valuable in principle, to be called in question."† Spencer, J., held still stronger language. "In vindictive actions," he said, "such as for libels, defamation, assault and battery, false imprisonment, and a variety of others, it is always given in charge to the jury that they are to inflict damages for example's sake, and by way of punishing the defendant."

So again, in another case,‡ where trespass was brought for beating a horse to death, the judge charged, that if they found for the plaintiff, it was a case in which from the wantonness and cruelty of the defendant's conduct, the jury had a right to give smart money. A verdict was found for $75. A motion was made to set aside the verdict for misdirection, and for excessive damages; but the Supreme Court of New York said, "Great barbarity was proved on the part of the plaintiff; we think the charge of the judge was correct, and should have been better satisfied with the verdict if the amount of damages had been greater and more exemplary;" and the motion was denied.

The same principle was recognized on the Massachusetts cir-

* Walker *v.* Smith, 1 Wash. C. C. R. 152.
† Tillotson *v.* Cheetham, 3 J. R. 56 and 64.
‡ Woert *v.* Jenkins, 14 J. R. 352.

cuit, by Mr. Justice Story,* who said, "In cases of marine torts, or illegal captures, it is far from being uncommon in the Admiralty to allow costs and expenses, and to *mulct the offending parties, even in exemplary damages*, when the nature of the case requires it. Courts of Admiralty allow such claims, not technically as costs, but on the same principle as damages are often allowed in cases of torts by courts of common law, as a recompense for injuries sustained, as *exemplary damages*, or as a remuneration for expenses incurred, or losses sustained, by the misconduct of the other party."

So, again, the same learned judge, on the Maine circuit, in an action for malicious prosecution, used this language: "If in the present case there was on the part of the defendant a want of probable cause; yet if he acted under a mistaken sense of duty and without any intention of oppression, it was [460] at most a case for *compensatory* and not for *vindictive* damages.†

So in New Hampshire, in an action[1] on a case to recover damages, resulting from defects of a bridge which the defendants were bound to repair, the jury were instructed that exemplary damages might be allowed in their discretion, in case they believed there had been gross negligence on the part of the defendants; and on a motion for a new trial for misdirection, the Superior Court reviewed the English and American cases, and closed by saying, "The principle being thus established, that in actions for torts to the person and to personal property, the jury may give liberal or exemplary damages in their discretion, damages beyond the actual injury sustained, for the sake of the example, the only remaining inquiry is whether the present case was proper for the exercise of that discretion." And it was held to be so. ‡[2]

* Boston Manuf. Co. *v.* Fiske, 2 Mason, R. 120.

† Wiggin *v.* Coffin, 3 Story, 1.

‡ Whipple *v.* Walpole, 10 N. H. R. 130.

[1] But while the doctrine of examplary damages is fully maintained in New Hampshire, (see Belknap *v.* Railroad, 49 N. H. 358, cited *post*, 466, n), the case of Whipple *v.* Walpole has been overruled, as not sanctioned by the statute under which the action was brought. Woodman *v.* Nottingham, 49 N. H. 387, 394.

[2] ANIMALS.—When, in actions for injuries to animals, or indeed to any property, there is no aggravation, the damages should be confined to such as are necessary and unavoidable. And where the plaintiff's horse was drowned in consequence of a collision of canal boats, it was held wrong to allow besides the value of the horse and interest on that value, the expense of hiring another horse to tow the plaintiff's boat to its place of destination. Edwards *v.* Beebe, 48 Barb. (N. Y.) 106. In this case it did not appear that the plaintiff could not have bought another horse where the injury occurred; otherwise he would have failed to recover actual compensation. And although in this class of actions the value of property destroyed with interest for the time the owner was deprived of it, will compensate him for the loss if no special or extraordinary damage occurred, yet if the plaintiff, besides losing his property,

So in Connecticut, in an action on the case for gross negligence, it was said by Church, J., in delivering the opinion of the Supreme Court of Errors, "There is no principle better established and in practice more universal, than that *vindictive damages or smart money* may be and is awarded by the verdict of juries, and whether the form of action be trespass or case."*

So in Pennsylvania, Gibson, J., delivering the opinion of the court, said, "In cases of personal injury, damages are given not to compensate but to punish."†

And the doctrine has been fully adopted by the Supreme Court of the United States. In an action of trover,‡ brought for goods illegally seized by the collector of New York under instructions from the secretary of the navy, his immediate superior, the circuit judge charged that the collector having acted in good faith should not be subjected to the payment of more than nominal damages. But the Supreme Court said, "Where a ministerial officer acts in good faith, for an injury done, he is not liable to exemplary damages; but he can claim no [461] further exemption where his acts are clearly against law.

* Linsley *v.* Bushnell, 15 Conn. 225, and Huntley *v.* Bacon, 15 Conn. 271.

† Pastorius *v.* Fisher, 1 Rawle, 27; but it is to be noticed that the remark is *obiter*.

‡ Tracy *v.* Swartwout, 10 Peters, 81.

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lose also the use of it under circumstances which necessarily subject him to a greater expense beyond the value of the property than the interest would compensate, further compensation should be given to that extent.

And where the driver of a street car negligently attempting to pass the horse and wagon of an expressman, which had been temporarily left in the city street near the curb-stone, the car was brought into contact with the wagon, and the horse, having been thrown in consequence on the curb-stone and against a tree, received a fatal injury, compensation for the loss of the profits of the plaintiff's business during the time reasonably necessary to enable him to select another horse, was allowed to be included in the damages recovered by him. Albert *v.* The Bleecker Street Railroad Company, 2 Daly, 389. See, however, McLaughlin *v.* The City of Bangor, 58 Maine, 398, *post*, 552, n.

Again, in an action to recover damages from a bridge corporation for the loss of a horse by reason of a defect in a passage-way leading to the bridge, the plaintiff was held entitled to recover, in addition to the value of the horse, the money prudently though ineffectually spent in trying to cure it. Watson *v.* Lisbon Bridge, 14 Maine, 201. So in two similar actions where the injury was not fatal, it was held that the plaintiffs might recover, besides the diminution of the market value of the horses, occasioned by the injury, such money as they had paid in reasonable efforts to cure them, and also a reasonable compensation for their own services in trying to cure them, and for the loss of the use of the horses under such treatment, it not appearing that these expenses exceeded in amount the benefit thereby done in diminishing the injurious effects of the defendants' negligence. Gillett *v.* Western Railroad Corporation, 8 Allen, 560. But we think, with deference, as already suggested, that the qualification that the damages in such a case should not exceed the animal's value is not always a necessary one. The rule in the above case of Watson *v.* Lisbon Bridge, seems to us correct. If the efforts to save the animal were proper, although, as it turns out, unavailing, the plaintiff would fail to receive compensation, unless he recover the expense thus caused, besides its value; and even if the animal survives, if the expense properly sustained in curing it, added to its value after the cure, exceed its sound value, we do not see why the whole loss should not be made good. See for an analogous ruling in a case of collision, The Glaucus, 1 Lowell, 366 *post*, 469, n. Besides, in the present day humanity is happily not to be ignored in judicial proceedings, and if an expensive treatment were necessary to save the animal from suffering, we think a plaintiff who employed such treatment should not lose by it.

The good faith with which the defendant seems to have acted, should not exempt him from *compensatory* damage."

So in a case of marine trespass, brought against the owners of a privateer for an illegal seizure, the Supreme Court of the United States said, "This is a case of gross and wanton outrage. The honor of the country and the duty of the court equally require that a just compensation should be made to unoffending neutrals, for all the injuries and losses actually sustained by them. And if this were a suit against the original wrong-doers, it might be proper to go yet further, and visit upon them, in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct. But it is to be considered that this is a suit against the owners of the privateer; they are innocent of the demerit of the transaction. Under such circumstances, we are of opinion they are bound to repair all the real injuries and personal wrongs sustained by the libellants, but they are not bound to the extent of vindictive damages." *

So in Connecticut, it has been said, that in actions for injuries to personal property, "the jury are not restricted to the pecuniary loss of the plaintiff.†

So in Pennsylvania, "that with a view to promote the peace and quiet of society, and to protect every one in the full enjoyment of his rights, the jury are at liberty to give vindictive or exemplary damages." ‡

In Alabama it has been recently said, in reference to the action for malicious prosecution, that "the common law in such cases allows the jury, if they choose, to make an example of the defendant when sued for redress, and will allow them to go beyond the actual damage the party has sustained." ‖

So in Louisiana, that damages are to be measured by the extent of injury; except where the defendant has been guilty of gross misconduct, and then vindictive damages may be sometimes given by the jury.¶

In New York the general rule has been repeatedly declared. So, in an action for libel, it was said by the [462] chancellor, in the Court of Errors, "The jury may not only give such damages as they think necessary to compensate the plaintiff for his actual injury, but they may also give damages by way of punishment to the defendants. This is usually denominated exemplary damages, or smart money." **

The subject has been again recently examined in the same

* Story, J., in the Amiable Nancy, 3 Wheaton, 546.

† Merrills *v.* Tariff Man'g Co. 10 Conn. 384.

‡ Phillips *v.* Lawrence, 6 Watts & Serg. 150.

‖ Donnell *v.* Jones, 13 Ala. N. S. 490, 502.

¶ Nelson *v.* Morgan, 2 Martin L. R. 257.

** King *v.* Root, 4 Wend. 113, 139.

State, and the general principle very clearly stated. It was an action for assault and battery, where it was insisted that the fact that the defendant had been punished criminally for the offence should be received in evidence to mitigate damages in the civil suit. The court held otherwise, saying,—

"In vindictive actions, and this is agreed to come within that class, jurors are always authorized to give exemplary damages, when the injury is attended with circumstances of aggravation; and the rule is laid down without the qualification, that we are to regard either the probable or the actual punishment of the defendant by indictment and conviction at the suit of the people. . . . We concede that smart money allowed by a jury, and fines imposed at the suit of the people, depend on the same principle. Both are penal, and intended to deter others from the commission of the like crime. The former, however, becomes incidentally compensatory for damages, and at the same time answers the purposes of punishment."*

In a still more recent case, in the Court of Errors of the same State, Mr. Senator Strong said, "In aggravated cases of this nature, are not jurors daily charged to give such damages as shall not only remunerate the plaintiff, but operate as a punishment to the defendant—as shall deter him and others in like case offending, from the perpetration of similar enormities?" †

A very full discussion has been recently had of the [463] subject in Pennsylvania, when the following language was held, and the doctrine well maintained on principle:—

"In trespass, the *quo animo* is certainly not material to the question of liability; nor is it so even to the quantum of damages, in order to bring it below the actual injury. The common law rejects the compromising principle of the civil law which divides the loss betwixt parties equally blameless; and acts on a sterner but more exact rule of justice, by casting the whole on him who occasioned it, and requiring him to bear the consequences of his own acts and his own mischances. But though mitigant circumstances may not reduce the compensation below actual loss, may not circumstances of aggravation be suffered to enhance it? Whatever be the speculative notions of fanciful writers, the authorities teach that damages may be given in peculiar cases, not only to compensate, but to punish. There are offences against morals, to which the law has annexed no penalty as public wrongs, and which would pass without repre-

* Cooke *v.* Ellis, 6 Hill, 466. See also, Tifft *v.* Culver, 3 Hill, 180; Auchmuty *v.* Ham, 1 Denio, 495; and Brizsee *v.* Maybee, 21 Wend. 144, where it is suggested the jury may give smart money in replevin.

In England, however, it has been held that a party not suffering any actual injury, who has preferred an indictment, and succeeded, and received from the treasury a portion of the fine imposed on the defendant, is not entitled in an action against the same defendant to recover more than nominal damages. Jacks *v.* Bell, 3 Car. & Payne, 316.

† Burr *v.* Burr, 7 Hill, 207, 217; and see the rule very strongly laid down in cases of slander of title, in Kendall *v.* Stone, 2 Sandf. S. C. 269.

hension, did not the providence of the courts permit the private remedy to become an instrument of public correction. Such, in a signal degree, is the function of an action for debauching a daughter, in which the consequential loss of service—the legal and technical injury—is compensated a thousand-fold though its value is as capable of accurate estimation as that of any other commodity. It is idle to say that loss of service is not the real gravamen. The law tolerates no anomaly so monstrous as a count for one cause of action, and a recovery for another. Were damages given not to castigate but to remunerate for loss of prospects, comfort, and honor,—if haply there could be an equivalent for these,—the count and the evidence would conform to the grievance; instead of which, it is indispensable to assert the evidence of servitude, and to prove it. As regards the plaintiff, then, the ostensible wrong is the real one; but as regards the public, it may be a very different thing. On no other principle could more be given than is commensurate with what the law admits to be an injury. On what other principle are the circumstances of the defendant put before the jury for the purposes of aggravation or mitigation, in perhaps all cases of personal tort? The ability of the plaintiff legitimately enters into the estimate of compensatory damages, because a dollar is worth less to a rich man than to a poor one; but the extent of an injury has no imaginable relation to the means of him who is to repair it. In actions whose end is clearly compensation, and no more—trover and debt for example—the law inquires not into the ability of him who has converted my chattels, or withheld my money, but gives me the same damages or interest, whether he be rich or whether he be poor, or whether the wrong were more or less excusable in a moral view; and the converse shows that where the defendant's circumstances are brought into the account, something else than individual reparation is contemplated. Nor can it be said that the wrong-doer is to suffer in order to appease the resentment of the injured, and that even vindicatory damages are in truth compensatory. The purposes of the law are more elevated than the gratification of revenge. Mental or bodily pain is doubtless a legitimate subject of amends, produced, however, not by the infliction of suffering, but by a pecuniary [464] equivalent. The enhancement of damages, by the ability of the defendant, not being designed for the benefit of the plaintiff, must consequently be for something beyond compensation. That corrective damages may be given for the sake of example, *is as old as the law itself*."*

But in an amicable action it is error to tell the jury they were not confined to the actual damage.† So in New York, in actions for the loss of service (not being for seduction), the

* McBride *v.* McLaughlin, 5 Watts' R. 375. In Kentucky, see Morrison's Ex'rs *v.* Hart, 2 Bibb, 4, and Smith *v.* Lush, 4 Bibb, 502. On the Massachusetts circuit, see Whittemore *v.* Cutter, 1 Gall. 478, 483. In Conard *v.* Pacific Ins. Co. 6 Peters, 262, 282, see a very strong charge at the circuit. Where, however, two persons are jointly sued for an assault or other trespass, only one of whom has acted from improper motives, the damages ought not to be assessed with reference to the act and motives of the most guilty or the most innocent party, but the true criterion of damage is the whole injury which the plaintiff has sustained from the joint act of trespass. Clark *v.* Newsom, 1 Exch. R. 131.

† Amer *v.* Longstreet, 10 Penn. St. 145.

father cannot recover more than actual damages, as the child may maintain his own suit.*[1]

In an exceedingly well reasoned case on the Pennsylvania circuit, Mr. Justice Grier said,—

"It is a well-settled doctrine of the common law, though somewhat disputed of late, that a jury, in actions of trespass or tort, may inflict exemplary or vindictive damages upon a defendant, having in view the enormity of the defendant's conduct rather than compensation to the plaintiff. Indeed, in many actions, such as slander, libel, seduction, etc., there is no measure of damages by which they can be given as compensation for an injury, but are inflicted wholly with a view to punish and make an example of the defendant."†

So, also, it has been said in Illinois, "In vindictive actions the jury are always permitted to give damages for the double purpose of setting an example and punishing the wrong-doer." ‡ So, again, in an action of trespass for assault and battery, it was said, "In this class of cases the jury may give exemplary damages, not only to compensate the plaintiff, but to punish the defendant." ‖ And in Texas the principle has been very recently recognized.¶

[465] So, also, recently, in the State of Alabama, in an action of trespass *quare clausum fregit.*** In a case of deceit, in South Carolina, the court said that the jury were at liberty to compensate the plaintiff, and punish a palpable fraud.†† And in another case in the same State, where a trespass having been committed, the actual damage was very trifling, not exceeding, as was admitted, twenty dollars, and the jury gave three thousand dollars; the court said that if it had rested with them, they should not have given more than five hundred, but they refused to disturb the verdict.‡‡

In North Carolina the principle of vindictive damages has been distinctly declared, but has been held not to apply to suits against the representatives of a deceased party who had committed the act complained of.‖‖[2]

* Whitney *v.* Hitchcock, 4 Denio, 463.
† Stimpson *v.* The Railroads, 2 Wallace, Jun. R. 164.
‡ Grabe *v.* Margrave, 3 Scammon, 373. See also, Johnson *v.* Weedman, 4 Scammon, 495.
‖ McNamara *v.* King, 2 Gilman, 432, 436.
¶ Smith *v.* Sherwood, 2 Texas R. 460.
** Mitchell *v.* Billingsley, 17 Ala. 391, Jan'y, 1850; Ives *v.* M'Queen, 17 Ala. 408.
†† Spikes *v.* English, 4 Strobhart, 34.
‡‡ Johnson *v.* Hannahan, 3 Strobhart, 425.
‖‖ Ripley *v.* Miller, 11 Iredell, 247.

[1] But in Iowa the rule is otherwise. Stevenson *v.* Belknap, 6 Iowa, 97. And in New Jersey, in a well considered case, it was held in an action by a father to recover damages for the abduction of his three minor children, that although proof of loss of services was essential to the maintenance of the action, yet that such loss being shown, exemplary damages could be given. Magee *v.* Holland, 3 Dutch. (N. J.) 86.

[2] The same is held in Texas. Wright's Adm'x *v.* Donnell, 34 Tex. 291.

IN SLANDER AND LIBEL NO PROOF IS NECESSARILY REQUIRED OF THE INJURY FROM ACTIONABLE WORDS.—In many cases of slander and libel, indeed, the law even steps beyond the line here drawn, and requires no proof of actual injury whatever, to entitle the plaintiff to such amount as the jury see fit to give;* the only restriction in all these cases being the power exercised by the courts over corrupt, partial, and pasionate verdicts.†

* Starkie on Slander, Prel. Dis. 26.

† I am not aware that the Roman law knew anything of exemplary or vindictive verdicts; but perhaps the heaviest claim for damages on record is that urged by Cicero against Verres, for his abuse of power in Sicily. He first rates it at *millies*, £800,000 (Div. in Cæcil. c. 5); then at *quadringenties*, £320,000 (1 Act. in Verr. c. 18); and was finally content with *tricies* (£24,000). "After a triennial indulgence of lust, rapine and cruelty," says the "luminous" historian, "Verres, the tyrant of Sicily, could only be sued for the pecuniary restitution of three hundred thousand pounds sterling. And such was the temper of the laws, the judges, and perhaps the accuser himself, that on refunding the thirteenth part of his plunder, Verres could retire to an easy and luxurious exile." Gibbon is not to be forgiven for perpetuating this gossiping slander of Plutarch against the integrity of Cicero. Gibbon, *Hist.* ch. 44.

In Scotland, the principle of compensation seems rigidly adhered to, even in cases of flagrant wrong. So in an action of damages for defamation, sending a challenge, assault, and threatened battery, the Lord Chief Commissioner, Adam, one of the most eminent judges of the present century, said, "In all cases of damage, a fair, unprejudiced discussion (*avoiding in civil cases the converting compensation for a civil injury into a matter of punishment*) will lead to a rational, conscientious, and fair compromise of your different opinions, and bring you to fix on one sum;" and the reporter adds, "In all cases of this sort, his Lordship has been in the habit of repeating this doctrine." Hyslop *v.* Staig, 1 Murr. R. 15.

Again, in an action for defamation, the Lord Chief Commissioner said, "The question of damages, in case of an attack on a professional man, must always include both a question of loss and *solatium*. You must consider it *as a question of reparation, not of punishment;* but if a person of perfectly pure character is assailed in this manner, you will consider whether a rich man ought not to pay a little more." Christian *v.* Lord Kennedy, 1 Murr. R. 428.

The same rule was laid down by the same judge in actions of *crim. con.*

In Baillie *v.* Bryson, 1 Murr. R. 317 and 337, an action of this class, the Lord Chief Commissioner said, "I cannot help thinking that Lord Kenyon introduced into cases of this sort, a principle as to damages, extremely dangerous in its consequences. He considered such questions not merely as calculated to *repair the injury* done to the one party, but *as a punishment of the* other, and as intended to correct the morals of the country. The morals of the country have not been improved, and I am afraid its feeling has been much impaired. A civil court in matters of civil injury, is a bad corrector of morals; it has only to do with the rights of parties."

I apprehend, also, that this doctrine of vindictive or exemplary damages has been somewhat shaken in the State of Massachusetts, though I find no express decision to the effect. In Barnard *v.* Poor, 21 Pick. R. 378, an action on the case was brought for setting a fire on defendant's own land, whereby plaintiff's wood was consumed. And it was held, that it was immaterial whether the plaintiff proved *gross negligence* or only want of *ordinary care*, inasmuch as he could only recover for the actual loss, and no more, whether claimed as vindictive damages or otherwise. If the negligence were so gross as to raise a presumption of malice, then, according to the law of the authorities in the text, I suppose it would be a case for exemplary or vindictive damages. But whether the principle of absolute compensation has been adopted or not by the courts of Massachusetts, it is certain that it has been systematically advanced by two very distinguished writers in that State. Mr. Metcalf, the reporter,[1] in an able and ingenious article, 3d Amer. Jur. 387 and 313, first, I believe, advanced the theory that the Anglo-American law does not admit of any other than compensatory damages, or in his own words, "that the defendant ought not to pay more than the plaintiff is entitled to receive." And Mr. Greenleaf, in his recent work on Evidence, has adopted this view to its fullest extent. Whatever may be the true principle of the matter, it seems to me not difficult to show that the theory of compensation is not the theory of our law.

Mr. Greenleaf says, vol. ii, p. 209, "that

[1] Since judge of the Supreme Court of the State.—ED.

[466] IN THESE ACTIONS ALL CIRCUMSTANCES OF AGGRAVATION

the damages should be precisely commensurate with the injury, neither more nor less." This language certainly is in direct conflict with the whole system of damages in cases of contract; and I apprehend that the denial of the right to vindictive damages is equally untenable. In addition to the authorities which I have cited in the text, how is this position to be reconciled with the uniform language of the courts, on motions for new trials in hard actions, that they will not interfere unless the verdict be evidently the result of corruption, prejudice, or passion? The bench has uniformly refused to limit the damages to their own idea of compensation. There is a cloud of cases going to show conclusively, that although the court are entirely satisfied that the damages are excessive, and altogether beyond a compensation for the actual loss sustained, they will not, on motion for a new trial, interfere with the finding, unless the verdict is so extravagant as to bear evident marks of prejudice, passion, or corruption. Sharpe *v.* Brice, 2 W. Black. 942; Benson *v.* Frederick, 3 Burr. 1845; Dubberly *v.* Gunning, 4 T. R. 651; Sargent *v.* Deniston, 5 Cow. R. 106; Graham on New Trials, 410, *et seq.*; Buller's N. P. 327.

In Thurston *v.* Martin, 5 Mason, 497, on the Rhode Island circuit, where a motion was made for a new trial on the ground of excessive damages, Story, J., said, "The damages are certainly higher than what, had I sitten on the jury, I should have been disposed to give, and I should now be better satisfied if the amount had been less; but on the ground that "nothing appeared inconsistent with an honest exercise of judgment," the motion was denied. See also, Wiggin *v.* Coffin, 3 Story Rep. 1; and Fisher *v.* Patterson, 14 Ohio, 418.

Again, Mr. Greenleaf admits, p. 224, "That where an evil intent has manifested itself in *acts and circumstances* accompanying the principal transcation, they constitute part of the injury;" and, 221, "that the defendant's wealth may be given in evidence." To admit testimony of this kind—to deny the power of the court to adjust the verdict according to the principle of compensation, and still to insist that the jury are bound to give a verdict strictly commensurate with the injury, seem to me practically incompatible and inconsistent propositions.

Nor, I confess, do I understand the wisdom of the proposed rule: in cases of tort, the suit at law appears to have public as well as private ends in view; I can see no reason why the defendant should not, in a civil suit, be punished for his act of fraud, malice, or oppression, nor why the pecuniary mulct which constitutes that punishment should not go into the pockets of the plaintiff, instead of the coffers of the State. A strong anology will be found in *qui tam* actions. Any attempt to limit the inquiry of the jury, in cases of this description, to a strict measure of compensation, will be, I think, to institute an investigation of a character distressingly metaphysical, and utterly impracticable.

Mr. Chancellor Kent, in his Commentaries, part 4, sec. xxiv, vol. i. 618, 7th ed. 1851, thus reviews and decides this controversy: "In the Law Reporter, April, 1847, there is an elaborate review of the cases in matters of tort, on the subject of exemplary damages, endeavoring to show that the decisions do not, on a strict examination and construction of the language of them, amount to authorities for going beyond compensatory damages. On this subject it appears to me that the conclusions in Mr. Sedgwick's treatise are well warranted by the decisions, and that the attempt to exclude all considerations of the malice and wickedness and wantonness of the tort, in estimating a proper compensation to the victim, is impracticable, visionary, and repugnant to fine feelings of social sympathy."

I take pleasure in recording the approbation of an eminent man, whom it is a happiness to have known; whose life was one of uninterrupted and useful activity; and whose old age presented one of those beautiful pictures that we are sometimes permitted to behold—as satisfied in its retrospect as the imperfections of humanity allow; as hopeful of the future as an unwavering confidence in a higher power, and a consciousness of faculties neither wasted nor abused, may warrant.[1]

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[1] DOCTRINE OF EXEMPLARY DAMAGES; ITS EXTENT AND QUALIFICATIONS.—In the third edition of this book were cited the following additional authorities: Hawkins *v.* Riley, 17 B. Monr. (Ky.) 101; Fleet *v.* Hollenkemp, 13 *Ibid.* 219; Kountz *v.* Brown. 16 *Ibid.* 577; Hair *v.* Little, 28 Ala. 236; Roberts *v.* Heim, 27 *Ibid.* 678; Porter *v.* Seiler, 23 Penn. St. 424; Robinson *v.* Rupert, *Ibid.* 523; Grant *v.* McDonough, 7 La. Ann. 447; Cook *v.* Garza, 9 Tex. 358; Graham *v.* Rober, 5 Tex. 141; Murphy *v.* Crain, 12 *Ibid.* 297; Birchard *v.* Booth, 4 Wis. 67; McCoy *v.* Danley, 20 Penn. St. 85; Clark *v.* Beales, 15 (Ark.) Barb. 452; McWilliams *v.* Bragg, 3 Wis. 424; Sherman *v.* Dutch, 16 Ill. 283; Wolff *v.* Cohen, 8 Rich. (S. C.) L. 144; Milburn *v.* Beach, 14 Mo. 104; Sutton *v.* Mandeville, 1 Cr. C. C. R. 187; Bradley *v.* Morris, Busbee's (N. C.) R. 395; Smith *v.* Eakin, 2 Sneed's (Tenn.) R. 456; Phelim *v.* Kenderline, 20 Penn. St. 354; McAfee *v.* Crofford, 13 How. 447; Seymour *v.* McCormick, 16 *Ibid.* 480; Major *v.* Pulliam, 3 Dana, 582; Sanborn *v.* Neilson, 4 N. H. 501; Sinclair *v.* Tarbox, 9 N. H. 135.

Also the following authorities in New York: Woodward *v.* Paine, 15 Johns. 493; Dain *v.*

GO TO THE JURY.—The necessary result of this rule is that all

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Wycoff, 3 Seld. 191 (in which, however, the propriety of allowing such damages was denied by Gardiner, J., individually, the remainder of the court expressing no opinion on the point); Taylor *v.* Church, 4 *Ibid.* 452, in which the principle of these damages was sustained by Mr. Justice Jewett in an opinion reviewing the authorities, and by a majority of the judges who passed on the question. Opinion of Allen, J., in Bush *v.* Prosser, 1 Kern. 356; s. c. below, 1 E. D. Smith's C. P. R. 292; Hicks *v.* Foster, 13 Barb. 663.

In the second and third editions also were published, in an appendix, two articles from the Law Reporter for April and June, 1847, one by the late Professor Greenleaf, maintaining his denial of the doctrine of exemplary damages, and the other a rejoinder by the author of this work.

But notwithstanding the hesitation shown in some of the less recent cases in which the question arose in New York, and perhaps elsewhere, in recognizing the principle of exemplary damages to the full extent claimed in the text as law (see Whitney *v.* Hitchcock, 4 Denio, 463; Hicks *v.* Foster, 13 Barb. 663; Covert *v.* Gray, 34 Howard's Pr. R. 450; Dain *v.* Wycoff, 3 Seld. 7 N. Y. 191, opinion of Gardiner, J., *supra*), the doctrine is now too firmly rooted in our jurisprudence to admit of further serious discussion. The distinction between these and other damages is ineffaceably stamped on the very language of the law. We think it therefore unnecessary to republish these controversial articles. But in addition to the preceding authorities, we cite, from the decisions on the subject which flood our late reports, recognizing the established doctrine, enough, we think, to justify our statement in its full extent. In each case the nature of the action is given: SLANDER.—Knight *v.* Foster, 39 N. H. 576; Hosley *v.* Brooks, 20 Ill. 115; Guard *v.* Risk, 11 Ind. 156. LIBEL.—Buckley *v.* Knapp, 48 Mo. 152; Gilreath *v.* Allen, 10 Iredell (N. C.) 67; Miles *v.* Harrington, 8 Kans. 425; Hunt *v.* Bennet, 19 N. Y. 173; Philadelphia, Wilmington and Baltimore R. R. Co. *v.* Quigley, 21 How. (U. S.) 202, recognizing the principle as established by Day *v.* Woodworth, 13 How. (U. S.) 363. DECEIT.—Nye *v.* Merriam, 35 Vt. 438; Platt *v.* Brown, 30 Conn. 336; Millison *v.* Hoch, 17 Ind. 227. FRAUD.—Oliver *v.* Chapman, 15 Tex. 400. (But in regard to actions for fraudulent representations, doubts have been expressed whether the doctrine of exemplary damages should be applied. Barber *v.* Kilbourn, 16 Wis. 485. It does not apply in the opinion of the Supreme Court of Wisconsin, where nominal damages only have been sustained by the grantee of real estate, although the estate was purchased in consequence of the false representation. *Ibid.* And it is denied by the Supreme Court of New York in the Fifth District, that "fraud in a transaction warrants the finding of punitive damages." Lane *v.* Wilcox, 55 Barb. (N. Y.) 615. But see Wheeler *v.* Randall, 48 Ill. 182. TRESPASS TO REAL ESTATE.—Bull *v.* Griswold, 19 Ill. 631; Perkins *v.* Towle, 43 N. H. 220. TRESPASS *q. c. f.*—Green & Col. R. Co. *v.* Partlow, 14 Rich. Law (S. C.) 237. TRESPASS.—Walker *v.* Wilson, 8 Bosw. (N. Y.) 586; Dibble *v.* Morris, 26 Conn. 416; Nagle *v.* Mullison, 34 Penn. St. 48; Bronson *v.* Green, 2 Duvall (Ky.) 234; Dorsey *v.* Manlove, 14 Cal. 553; Young *v.* Mertens, 27 Md. 114. KILLING SLAVE.—Polk *v.* Fancher, 1 Head (Tenn.) 336; Champion *v.* Vincent, 20 Tex. 811; Hedgepeth *v.* Robertson, 18 Tex. 858. ASSAULT AND BATTERY.—Wade *v.* Thayer, 40 Cal. 578; Dougherty *v.* Shown, 1 Heiskell (Tenn.) 302. [In this case the doctrine was reluctantly acquiesced in.] Foote *v.* Nichols, 28 Ill. 486; Reeder *v.* Purdy, 48 Ill. 261; Wiley *v.* Keokuk, 6 Kansas, 94; Roberts *v.* Mason, 10 Ohio (N. S.), 277; Ousley *v.* Harden, 23 Ill. 403; Goetz *v.* Ambs, 27 Mo. (6 Jones) 28. TRESPASS AGAINST PERSON.—Green *v.* Young, 47 Mo. 90. TRESPASS *vi et armis*.—Hawk *v.* Ridgway, 33 Ill. 473. MARINE TORT.—Barque Yankee *v.* Gallagher, 1 McAllister, 467. PERSONAL INJURY.—Towle *v.* Blake, 48 N. H. 92; Taylor *v.* Railway, 48 N. H. 304; Memphis & Charleston R. Co. *v.* Whitfield, 44 Miss. 466; Hopkins *v.* Atlantic and St. Lawrence R. R. Co. 36 N. H. 9; Slater *v.* Sherman, 5 Bush. (Ky.) 206; Chiles *v.* Drake, 2 Metc. (Ky.) 146; Etchberry *v.* Levielle, 2 Hilt. (N. Y. C. P.) 40; Balt. & Ohio R. R. Co. *v.* Blocher, 27 Md. 277. TRESPASS FOR INJURING GOODS.—Best *v.* Allen, 30 Ill. 30. WRONGFUL SEIZURE OF GOODS.—Thomas *v.* Harris, (1 F. & F. 69), 27 L. J. Exch. 353. TRESPASS *de bonis asportatis*.—Moore *v.* Shultz, 31 Md. 418. SEDUCTION.—Fox *v.* Stevens, 13 Minn. 272; Damon *v.* Moore, 5 Lansing (N. Y.) 455; Ball *v.* Bruce, 21 Ill. 161; Stevenson *v.* Belknap, 6 Clarke (Iowa), 97; Robinson *v.* Burton, 5 Harring. (Del.) 335. BREACH OF PROMISE AND SEDUCTION.—Goodall *v.* Thurman, 1 Head (Tenn.), 209. MALICIOUS PROSECUTION.—Burnett *v.* Read, 51 Penn. St. 190; Cooper *v.* Utterbach, 37 Md. 282. OBSTRUCTING RIGHT OF WAY.—Windham *v.* Rhame, 11 Rich. Law (S. C.), 283; Jefcoat *v.* Knotts, *Ibid.* 649; Zeigler *v.* Braddy, *Ibid.* 557. TORT AGAINST COMMON CARRIER.—Heirn *v.* McCaughan, 32 Miss. (3 George) 17; Peoria Bridge Ass'n *v.* Loomis, 20 Ill. 235; New Orleans, Jackson and Great Northern R. R. Co. *v.* Hurst, 36 Miss. (7 George) 660; Southern R. R. Co. *v.* Kendrick, 40 Miss. 374. ACTION AGAINST CARRIER FOR GROSS BREACH OF DUTY.—Mendelsohn *v.* Anaheim Lighter Co. 40 Cal. 657. WILFUL SUING OUT OF ATTACHMENT.—Campbell v. Chamberlain, 10 Iowa, 337. ILLEGAL ARREST.—Wanzer *v.* Bright, 52 Ill. 35. FALSE IMPRISONMENT.—Whitmore *v.* Allen, 23 Tex. 255; Floyd

the attendant circumstances of aggravation which go to char-

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v. Hamilton. 33 Ala. 235; Kolb *v.* Bankhead, 18 Tex. 228. REPLEVIN.—Craig *v.* Kline, 65 Penn. St. 399. TROVER.—Mowry *v.* Wood, 12 Wis. 413; CASE FOR GROSS NEGLIGENCE, 3 Head (Tenn.) 530, with count in trover. GROSS NEGLIGENCE.—Cochran *v.* Miller, 13 Iowa, 128; Frink *v.* Coe, 4 Iowa (Greene) 555. In the case of Day *v.* Woodworth (13 How. 363), in the Supreme Court of the United States, Mr. Justice Grier, in delivering the opinion of the court, used the following language: "It is a well established principle of the common law, that in actions of trespass, and in all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts by means of a civil action, and the damages inflicted by way of penalty or punishment given to the party injured. In many civil actions, such as libel, slander, seduction, etc., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory.

"In actions of trespass, where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff, which he would have been entitled to recover had the injury been inflicted without design or intention, something further by way of punishment or example, which has sometimes been called 'smart money.' This has been always left to the discretion of the jury; as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case."

Indeed, in Massachusetts, where the principle was sternly contested by eminent jurists (2 Greenl. on Ev. 209; 3 Am. Jur. 387), it has received an implied legislative recognition by the legal provision that where an action of tort, which by the laws of that State survives (G. S. 1860, 648), is "commenced or prosecuted against the executor or administrator of the person originally liable, the plaintiff shall be entitled to recover only for the value of the goods taken without any *vindictive or exemplary damages*, or damages for any alleged outrage to the feelings of the injured party." G. S. Mass. 1860, ch. 128, § 1, p. 651. And the late learned and candid Dane Professor of Law in Harvard College substantially admits its existence. 3 Parson Con. 5th ed. 470. Nor are the English courts behind our own in the continued sanction of the doctrine, which is there applied to actions for consequential damages as well as for trespasses. Emblen *v.* Myers, 6 H. & N. 54; s. c. 30 L. J. R. (N. S.) Exch. 71; s. p. Bell *v.* The Midland Counties R. Co. 4 L. T. R. (N. S.) 293 (per Willes & Byles, JJ.) Professor Greenleaf himself, when not enlisted in controversy respecting the doctrine, we think, gives his assent to it. "The jury are at liberty to consider the malice of the defendant, the insulting character of his conduct, the rank in life of the several parties, and all the circumstances of the outrage, and thereupon to award such *exemplary* damages as the circumstances may, in their judgment, require." 2 Greenl. Ev. § 89. So, again, he says "the jury in the estimation of damage are to consider not only the direct expenses incurred by the plaintiff, but the loss of his time, his bodily sufferings, and if the injury *was wilful*, his mental agony also." (2 Greenl. Ev. § 267), thus varying the degree of compensation for the same harm, according to the motive of the person by whom it was wrought.

Yet, though the authorities thus exuberantly justify the author, it is nevertheless true that the allowance of punitive damages in a civil suit is a wide departure from the principle on which, both in Britain and the United States, damages in such suits are awarded, which, as we have repeatedly seen, in theory at least, is compensation. To adjust in a civil controversy between man and man the claims of society at large, or in such a suit to forestall or encroach on the action of the tribunals which it has established for the preservation of order, were it a new proposition, would strike the Anglo-Saxon lawyer as an absurdity. Yet, beginning with the wide range always given to the jury in actions of tort (see for illustration in New York, the comparatively early cases of Coleman *v.* Southwick, 9 J. R. 45; Hoyt *v.* Gelston, 13 J. R. 141; Woodward *v.* Paine, 15 J. R. 493), and fostered by the justest instincts and strongest sympathies of our nature, the doctrine has grown to the full manhood of a dogma of our jurisprudence. As such it must be accepted and submitted to. If it be a subject of regret, no remedy less radical than the law-making power can now be applied.

But we do not think it is a subject of regret. Pecuniary indemnity for a wrong is unsatisfactory at best, and there is little practical harm in the injured party getting more than actual compensation, if it be proper that the offender should pay it. There is a large class of offences which society is slow in punishing. The community (or those who represent it in the prosecution of such offences) often fails to pursue the offender, and he would too often escape unless brought to justice by the determined effort which springs from the personal sense of wrong.

acterize the wrong complained of, may be given in evidence;

A change in the rule would therefore be, to a certain extent, an irreparable loss to society. In many cases it furnishes the only practical restraint upon a trespasser, who would not be deterred from repeating his trespass by merely trifling or nominal damages.

It is true that the Constitution of the United States, and those of the States generally, provide that no person shall be twice put in jeopardy for the same offence (Am'ts to Cons. U. S. art. 5; Const. N. Y. 1846, art. 1, sec. 2). But the infliction of a pecuniary punishment does not conflict with those provisions.

It is true also that the laws of many of the States, as in New York (Code of Procedure, § 7), declare that "where the violation of a right admits of both a civil and a criminal remedy the right to prosecute the one is not merged in the other" (*post*, 471, note), and there is therefore a possibility that an offender may be subjected to a double fine for the same offence. For this reason, in the States of Massachusetts and Indiana, the doctrine—it can hardly be called a rule—of exemplary damages is held not to apply to actions for wrongs which are also criminal offences. Austin *v.* Wilson, 4 Cush. 273; Tabor *v.* Hutson, 5 Ind. 322; Butler *v.* Mercer, 14 Ind. 479; Nassamen *v.* Rickert, 18 Ind. 350; Humphreys *v.* Johnson, 20 Ind. 190. In North Carolina evidence of a conviction and fine paid may be given for the purpose of mitigating exemplary damages, but does not bar the claim altogether as a matter of law. Smithwith *v.* Ward, 7 Jones L. R. (N. C.) 64; Johnston *v.* Crawford, Phillips L. R. (N. C.) 342.

Such a distinction, however, is not generally observed. Cook *v.* Ellis, 6 Hill, 466 (*supra* 462); Klopfer *v.* Bromme, 26 Wisc. 372; Hendrickson *v.* Kingsbury, 21 Iowa, 379; Garland *v.* Wholeham, 26 Iowa, 185; Cole *v.* Tucker, 6 Tex. 266; Wilson *v.* Middleton, 1 Cal. 54; Corwin *v.* Walton, 18 Mo. 71. And it has been held that even after a criminal conviction, vindictive damages may be given in a civil action against the offender. Roberts *v.* Mason, 10 Ohio (N. S.), 277. And in the case of Fry *v.* Bennett, 4 Duer, 247 (N. Y. Superior Court), which was an action of libel, Mr. Justice Hoffman maintained, with much force, that there was a clear difference between the particular injury to a plaintiff (independently of his pecuniary damage) by the defendant's wrongful act, and the injury caused by the same act to society at large, contending that penalties for each, although both pecuniary, might be inflicted without injustice to the defendant.

We think, notwithstanding a disposition in legal tribunals which we shall presently notice, to observe a certain measure in these cases, by directing the jury to consider separately how much should be allowed for compensation and how much inflicted for punishment, although the two amounts are blended in the verdict, the doctrine in its more extended application is fixed and universal. "For the legal wrong," says Mr. C. J. Lowry, of the Supreme Court of Pennsylvania, in charging the jury in the case of Hodgson *v.* Millward, 3 Grant's Cases, 406, "compensation is the measure of redress. For the moral wrong, the recklessness of the act, the personal malice with which it is done, the violence and outrage attending it, for this you are authorized to allow exemplary damages."

There is, however, an inclination in the courts not to extend the principle as conflicting with the rule of compensation. Thus, in Malone *v.* Murphy, 2 Kansas, 250, the Supreme Court of Kansas say, "We would rather adopt the compensatory theory, believing it to be more logically correct, but the other having been long established, recognized, and acted on by enlightened courts, we are not disposed to change it." And while the subject of exemplary damages is far from reduced to rule, and indeed from its nature is not susceptible of a definite one, yet it will be continually seen that the courts, sensible of the danger from the absence of a standard of measurement in such cases, endeavor to find one, whenever by painstaking search they can do so. Thus loss of profit, ascertainable damage from loss of credit, and other remote or secondary, but still definable damages, are sometimes allowed on this ground only, thus apparently giving, in cases where the pecuniary results of a wrong are more or less traceable, a rule for this description of damages, where otherwise none would exist. See Selden *v.* Cashman, 20 Cal. 56.

So in an action for deceit, the rule applicable to warranties is abandoned, but there is nominally still a measure of the pecuniary retribution, which embraces and is defined by all those damages which naturally flow from the deceit. Sharon *v.* Mosher, 17 Barb. 520; Thompson *v.* Burgey, 36 Penn. 403.

So in Brown *v.* Chadsey, 39 Barb. 253, which was an action for false imprisonment, the court refused to allow the jury to carry these damages to an arbitrary extent.

The cases, also, where counsel fees are allowed in actions of tort illustrate the point. See *ante*, 93, note; also The New Orleans, Jackson, and Great Northern R. R. Co. *v.* Albritton, 38 Miss. 242. So as we have seen in Connecticut, in actions of tort, where the defendant is guilty of malicious or wanton misconduct or culpable neglect, the expenses of litigation may be assessed against him. Welch *v.* Durand, 36 Conn. 182; *ante*, 98, head p. 111. note, 1. So the costs of a second suit, which was necessary in consequence of the defendant's

[467] and so it has been held both in England and in this

wrongful act, are sometimes allowed in cases where the wrong was wilful, which would else be too remote. Palmer *v.* Gallup, 16 Conn. 555, *post*, ch 21. And in Crouch *v.* Great Northern Railroad Co. 11 Exch. 742 (*ante*, head p. 438, note 2), the question was suggested by Baron Martin whether, in a case where special damages claimed by a carrier for injury to his business in consequence of the refusal of the railway company to carry packed parcels for him, were too remote a consequence of the wrong to be allowed under a declaration which merely claimed damages for the injury without any averment of wilfulness; such damage might not have been recovered under a declaraiion which charged a wilful breach of the law by the defendants, with a view to getting a monopoly and destroying the plaintiff's business. The punishment for the wrong should of course be proportioned to its extent, and therefore all the obvious consequences of the injury should be considered by the jury even where there is no question of compensation. But we think, as has been stated with reference to counsel fees, that the attempt to mix compensation as a distinct element in these damages is impracticable, and that they must be placed on the ground only of punishment for the wrong done and an example to prevent its repetition, and that the consideration of the pecuniary injury, whether immediate or remote, as a *measure* of the recovery, belongs only to the question of compensation. The occasional allowance of consequential damages as a punishment amounts, we think, as authority, to no more than this—that the jury may give them if so inclined. But as they could give an equal sum if such pecuniary consequences did not follow the wrong, and even where they do follow, may give in their discretion a greater or less sum, these consequences, although they may sometimes furnish a satisfactory guide to the jury, cannot be said to prescribe a legal measure in graduating the punishment.

Where an action of tort clearly belongs to the class to which the principle of exemplary damages applies, no very distinct proof of the existence of a wrongful intent is required to justify their allowance. In an action by a father to recover damages for the abduction of his infant child, Mr. Justice Elmer, in delivering the opinion of the Supreme Court of New Jersey, after remarking that the principle of exemplary damages was "too well established in that State to admit of question," said in reference to the argument that "there must be fraud, malice, wantonness, or oppression" to justify them, that he was not willing to concede that in actions of that kind "the jury might not properly look at all the circumstances, and apportion the damages to the actual wrong done to the plaintiff's feelings, and paternal affections and rights, without any positive proof of malice or oppression." Magee *v.* Holland, 3 Dutch. (N. J.) 86. When the element of punishment is introduced into the damages which the jury undertake to give, it is said that it becomes proper for them "to inquire into the condition, and circumstances of the defendant, because what would be a severe punishment for a poor man, by way of fine or exemplary damages, might not be felt by one that was rich." Belknap *v.* Boston and Maine Railroad, 49 N. H. 358.

There is a want of precision in the application of the principle under discussion to a class of cases usually mentioned as falling within it—namely, cases of gross negligence. It was remarked by Lord Cranworth, that he could see no difference between negligence and gross negligence—that it was the same with the addition of a vituperative epithet. Wilson *v.* Brett, 11 M. & W. 113, and this observation has been repeatedly quoted with approval from the bench. Grill v. The General Iron Screw Collier Co. Limited, 12 Jurist (N. S.) 727, per Willes, J.; McPheeters *v.* Hannibal and St. Joseph R. Co. 45 Mo. 22; and see the remarks of Mr. Justice Curtis, in the case of The Steamboat New World *v.* King, 16 How. U. S. 474 (*ante*, 114). But however, difficult it may be to draw the line where negligence ceases to be ordinary, and becomes gross, so as to change the character of the legal liability attaching to it, most persons recognize as a fact, that there are degrees of negligence, as of turpitude—that it is sometimes so flagrant and continued as to border on criminality, and at others so much the result of exceptional circumstances as to be comparatively pardonable; that it varies with the consequences which may result from it; and that the same act or conduct, which under ordinary conditions would be but slightly negligent, and therefore venial, may become inexcusable in cases where it endangers limb or life. And without entering into nice psychological distinctions, we think, that as regards the infliction of exemplary damages, the distinction, so generally recognized, between ordinary and gross negligence is properly taken. To justify these damages, the negligence, according to the more carefully considered authorities, must be so great as to amount to recklessness—that is, to a degree, where a generally malicious or malignant purpose, careless of consequences, might perhaps be presumed, although no hostile purpose were entertained against an individual. See Wardrobe *v.* Cala. Stage Co. 7 Cal. 118; Pickett *v.* Crook, 20 Wis. 358; Louisville & Portland R. R. Co. *v.* Smith, 2 Duvall (Ky.), 556. So vindictive damages should not be given for an injury from neglect to repair a highway, where the injury occurred at a point out of the traveled path, and the town had not been notified of any danger or difficulty at that point, and the road showed as much care for the safety of

country.*[1] Indeed, it may be said that in cases of tort, where no fixed and uniform rule of damages can be declared, the func-

* Bracegirdle *v.* Orford, 4 Maul. & Sel. 77; Bateman *v.* Goodyear, 12 Conn. 575; Smith *v.* Lush, 4 Bibb, 502.

passengers as was customary in that part of the country. Hull *v.* Town of Richmond, 2 Woodf. & M. 337. So the Court of Common Pleas for the City and County of New York, deny that exemplary damages can be allowed even for gross negligence merely. To justify them, the act must be wilful, or the negligence must amount to a reckless disregard of the safety of person or property. Wallace *v.* The Mayor, 2 Hilt. 440. In the case of such recklessness, it is settled in New York, that they are recoverable (Caldwell *v.* New Jersey Steamboat Co. 47 N. Y. 282), though the commissioners for the New York civil code have excluded negligence altogether, as a basis for the allowance of exemplary damages, which they confine to "cases of oppression, fraud, or malice, actual or presumed." Proposed Civil N. Y. Code, § 1503. In Bannon *v.* Balt. & Ohio R. R. Co. 24 Md. 108, the principle of exemplary damages in cases of gross negligence is admitted, but the court say that "what facts are sufficient to prove malice or gross negligence, is in such cases the province of the court to determine."

The subject was recently carefully reviewed by the Supreme Court of New Hampshire, in an action against a railway company for injuries sustained by an accident; and the charge of the judge, by which the jury were instructed that they might, if they chose, give exemplary damages, but that they were not bound to do so, was sustained as to this instruction. Taylor *v.* Grand Trunk Railway Co. 48 N. H. 304 (*supra*).

Other qualifications to the rule have been suggested or established Thus it is said, a principal cannot be compelled to pay exemplary damages for the fault of his agent (Wardrobe *v.* Stage Co. 7 Cal. 118; Mendelsohn *v.* Anaheim Lighter Co. 40 Cal. 657; Turner *v.* North Beach R. R. Co. 34 Cal. 594; Hill *v.* The New Orleans, Opelousas, and Great Western R. Co. 11 La. Ann. 292), if it be neither authorized nor ratified by the principal (Milwaukee and Miss. R. R. Co. *v.* Finney, 10 Wis. 388). So during the existence of slavery, the owner of a slave was not liable for exemplary damages for the unauthorized act of the slave. Boulard *v.* Calhoun, 13 La. Ann. 445. But in Mississippi the rule as to the principal's responsibility is otherwise. New Orleans, Jackson, and Great Northern R. Co. *v.* Bailey, 40 Miss. 395; Same *v.* Hurst, 36 Miss. (7 George) 660; Vicksburg and Jackson R. Co. *v.* Patton, 31 Miss. 156. So in Kentucky, in an action against a railroad company for an injury caused by the carelessness, negligence, and unfitness of its agents, the damages are not confined to the actual injury. Bowler *v.* Lane, 3 Metc. (Ky.) 311. And in a late case, where a brakeman, who without provocation had grossly insulted a passenger, was retained in the defendant's employ, the Supreme Court of Maine, in an action brought to recover damages for the indignity, sustained a verdict of $4,500, against the company. In this case, the Court, after a thorough examination of the subject, made by Mr. J. Walton, held that exemplary damages have been "a fundamental rule of the common law for more than a century," that the doctrine is applicable to corporations, even where the offence is neither authorized nor ratified by them; observing that cases where it is authorized or ratified never occur, and conclude that it is even more beneficial in such application than in the case of natural persons, since, unlike individuals, the corporation can be subjected to no other corrective influence, than that of pecuniary loss. Goddard *v.* Grand Trunk Railway, 57 Maine, 202. So it has lately been held in Ohio, after a careful consideration of the subject, that a corporation may be held liable to pay exemplary damages for such acts done by its agents or servants, as would, if done by an individual acting for himself, render him liable for such damages. The Atlantic and Great Western Co. *v.* Dunn, 19 Ohio St. 162. And the recovery of exemplary damages is now generally allowed in the case of gross torts of corporations. Belknap *v.* Boston and Maine R. R. 49 N. H. 358; Caldwell *v.* New Jersey Steamboat Co. 47 N. Y. 282 (*supra*). It has been lately said, however, that the jury have no right to give such damages against a municipal corporation. City of Chicago *v.* Langlass, 52 Ill. 256.

Again, the fact that a defendant in doing the act complained of, was actuated by malice against a third person not a party to the suit, has been said to afford no ground for vindictive damages. Wood *v.* Barker, 1 Ala. Select Cases, 311. Nor can vindictive damages be allowed where the wrong results from an error of judgment only. Jackson *v.* Schmidt, 14 La. Ann. 806. See also Bonesteel *v.* Bonesteel, 30 Wisc. 511. And in these damages the measure, such as as it is, which punishment and example prescribe, must not be overstepped, and no

[1] Pendleton *v.* Davis, 1 Jones (N. C.), 98. But wherever the plaintiff may enhance the damages by proof of circumstances of aggravation, the defendant has the correlative right of reducing them by proving facts of an opposite tendency. Millard *v.* Brown, 35 N. Y. 297.

tions of the court at the trial of the cause are mainly limited to the reception and exclusion of evidence when offered either by

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consideration should be presented by the court to the jury which should lead them to increase them beyond what they would give for the sake of the punishment and the example. In an action of assault and battery, therefore, it was held by the Supreme Court of Iowa, erroneous to tell the jury they could increase the amount of the verdict "to manifest the detestation in which the act is held by them." Hendrickson *v.* Kingsbury, 1867, N. Y. Transcript, May, 1867, from Western Law Journal. On the one hand the jury must not be instructed to give vindictive damages, Hawk *v.* Ridgway, 33 Ill. 473; Southern R. R. Co. *v.* Hendrick, 40 Miss. 374. Nor on the other, must they be restricted by a direction not to give them, if they believe from the evidence that the defendant's trespass was malicious, and perpetrated in a rude and insulting manner. De Vaughan *v.* Heath, 1 Ala. Select Cases, 523. And where the highest value of a house torn down and removed by the defendant, testified to by any witness, was $250, and the court instructed the jury, that if they found it a case for exemplary damages, they might find a verdict for any amount not exceeding the sum laid in the declaration, which was $2,000, and the jury found a verdict for $567, it was set aside on the ground that this instruction might have wrongly influenced them as to the amount of damages, as a verdict for the amount laid in the declaration would have warranted the inference of prejudice, partiality, or corruption on their part. Bryan *v.* Acee, 27 Geo. 87. In Wisconsin however, in a late case of assault and battery, an instruction to the jury that "if the assault was committed in an insulting manner, wilfully and maliciously, with an intent to injure the plaintiff's feelings, and disgrace him in the estimation of the public," they "*ought* to give punitory damages," was lately held not to be error. Hooker *v.* Newton, 24 Wisc. 292. Where, in the opinion of the court, the evidence is insufficient to show that a trespass is malicious, it may instruct the jury that exemplary damages cannot be recovered. Selden *v.* Cashman, 20 Cal. 56; Lykens Valley Coal Co. *v.* Dock, 62 Penn. St. 232, 239; Herdic *v.* Young, 55 Penn. St. 176; *post*, 502, *note*. The supposition of a trespasser, that he is exercising his legal rights, does not diminish his liability to punitive damages. Johnson *v.* Camp, 51 Ill. 219.

In Louisiana, in cases proper for exemplary damages, the jury are still under the control of the court in regard to the extent to which they may go, and in an action for malicious arrest and imprisonment, the court said, "Exemplary damages should nevertheless be commensurate to the nature of the offence, and when extravagant damages are allowed, they will be reduced to the proper standard." Burkett *v.* Lanata, 15 La. Ann. 337. And see Fitzgerald *v.* Boulat, 13 La. Ann. 116.

In general, however, from the nature of the subject, in cases proper for exemplary damages, it would seem impracticable to set any bounds to the discretion of the jury, though in cases where the wrong done, though with malicious intent, is greatly disproportioned to the amount of the verdict, the court may exercise the power it always possesses to grant a new trial for excessive damages. See Coffin *v.* Coffin, 4 Mass. 1. The case of the New Orleans, Jackson, and Great Northern R. R. Co. *v.* Hurst, 36 Miss. 7 George (*supra*), would seem to carry the principle of exemplary damages to its extreme limit, if it have a limit, or rather if rightly decided, to show that there is none. The jury having, in that case, found a verdict of $4,500 against a railroad company for the misconduct of a conductor in carrying the plaintiff four hundred yards beyond the station and refusing to return, so that, to avoid being taken to the next station, he had to walk back carrying his valise, the court, while regretting the rigor of the jury, refused to set aside the verdict, saying that the law in such cases furnished "no legal measurement save the discretion of the jury." In this case, we think, with deference, that the verdict might with great propriety have been set aside. The amount warranted the presumption of undue bias.

The rules that *actio personalis moritur cum persona* and that executors and administrators sued in their representative character are in general liable only to the extent of their assets, prevent the recovery of any damages against executors or administrators for the tortious acts of their decedents, except in such cases as are provided by special statute. See Mass. R. S. 1860, p. 695, already cited. And as they can bring an action only in respect of an injury to the personal estate of their decedent, the damages recoverable by them must be measured by such injury, and exemplary damages cannot be recovered. Lockier *v.* Patterson, 1 C. & K. 271. See *post*, 552, note.

The terms "vindictive," "punitive" or "punitory," and "exemplary," are indifferently employed in describing these damages. But in a case in Missouri, the court, while entertaining some misgivings as to any allowance of damages beyond compensation, suggest a distinction between "exemplary" damages, and those which are "vindictive" or "punitory."

The case, which was decided in August, 1865 was an action to recover damages from the defendants for conspiring together and unlawfully breaking open the plaintiff's store by

way of aggravation or mitigation, and to a definition of the line between direct and consequential damage.

CONCURRENT NEGLIGENCE.—We have already * had occasion to advert to the principle, that the party seeking legal redress must not only show his adversary to be in the wrong, but must also be prepared to prove that no negli- [468]

* *Ante*, 93, 143.

armed force, and taking various wagon loads of clothing. The court, holding that besides the value of the goods, the plaintiff was entitled to *compensation* for the injury sustained by the fears of bodily harm and danger to his life, sustained the finding of the jury for an amount exceeding the value of the goods, on the ground that the verdict did not go beyond an adequate recompense for the whole injury. The judge at Nisi Prius had charged the jury that they might, in addition to the value of the goods, "also find such further sum as to them might seem right in the way of exemplary damages," not exceeding the amount claimed. This instruction received the sanction of the full court, but in giving it, they drew the distinction we have mentioned. Exemplary damages they apparently consider within the limits of compensation, defining them as follows: "Exemplary damages would seem to mean, in the ordinary and proper sense of the word, such damages as would be a good round compensation and an adequate recompense for the injury sustained, and such as might serve for a wholesome example to others in like cases." The question of "merely vindictive or punitory damages by way of punishing the defendant," they did not consider to have necessarily arisen in the case, and added that they were "not to be understood as sanctioning a principle which by the nature of it would seem rather to belong to the domain of criminal than civil jurisprudence." Freidenheit *v.* Edmundson, 36 Mo. 226.

But in a case decided somewhat later in the same year (October, 1865), the learned court appear to lose sight both of the distinction and the doubts suggested in Freidenheit *v.* Edmundson, saying, "To authorize the giving of exemplary or vindictive damages, either malice, violence, oppression, or wanton recklessness must mingle in the controversy. The act complained of must partake of a criminal or wanton nature, else the amount sought to be recovered will be confined to compensation." Kennedy *v.* North Missouri R. R. Co. 36 Missouri, 351. Later, however, in the same court, the doubts originated in Freidenheit *v.* Edmundson recur, and the question whether "punitive" are not distinct from "exemplary" damages, and whether punishment in the form of such damages can be administered in a civil action, is again suggested. McKean *v.* Citizens' R. Co. 42 Mo. 79. But again the learned court, in a still more recent oscillation (October, 1870), say, "Exemplary and punitory damages in law mean the same thing." Green *v.* Craig, 47 Mo. 90. See, also, Honeseifer *v.* Sheble, 31 Mo. 243.

To us, the refined distinction drawn in Freidenheit *v.* Edmundson does not appear susceptible of practical application. Damages for the sake of example overstep the line of compensation as well as those for the sake of punishment; and as there is no rule for measuring either, juries and courts would be alike lost in the attempt to trace a boundary between them. The Supreme Court of Kentucky, in the case of Chiles *v.* Drake (2 Metc. Ky. 146), declare that "punitive, vindictive, and exemplary damages are all synonymous terms." And again in the more recent case of Louisville and Portland R. R. Co. *v.* Smith, 2 Duvall, 556, the same court say: "Although the strictly legal phrase is perhaps *vindictive* as contradistinguished from *compensatory*, yet exemplary and punitive . . . . are . . . . generally considered as tantamount to vindictive damages." And such is the general language of the bench.

The practice is growing up in some of the United States, in cases admitting of this description of damages, of instructing the jury where they find such damages to distinguish in their verdict between the amount allowed for them and that found as compensation. See Belknap *v.* Railroad, 49 N. H. 358. So in an action of trespass for logs which were claimed by the plaintiffs, and admitted by the defendant to be worth $42 29, and the jury found a verdict of $94 27, intending the difference between the two sums as exemplary damages, the court remitted the exemplary damages, and allowed judgment for the $42 29. Cram *v.* Hadley, 48 N. H. 191.

Where a court of equity, as we have seen, has the power to award damages, it cannot go beyond compensation. (*Ante*, 10, note 1.) And by applying to such a court, the complainant waives all claim to exemplary damages. Bird *v.* The W. & M. R. Co. 8 Rich. (S. C.) E. 46.

gence of his own has tended to increase or consummate the injury.[1] "A party in an action on the case for negligence

[1] LATE AUTHORITIES.—The following are some of the later decisions in which this principle is applied or defined: Pittsburgh, Fort Wayne, and Chicago R. R. Co. *v.* Methuen, 21 Ohio St. 586; Keenan *v.* Cavanaugh, 44 Vt. 268; Macon and Western R. Co. *v.* Johnson, 38 Geo. 409; Morrissey *v.* Wiggins' Ferry Co. 47 Mo. 521; N. J. Railroad Co. *v.* Palmer, 33 N. J. (4 Vroom), 90; Drake *v.* Mount, 33 N. J. 441; Memphis and Charleston R. Co. *v.* Whitfield, 44 Miss. 466; The Pennsylvania R. R. Co. *v.* McTighe, 46 Penn. 316; Hull *v.* Richmond, 2 Woodb. & M. 337–345; Chicago, Burlington, and Quincy R. R. Co. *v.* Dewey, 26 Ill. 255; Chicago, Burlington, and Quincy R. R. Co. *v.* Hazzard, 26 Ill. 373; Moss *v.* Johnson, 22 Ill. 633; Stucke *v.* Milwaukee and Mississippi R. R. Co. 9 Wis. 202; Telfer *v.* Northern R. R. Co. 1 Vroom (N. J.), 188; Galena, Dunleith, and Minnesota Packet Co. *v.* Vandergrift, 34 Mo. 55; Hassa *v.* Junger, 15 Wis. 598; Brown *v.* Maxwell, 6 Hill, 592; Mentz *v.* Second Av. R. R. Co. 2 Robertson (N. Y. Superior Court), 356; Lannon *v.* Albany Gaslight Co. 46 Barb. 264; Spooner *v.* Brooklyn City R. R. Co. 31 Barb. (N. Y.) 419; 36 Barb. 217; Mangam *v.* Brooklyn City R. R. Co. 36 Barb. 230; 38 N. Y. 459; Willis *v.* Long Island R. R. Co. 32 Barb. 398; Uhl *v.* 42d street R. R. Co. 47 N. Y. 317; Owen *v.* Hudson R. R. Co. 35 N. Y. 516; 34 N. Y. 670; Delafield *v.* Union Ferry Co. 10 Bosw. (N. Y.) 216; Morris *v.* Phelps, 2 Hilt. (N. Y.) 38; Mentges *v.* N. Y. & Harlem R. R. Co. 1 Hilt. 425; Steves *v.* Oswego and Syracuse R. R. Co. 18 N. Y. 422; Wilds, Adm'x, *v.* Hudson River R. R. Co. 24 N. Y. 430; Chamberlain *v.* Porter, 9 Minn. 260; The City of St. Paul *v.* Kuby, 8 Minn. 154; Daily *v.* N. Y. and N. H. R. R. Co. 32 Conn. 356; Isbell *v.* N. Y. and N. H. R. R. Co. 27 Conn. 393; Owings *v.* Jones, 9 Md. 108; Mayor, &c. *v.* Marriott, 9 Md 160; Mayor, &c. *v.* Brannan, 14 Md. 227; McCoy *v.* California Pacific R. R. Co. 40 Cal. 532; Maumus *v.* Champion, 40 Cal. 121; Kline *v.* Cent. P. R. Co. of California, 37 Cal. 400; Needham *v.* S. F. and S. J. R. Co. 37 Cal. 409. So in the case of a traveler on the highway who fails to look for the approaching train of an intersecting railroad. North Penn. R. R. Co. *v.* Heillman, 49 Penn. St. 60.

DEFINITIONS AND DISTINCTIONS.—Want of *ordinary* care in the plaintiff prevents his recovery. State *ex rel.* Rice *v.* Powell, 44 Mo. 436. If the injured party might have avoided the accident by the exercise of a *reasonable* amount of prudence, he cannot recover. Mercier *v.* New Orleans and Carrolton R. Co. 23 La. An. 264; Knight *v.* Pontchartrain R. Co. 23 La. An. 462. But if the plaintiff's want of vigilance was the consequence of an omission of duty on the defendant's part, it is no defence. Penn. Railroad *v.* Ogier, 35 Penn. St. 60; Beisiegel *v.* N. Y. Cent. R. R. 34 N. Y. 622; see Scott *v.* Dublin and Wicklow R. R. Co. 11 Ir. Com. Law, 377. The principle applies to cases of contract as well as of tort. Milton *v.* Hudson R. R. R. Co. 37 N. Y. 210; Greenland *v.* Chaplin, 5 Exch. 243; Salem Bank *v.* Gloucester, 17 Mass. 1, 31. And it seems that where a person employs one man to furnish materials, and another to do work with those materials, if the second man is guilty of negligence, the first may notwithstanding be held liable for an accident sustained because the materials supplied by him were not according to contract, although the other's negligence was the immediate cause of the accident. Burrows *v.* The March Gas and Coke Co. L. R. 7 C. P. 96.

But to prevent a recovery, the plaintiff's negligence must *proximately* contribute to the injury. If the sole immediate cause of the accident was the defendant's negligence, the plaintiff can recover notwithstanding previous carelessness of his own. Walsh *v.* Mississippi Valley Transportation Co. 52 Mo. 434; Meyer *v.* People's R. Co. 43 Mo. 523; The Pittsburg, Fort Wayne, and Chicago R. R. Co. *v.* Karns, 13 Ind. 87; Richmond *v.* Sacramento Valley R. R. Co. 18 Cal. 351; Stucke *v.* Mil. & Miss. R. R. Co. 9 Wis. 202; Trow *v.* Vt. Cent. R. R. Co. 24 Vt. 487; The Vicksburg and Jackson R. R. Co. *v.* Patten, 31 Miss. 156; Kerwhacker *v.* The Cleveland, Columbus, and Cincinnati R. R. Co. 3 Ohio St. 172; Flynn *v.* San Francisco and San José R. R. Co. 40 Cal. 14. An attempt has been made in Iowa to introduce a new distinction into the law relating to this subject. In Wright *v.* The Ill. & Miss. Tel. Co. 20 Iowa, 195, it was said by the court that although the plaintiff may recover when his negligence is not the proximate cause of the injury, still he is not entitled to recover for any enhancement of his damages by reason of his own want of care. That is to say, his damages would be measured by the amount of injury he would have suffered had he been entirely careful. In the words of the court: "To illustrate by this case: suppose that it was careless and negligent for the plaintiff to take so many horses and mules with only one assistant (as the proof tends to show), when he should have had three, and that the eight horses, led by the one man, would have run against and become entangled in the wire, if led by two men; yet, if by reason of having but the one man to manage them, after they became thus entangled, the horses suffered more injury and damage than they would if there had been two men to the eight horses, the plaintiff ought not to recover for such excess of damage." It is difficult to see how such a rule could furnish a measure of damages. How can a jury say what would have been the injury if the plaintiff had been a little more careful than he was?

cannot recover damages which have resulted from his own negligence and want of care. He must show himself in the right, and the defendant in the wrong; that he has performed his duties, and that the defendant has neglected his, and that the damages are the legitimate consequence of the negligence of the defendant."* [1]

So in Massachusetts, an action from an injury received from a collision of carriages passing on a public road, cannot be maintained by a plaintiff who, at the time of the collision, was guilty of negligence, although the other party was also negligent, and even though he was on the wrong side of the road.† "It is a well-settled principle," said the court, "that to entitle the plaintiff to recover, he must show the injury to have been attributable to the imprudence of the defendant, and under such circumstances as to exonerate himself from all neglect of duty on his part." ‡ So in the same State, in an action against towns for neglecting to keep the roads in repair, the plaintiff does not entitle himself to a verdict by establishing the fact of a defective highway and damage resulting therefrom, unless he also show that he was using ordinary care and diligence in traveling upon the road. ‖ But it is not necessary in the declaration to aver the exercise of ordinary care; ¶ it is sufficient if the fact so appear; and this burden of proof he assumes.** So in Mas-

* Persons *v.* Parker, 3 Barb. S. C. R. 249; Carlisle *v.* Holton, 3 La. Ann. R. 48; Moshier *v.* U. & S. R. R. Co. 8 Barb. S. C. R. 427; Murphy *v.* Diamond, 3 La. Ann. R. 441; Rathbun *v.* Payne, 19 Wend. 399; Spencer *v.* Utica & Sch'y R. R. Co. 5 Barbour, S. C. R. 337; Pluckwell *v.* Wilson, 5 Car. & Payne, 375; Williams *v.* Holland, 6 Car. & Payne, 23; 10 Bing. 112; Hawkins *v.* Cooper, 8 C. & P. 473; Brand *v.* Troy & S. R. Co. 8 Barb. S. C. R. 368; Marsh *v.* N. Y. & Erie R. R. Co. 14 Barb. S. C. R. 364.

† Parker *v.* Adams, 12 Met. 415.

‡ See, also, Halderman *v.* Beckwith, 4 McLean, 286; and Lane *v.* Crombie, 12 Pick. 177; also Moore *v.* The Mayor of Shreveport, 3 La. Ann. R. 645. See, also, in Maine, Kennard *v.* Burton, 12 Shepley (25 Me.) 39; and in Vermont, Rice *v.* Montpelier, 19 Verm. 471.

‖ Thompson *v.* Inhab. of Bridgewater, 7 Pick. 188; Adams *v.* Inhabitants of Carlisle, 21 Pick. 146.

¶ May *v.* Inhab. of Princeton, 11 Met. 442.

** Tourtellot *v.* Rosebrook, 11 Met. 460; Adams *v.* Inhab. of Carlisle, 21 Pick. 146.

But as the case was decided on another ground, this may be considered as nothing more than a *dictum*.

Neither does the law, which is always practical, and takes men as they are, exact the utmost possible caution from the plaintiff. It is enough if he were exercising ordinary care. Fero *v.* Buffalo and State Line R. R. Co. 22 N. Y. 209; Ernst *v.* Hudson R. R. Co. 35 N. Y. 9. So where a horse had sickened in consequence of improper care by the hirer, he was held liable for its full value, notwithstanding that, after its return to the owner, the ill-advised treatment of a suitable veterinary surgeon employed by the owner, who acted according to his best judgment, contributed to its death. Eastman *v.* Sanborn, 3 Allen (Mass.) 594; see Morrissey *v.* Wiggins' Ferry Co. 43 Mo. 380; but see Catawissa R. R. Co. *v.* Armstrong, 49 Penn. St. 186.

[1] It is said by Sir R. J. Phillimore, in a case of collision, in the English High Court of Admiralty, however, that the decisions in that court seem to throw *the burden* of proof on the original wrong-doer, who alleges that the vessel was unnecessarily abandoned. The Thuringia, 41 L. J. R. N. S. Adm. 44. In the same case it is held that to the ordinary care required of a plaintiff, to avoid the consequence of the defendant's negligence, must be added as a further requirement, in the case of a collision at sea, "ordinary *courage* and *resolution*."

[469] sachusetts, if the accident happen on a Sunday, when traveling is forbidden except for necessity or charity, the plaintiff is bound to show that the traveling was of that character.* And in England, the rule has been carried so far, that one who sustains an injury from a carriage or vessel, cannot maintain an action against the owners of such carriage or vessel if negligence, either on his own part or on the part of those having the guidance of the carriage or vessel in which he is a passenger, conduced to the accident, and if such injury might have been avoided by the exercise of reasonable care either on his or their part.† [1]

To Defeat a Recovery, the Defendant's Wrong must Contribute to the Injury.—This general principle applies to all cases where injuries to person or property, arising from negligence, form the subject of inquiry. Of these, cases of collision between carriages and vessels form a considerable class.[2] And in these

* Bosworth *v.* Inhab. of Swansey, 10 Met. 363.

† Thorogood *v.* Bryan, 8 Man. Gr. & Scott, 115, and Cattlin *v.* Hills, *Ibid.* 123. I confess this seems to me an indiscreet extension of the rule, as when both the carriers are in fault, all redress is practically denied.

[1] In such a case, by the New York rule, the exercise of due care by the injured party is an element in the cause of action, and in a conflict of evidence there must be a preponderance showing his observance of due care, although his negligence is not to be presumed. Button *v.* The Hudson River R. R. Co. 18 N. Y. 248.

[2] Collision.—The general principle followed by the admiralty courts in cases of collision is, that the damages to be assessed against the offending vessel must be sufficient to restore the other to the condition she was in at the time of collision, if restoration is practicable. The Granite State, 3 Wallace, 310; The Pilot-boat Blossom, Olcott, 188; The Steamboat Narragansett, *Ibid.* 388; The Steamboat New Jersey, *Ibid.* 444; The Steamboat Rhode Island, *Ibid.* 505; The Schooner Catharine *v.* Dickinson, 17 How. 170. The owner cannot, therefore, sell her as she lies, deduct the price from her value before the collision, and recover the difference. *Ibid.* And see Atchinson *v.* The Dr. Franklin, 14 Mo. 63; Minor *v.* Steamer Picayune, 13 La. Ann. 564. If, on the other hand, the injured vessel is a total loss, her market value at the time will be the criterion of damages. The Ann Caroline, 2 Wallace, 538; The Rebecca, Blatchf. & H. 347; The New Jersey, Olcott, 444. In the case of a less injury, the permanent depreciation in value is allowed for. The Favorita, 4 Ben. 132; The Transit, *Ibid.* 138.

So the damages to the cargo are to be made good. The Steamboat Narragansett, Olcott, 388. Where it is a total loss its value is the measure. Porter *v.* Allen, 8 Ind. 1. This value, it has been held in a comparatively early case, in analogy to the rule in the case of carriers, was to be estimated at the port of destination, at the time when, in the ordinary course of things, it would have been delivered. The Joshua Barker, Abb.'s Adm. 215. But by the rule now prevailing, it seems settled that the value must be taken at the port of shipment, and on this sum interest may be allowed. Smith *v.* Condry, 1 How. (U. S.) 28. Also the expense of lading the cargo and transporting it to the place of collision. The Ocean Queen, 5 Blatchf. C. C. R. 493; The Propeller Vaughan and The Telegraph, cor. Blatchford, J. 2 Benedict, 47. (This corresponds with the rule in prize cases. The Schooner Lively, 1 Gallison, 315; The Amiable Nancy, 3 *Ibid.* 546, 560, *ante*, 70, 71.) And where the currency at the port of shipment, in which the value is computed, is equivalent to coin, it has been held that judgment may be recovered in the United States for the equivalent in legal tender notes of such coin value. The Vaughan and Telegraph, 14 Wall. 258; reversing, *pro tanto*, s. c. 2 Benedict, 47, *supra*. But we have seen that by the general practice in this country, judgments for *coin* debts are rendered payable in coin. *Ante*, head p. 284, note. The Vaughan and Telegraph, *supra*. It is held by the Supreme Court of the United States, affirming the

as in other cases, where negligence or infringement of the rights of others is complained of, the general rule appears to be

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decree of the Circuit Court for the Second Circuit, and modifying that of the District Court for the Southern District of New York (2 Benedict, 47).

So profits in the larger sense are now generally excluded as too remote. Smith *v.* Condry; Adams *v.* The Ocean Queen; Gordon *v.* The Vaughn, *supra;* Cummings *v.* Spruance, 4 Harring. (Del.) 315; Steamboat Co. *v.* Whilldin, 4 Harring. 228.

But the line is not clearly drawn, and in the sense of earnings of which the vessel is certainly deprived during the repairs, they are allowed. Williamson *v.* Barrett, 13 How. 101; The M. M. Caleb, 10 Blatchf. C. C. R. 467; The Narragansett, Olcott, 388; The Rhode Island, 2 Blatchf. C. C. R. 113; 1 Abb.'s Adm. 100; Vantine *v.* The Lake, 2 Wallace, Jun. 52. So a similar rule prevails in the common law courts. The Shelbyville Lateral Branch R. Co. *v.* Lewark, 4 Ind. 471; as also in the analogous case of the detention of a vessel from an unlawful obstruction to the navigation. Jolly *v.* The Terre Haute Draw-bridge Co. 2 M'Lean, 237.

And the rule in England broadly allows profits. So in the case of Heard *v.* Holman, 19 C. B. R. (N. S.) 1, the general measure of damages is declared by Erle, C. J., approving the rule there recognized in admiralty, to be "the expenses of repairs rendered necessary by the collision, and also compensation for the loss of profits that would have been made from the use of the vessel if the collision had not occurred." And see the Gazelle, 2 Wm. Rob. 279.

And where a vessel is engaged in carrying freight at the time of the collision, the rate of freight she could have earned, deducting expenses, during the time required for repairing, is a proper measure of damages. Williamson *v.* Barrett, *supra.* And if she were not carrying freight, at the time, but might have been chartered during the period of the repairs, the market price of the hire of the vessel affords a rule. *Ibid.* And in the absence of direct evidence of the value of the use of the vessel, interest on her value may be allowed for the time occupied in repairing. The Rhode Island, *supra.* But compare Quarrier *v.* Richards, 7 La. Ann. 277. Demurrage is allowed if the vessel has lost employment. The Stromless, 1 Lowell, 153. But the allowance must not extend beyond the time *necessarily* lost. The Thomas Kiley, 3 Ben. 228. In England, where the full value of the vessel is allowed, nothing further will be awarded for demurrage. The Columbus, 3 W. Rob. Adm. 158. In this country, on the other hand, although, under ordinary circumstances, the value of the vessel limits the recovery, it was held otherwise by a very able judge, in a case where the repairing of the vessel had been a prudent course, and the necessary repairs and demurrage together exceeded the value of the vessel at the time of the loss. The Glaucus, 1 Lowell, 366. This accords with the views expressed *ante,* p. 460, n.

There is no established market value for boats, barges, and other articles of that description, as in the case of grain, cotton, or stock, and their loss cannot be measured by the ratio of their profits, since the loss of an old hulk of little value which was making or might make considerable profits, might be supplied at a price much less than one proportioned to such profits. The Granite State, *supra.* In the absence of a market, resort may be had to the judgment of persons acquainted with the business and values involved. The Transit, 4 Ben. 138; The Emilie, *Ib.* 235.

Hypothetical or consequential damages must be excluded. The Pilot Boat Blossom, Olcott, 138: The Steamboat Narragansett, *Ibid.* 246. But necessary incidental expenses and losses are allowed, such as loss of wages, and damage to the vessel from efforts to save her at the time of the collision (The Nautilus, Ware, 529), salvage expenses (*Ibid.*), charges for wharfage while repairing, and the time of those employed in raising and clearing out the vessel. Vantine *v.* The Lake, *supra.* And the offending vessel is not exonerated from full damages because after the wreck a part of the cargo was injured or lost through the efforts of a third party to save it (The Narragansett, *supra*). And in England, such vessel is liable for personal injuries (including loss of life, within Lord Campbell's act, *post,* 552), which are the natural and proximate consequence of the collision. The George and Richard, 24 L. T. R. (Adm.) 717.

Stipulators cannot be made liable for more than the amount assumed in the stipulation as the value of the offending vessel, with costs as stipulated. The Ann Caroline, 2 Wall. 538, (*supra*).

If both vessels are in fault in the collision, then the loss is divided between them. The Schooner Catherine *v.* Dickinson, 17 How. 170; Ralston *v.* The State Rights, Crabbe's C. C. R. 22; Foster *v.* The Miranda, 6 M'Lean's C. C. R. 221; Lucas *v.* The Steamboat Thomas Swann, *Ibid.* 282; The Agra and Elizabeth, 4 Moore, P. C. (N. S.) 435. And see The Singapore and The Hebe, *Ibid.* 271; The Stromless, 1 Lowell, 153 (*supra*); The Monticello, *Ib.* 184; The Clover, *Ib.* 342. And this rule prevails also when the collision is occasioned by inscrutable fault; and in dividing the damages under this rule, no regard is paid to the difference in value between the vessels. The Nautilus, Ware, 529; Ward *v.* The Brig Fashion, 1

that at law the plaintiff, in order to recover, must be able to show that he has not in any way contributed to the accident; on the other hand, although he may have been in the wrong, still, if his error did not aggravate the difficulty, his right to relief will be unprejudiced.[1] But the mere fact of the conduct of the plaintiff not being strictly regular, is immaterial; the inquiry is whether his irregularity has augmented the mischief; if so, as the law is inadequate to apportion the wrong, there can be no recovery.

So in another case in England, where the defendant undertook to excuse himself by throwing the blame of the accident on the plaintiff, this language was held: "If the plaintiff's servants substantially contributed to the injury by their improper or negligent conduct, the defendant would be entitled to a verdict; but if the injury was occasioned by the improper or negligent conduct of the defendant's servants, and the plaintiff's servants did not substantially contribute to produce it, then the plaintiff would be entitled to the verdict." *

So said the English Exchequer in a recent case: There may have been negligence in both parties, and yet the plaint-
[470] iff may be entitled to recover. The rule is, that although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negli-

* Sills *v.* Brown, 9 Car. & Payne, 601.

Newb. Adm. 8. But to make the rule applicable, the fault must be such as contributes to the collision. Wilson *v.* The Envoy, 1 Phil. viii, 10 (bot. p. 138).

But if the collision is the result of inevitable accident, each vessel, in this country, must bear her own loss. Stainbach *v.* Rae, 14 How. 532; The Nautilus, Ware, 529. And this is the law in Louisiana and Arkansas, where there is mutual fault. Sackett *v.* M'Comb, 11 La. Ann. 325; and see Love *v.* The Captain, &c., of the Montgomery, 10 *Ibid.* 113; Miller *v.* Morgan, 22 La. Ann. 625; Duggins *v.* Watson, 15 (Ark.) Barb. 118. It is no defence to a cause of collision that the loss has been paid by the underwriters. The trespasser has no concern with the contract with the insurer. The Propeller Monticello *v.* Mollison, 17 How. 152; Yates *v.* White, 4 Bing. (N. C.) 272, *ante*, 39. Where in a case of collision a decree has been obtained abroad against the offending vessel, but for an amount less than the actual loss, in an action here for the rest of the loss, against the insurance company, in which the injured vessel was insured, the amount recovered abroad is to be deducted from the gross damage only, and not from the loss adjusted as a partial loss by deducting one-third new for old. Dunham *v.* New England Mut. Ins. Co. 1 Lowell, 253.

In a case of a wilful and malicious collision, damages may be given above the amount of actual injury. Ralston *v.* The State Rights, Crabbe's C. C. R. 22.

Under the statute of the State of New York (Laws of 1831, 421, ch. 318), giving a lien upon ships and vessels for damages occasioned by collisions, and an attachment of such ships and vessels therefor, the remedy is confined to the actual damage to the vessel injured, *i. e.* to the amount necessary to repair and put her in as good condition as when the accident happened. The owners of the injured vessel cannot, in this proceeding, recover for their loss of earnings, or other like damages, consequent upon the collision. But the expense of towing the vessel to her place of repair, and wharfage while repairing, are proper items of damage. The owners are also entitled to recover interest on the amount of damages from the time of the injury. Fitch *v.* Lexington, 4 Sandf. (N. Y.) 492.

[1] See *ante*, 468, note 1.

gence, he is entitled to recover: if by ordinary care he might have avoided them, he is the author of his own wrong.*

This doctrine has been approved by the Supreme Court of Connecticut, in a case † where it was said, "The defendant shall not be permitted to shield himself from an injury which he has committed, because the party injured was in the wrong, unless such wrong contributed to produce the injury." ‡

INFANTS.—Whether this doctrine, in its broad extent, is applicable to infants of tender years, may be considered uncertain. In England it has been held, in a suit brought by the guardian of an infant injured by the defendant's negligence, that though the carelessness of the child was a co-operating cause of his misfortune, still he could recover, as his misconduct bore no proportion to that of the defendant. ‖ But in New York in a very similar case, it was said that infants could not be exempted from legal rules when suing for redress, and the right to recover was denied.¶ [1] In Connecticut and Vermont, however, the case of Lynch *v.* Nurdin has been cited with approbation; and in the former State it has been said, "What would be but ordinary neglect in regard to one whom the defendant supposed a person of full age and capacity, would be gross neglect as to a child, or one known to be incapable of escaping danger." ** [2]

* Bridge *v.* Grand J. R. Co. 3 Mees. & Wels. 246; S. P. cited in Davies *v.* Mann, 10 Mees. & W. 546; Marriott *v.* Stanley, 1 Man. & Gr. 568.

† New Haven Steamboat and T. Co. *v.* Vanderbilt, 16 Conn. 420. See also, Beers *v.* Housatonic R. R. Co. 19 Conn. 556, S. P.

‡ See also, Raisin *v.* Mitchell, 9 Car. & Payne, 613.

‖ Lynch *v.* Nurdin, 1 Q. B. 29.

¶ Hartfield *v.* Roper, 21 Wend. 615. And see this case cited with approbation in Willets *v.* Buffalo & Rochester R. R. Co. 14 Barb. 585.

** Robinson *v.* Cone, 22 Verm. 213; Birge *v.* Gardiner, 19 Conn. 507.

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[1] See Kerr *v.* Forgue, 54 Ill. 482, and the note subjoined to the report of the same case in 5 Am. R. at p. 146, in which the authorities on both sides of the question are collected.

[2] An infant in his first years is not *sui juris*, but the law does not fix a positive age at which he becomes so. Mangam *v.* Brooklyn R. R. Co. 38 N. Y. 455. Nor does it fix an age at which a child becomes competent to act as the attendant of another too young to be left alone. Ihl *v.* 42d street R. R. Co. 47 N. Y. 317. As matter of law, it is not negligence in a parent to send a child eight years old to school unattended. Drew *v.* Sixth Avenue R. R. Co. 25 N. Y. 52. Nor even to allow an intelligent child five and a half years old to be in the streets alone. Barksdull *v.* N. O. & Carrolton R. R. Co. 23 La. Ann. 180. If the infant is too young to be *sui juris*, the act or neglect of its attendant or custodian which contributed to the negligence that occasioned the accident, is deemed in law the act or neglect of the infant. Honigsberger *v.* Second Ave. R. R. Co. 1 Keyes, N. Y. 570 (1864). And if the child has reached an age at which the parents, in the exercise of a sound discretion are justified in permitting him to go to school alone, it is said in this case that he is nevertheless not to be "held only to the exercise of that discretion, and discretion of which other children of his age are presumed to be capable." The same rule applies to such a case, as to a grown person, and he is equally held to the same degree of care "which a person of ordinary prudence would exercise" in the same situation. But this rule is not uniformly held, and the opinions expressed by the Court of Appeals in this case are apparently modified somewhat later. O'Mara *v.* Hudson R. R. Co. 38 N. Y. 445. "Greater indulgence," it is there observed by Mr. Chief Justice Hunt, in delivering their opinion, "should be extended to a lad eleven and a

MODIFICATIONS OF THE RULE AS TO CONCURRENT NEGLIGENCE. —As another modification or qualification of the general rule, that the concurrence of the plaintiff's negligence with that of the defendant will defeat the claim for redress, has been laid down in New York, it has been said that "where one in the lawful use of his property put it in an exposed or hazardous position, and in more than ordinary danger from the lawful acts of others, as for instance, if he build near a railroad, still [471] he does not lose his remedy for an injury caused by the culpable negligence of others." * And the same principle has been recently declared in England; where it has been said that the defendant is not excused merely because the plaintiff knew that some danger existed, and voluntarily incurred such danger, provided the defendant's negligence was the cause of the damage; the whole matter being for the consideration of the jury.†

So, also, it has been said in New York, that the plaintiff's negligence does not excuse injuries inflicted by design. "A wrong-doer is not necessarily an outlaw, but may justly complain of wanton and malicious mischief." ‡ [1]

In England, it has been declared to be the general rule, that a party has no right to sue for damages in a civil action for any act which amounts to felony, until the felon is prosecuted and acquitted or convicted; and the reason assigned is a desire to prevent the criminal justice of the kingdom from being defeated, ‖ as well as the fundamental principles of the feudal system. By that system, the commission of a felony worked a forfeiture of the feudatory's grant, and the forfeiture extending to the whole

* Cook *v.* Champlain Transportation Co. 1 Denio, 91.

† Clayard *v.* Dethick *et al.* 12 Q. B. 439.

‡ Tonawanda R. R. Co. *v.* Munger, 5 Denio, 255.

‖ Crosby *v.* Lang, 12 East, 409.

half years old than to an adult." In such a case the jury are "not bound to require the same demureness and caution as in the case of an older person. The young are entitled to the same rights, and cannot be required to exercise as great foresight and vigilance as those of maturer years." And if an infant is capable of taking proper care of himself in the streets, is without fault in himself in contributing to the accident, a recovery may be had "notwithstanding his father or mother were guilty of negligence." McMahon *v.* Mayor, 33 N. Y. 642. And as a general rule a child who may be reasonably thought old enough to take care of himself is held to the same degree of care only that naturally belongs to his age. Oakland R. Co. *v.* Fielding, 48 Penn. St. 320; Robinson *v.* Cone, 22 Vt. 213.

[1] And if the wrong done be wholly unjustifiable, as in ejecting a passenger from the front of a railway car while the car was in motion, at the danger of his life, because of his refusal to pay his fare, then the conduct of the party injured contributing to the injury, as in provoking the assault by non-payment of his fare, and in resisting the attempt, is not to be considered in reducing the claim for damages occasioned by his death. Sandford *v.* The Eighth Avenue R. R. Co. 23 N. Y. 343.

Where the right of action is not destroyed by concurrent negligence in the plaintiff, it is still his duty (as in cases of breaches of contract, *ante*, 200, note) to reduce the damages as far as may be reasonably in his power, and in case of his failure to do so, the damages should be proportionably reduced. Illinois Cent. R. R. Co. *v.* Finnegan, 21 Ill. 646.

property of the felon, and the crime being capital and punished by death, nothing remained to satisfy a private demand, and no person against whom an action could be brought. But it seems that such is not the law in this country.* [1]

The subject of remote and consequential damages in cases of tort, we have already considered elsewhere.† And we have also had occasion to call attention to cases bearing on this point, in which it has been held, that the fact of the plaintiff being indemnified by charity or otherwise, cannot be set up by a wrong-doer in diminution of the amount which he is liable to pay.‡

THE LAW SHOULD ALWAYS FURNISH THE RULE EXCEPT WHERE PUNITIVE DAMAGES ARE JUSTIFIABLE.—In closing this branch of our subject, it ought to be observed, that while, where circumstances of aggravation are proved, the jury are [472] the necessary as well as the rightful judges of the amount of relief, on the other hand, where no such facts are presented, too much care cannot be taken to apply settled rules to the subject of compensation. It can make no difference whether the action be one nominally *ex contractu* or *ex delicto*, whether for the breach of a contract or the violation of a right; in either case, if no evil motive be imputed, the amount of compensation is as much a matter of law as the right itself, and can, with no greater safety, be submitted to the vague and fluctuating discretion of a jury.‖

We shall, in discussing the cases which arise under the present branch of our subject, first consider those where, though the proceeding be nominally in tort, no circumstance of aggravation is proved, and where the law undertakes to apply a fixed measure of compensation.

* Boardman *v.* Gore, 15 Mass. 336; Ocean Ins. Co. *v.* Fields, 2 Story, 59; Plummer *v.* Webb, Ware Rep. 78.

† *Ante*, 57, *et seq.* See, too, on this subject, Molinæus, de Eo quod Int. § 177.

‡ *Vide ante*, 39.

‖ *Vide post*, ch. xxii.

In an action on the case for fraud in the sale of personal property, it is said to be the well settled doctrine in Kentucky, that vindictive damages cannot be given. Singleton's Adm'r *v.* Kennedy & Co. 9 Ben. Monroe, 222. And the court considered that they could not be given in like cases in Louisiana. But they may be given in Kentucky, where a trespass is committed wilfully and in a high-handed manner. Jennings *v.* Maddox, 8 B. Monroe 430.

The precise demarkation of the cases in which exemplary or vindictive damages are allowed, has not yet been made in any distinct manner. In all actions of tort accompanied by violence, malice or oppression, they are undoubtedly recoverable; but how far, in cases of tort, mere fraud will found a claim for them, is not yet determined. In many cases of fraud the courts have declared a fixed and uniform rule, which, of course, excludes all idea of vindictive or exemplary damages. But there are many other cases where fraud, though unattended by violence, is accompanied by gross malice and manifest design to injure; and in these it would seem that they should be allowed.

[1] In New York, it is enacted that where the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other. N. Y. Code of Procedure, § 7. A similar provision exists in many of the States.

CHAPTER XIX.

THE RULE OF DAMAGES IN ACTIONS BROUGHT FOR THE MISAPPROPRIATION OR CONVERSION OF PERSONAL PROPERTY.—THE COMMON-LAW ACTION OF TROVER.

The General Rule is the Value of the Property Converted.—Special Damages whether Recoverable.—Value, whether estimated at the Time of Conversion, or at Time of Trial.—Rule of Intermediate Higher Value considered.—Stocks.—Confusion.—Tortious Taking.—Where Plaintiff claims a Special Property, or by Virtue of a Lien.—Where the Defendant has bestowed Labor on the Property.—In regard to Choses in Action.—Title Deeds.—Securities.—Policies of Insurance.—Interest.—Mitigation of Damages.—Forms of Action.—General Conclusions.

In treating of the subject of torts, we shall first discuss those cases which, being unattended by any circumstances of aggravation, are regarded as entirely under the control of the court, and in which a fixed rule of damages is maintained as matter of law. In these cases, as in contracts, compensation is awarded on fixed legal principles. Where, on the other hand, the amount of relief is submitted to the discretion of the jury, few questions present themselves as to the measure of damages.

Nature of Trover.—Trover is the form of action prescribed by the common law, where damages are demanded for specific personal property which has been wrongfully appropriated, or in more technical language, converted to the use of any other than its rightful owner. It is often brought at the option of the plaintiff in cases where assumpsit, and in others where trespass, or replevin, would lie.* The consequences flowing from the election of assumpsit are well stated in the language of Lord C. J. Ellenborough. "In bringing an action for money had and received, instead of trover, the plaintiff does no more than waive any complaint with a view to damages for the tortious act by which the goods were converted into money, and takes to the net proceeds of the sale as the value of
[474] the goods, subject of course to all the consequences of considering the demand in question as a *debt*, and amongst others to that of the defendants' having a right of

* Barker *v.* Cory, 15 Ohio, 9.

set-off, if they should happen to have any counter-demand against the plaintiff." * [1]

VALUE OF THE PROPERTY GENERALLY MEASURES THE DAMAGES.—But where trover is adopted, the general proposition may be laid down, that the value of the property converted is the measure of damages.[2] This, however, is subject to many qualifications.

PRETIUM AFFECTIONIS.—It is proper, perhaps, before entering on the general discussion, to take notice of an exception to which is applied the term of *pretium affectionis*. It has been intimated in many cases, though perhaps never as yet directly decided, that where the property in question had for some particular reason a peculiar value to its owner, as a picture to a relative, a manuscript to a descendant, and so in many other cases that may be supposed, it would be proper for the jury, instead of confining themselves to the rigid estimate of value, of which, perhaps, there might be no criterion, to give an enhanced remuneration for the peculiar estimate in which the true owner held the article in question, as a *pretium affectionis*.

* Hunter *v.* Prinsep, 10 East, 378, 391; Greenleaf on Evidence, vol. ii, 218. *Vide ante*, 38, in notes.

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[1] Assumpsit for money had and received is the proper form of action when the defendant has received money, or what is to be treated as such, to the use of the plaintiff; but it will not lie for stocks, goods, or other articles, unless by the understanding of the parties they were to be treated as money. Accordingly, where the plaintiff sued in this form of action to recover a sum of gold which had been deposited with the sheriff's deputy as bail, at a time when gold was at a premium, the recovery was limited to the value of the gold as money, with interest. Frothingham *v.* Morse, 45 N. H. 545. But in an action of trover for the value of certain special deposits in coin, it was lately held by the Supreme Court of Missouri, that the measure of damages was the *value* of the coin at the date of its conversion. Coffey *v* .The National Bank of the State of Missouri, 46 Mo. 140.

"*In trover*," say the Supreme Court of Tennessee, "the rule of damages is arbitrary; the measure in general is the value of the property tortiously converted. But in *case*, which is an action founded on the plaintiff's title in justice and equity to receive a compensation in damages (2 Stark. Ev. 212), the damages are to be estimated by the jury, in view of all the circumstances of the (particular) case." Jones *v.* Allen, 1 Head (Tenn.), 626.

[2] Beecher *v.* Denniston, 13 Gray (Mass.), 354; Watson *v.* McLean, 1 E. B. & E. 75; Dixon *v.* Caldwell, 15 Ohio St. 412; Stirling *v.* Garrittee, 18 Md. 468. See Chase *v.* Blaisdell, 4 Minn. 90; Justice *v.* Mendell, 14 B. Monr. 12; Hildebrant *v.* Brewer, 6 Tex. 45; Carter *v.* Feland, 17 Mo. 383; Cassin *v.* Marshall, 18 Cal. 689.

If the property have little or no market value, the actual value to the owner is the just rule. The jury may consider the cost of replacing the property. Stickney *v.* Allen, 10 Gray, 352; Starkey *v.* Kelly, 50 N. Y. 676; and see Bourne *v.* Ashley, 1 Lowell, 27; also France *v.* Gaudet, L. R. 6 Q. B. 199, *post*, 481 *n.*

The Supreme Court of Massachusetts sustained the refusal of the judge at Nisi Prius to qualify the rule by limiting the inquiry to the *place* of conversion. It might have been impossible to find that the property had any marketable value at the precise spot where the conversion took place, or in its immediate vicinity. Selkirk *v.* Cobb, 13 Gray, 313.

It seems to have been held by the New York Court of Appeals, that the value of foreign goods in an action of trover should be ascertained by the custom-house valuation of them in this country, if made nearly at the time of the conversion. Caffe *v.* Bertrand, 1 How. App. Cas. 224.

It is very difficult to reduce remuneration of this kind to principle or settled rule. In cases of intentional wrong, the rule of vindictive damages covers the case. But when such is not the case, how far should a plaintiff be remunerated, for what is in truth an injury to his feelings? As a general rule, injuries to the feelings of the plaintiff are not subjects of legal recompense, except when the wrong is malicious. To authorize such a recovery, it would seem to be essential at least that the defendant should have been apprised of the peculiar value set upon the property by the owner, and that he should have disregarded his feelings. And then again, to what extent shall the jury go in their endeavor to appreciate the various motives that may enter into the plaintiff's estimate of the article? There would seem to be great intrinsic difficulty in permitting recovery on these grounds. During the existence of slavery in Mississippi the difficulty was partially got over in regard to slaves, by permitting the owner to seek equitable relief, [475] and to claim a specific return of the property, where at common law he would have been limited to an action for damages.*[1]

RULES IN TROVER. PRESUMPTION AGAINST WRONG-DOERS.—We now come to the examination of the rules which govern damages in the common-law action of trover, or in actions where redress is demanded for the wrongful conversion of specific articles of personal property.

In one of the earliest cases on the subject of damages in trover,† where the action was brought for a jewel, several of the trade being examined to prove what a jewel of the first water, of the size in question, would be worth, the chief justice of the King's Bench directed the jury, that unless the defendant produced the jewel and showed it not to be of the first water, "they should presume the strongest against him, and make the value of the best jewels the measure of their damages;" which they did.[2]

* Butler *v.* Hicks, 11 Sm. & Marsh. 78; Hull *v.* Clark, 14 Sm. & Marsh. 187.

† Armory *v.* Delamirie, 1 Strange, 504.

[1] But in that State the *pretium affectionis* could not be considered in estimating the value of a slave. Mosely *v.* Anderson, 40 Miss. 49.

[2] But in other forms of action, as assumpsit for goods sold, or debt for money lent, where there is no fraud in the defendant, this rule is reversed, and the jury will be instructed to presume against the plaintiff's demand. Thus, in the former case, in the absence of evidence as to the quality of liquor in bottles sold by the plaintiff, they were told by Lord Ellenborough to presume the bottles were filled with the cheapest liquor in which the plaintiff dealt. Clunnes *v.* Pezzy, 1 Camp. 8. And in the latter, where the proof was simply that the plaintiff handed the defendant a bank note in reply to a request for money, the English

"The general rule in trover," said Patterson, J.,* "is that the damages are measured by the value of the thing taken. I never knew of any attempt to reduce the damages by showing the manner in which the goods were seized." And in this case, it being specially pleaded that the defendant did not convert the goods claimed, a horse and cart, evidence was refused to show that they did not belong to the plaintiff.†

SPECIAL DAMAGES.—It has, however, been intimated that special damages may be recovered in this action for the detention of the property, over and above its value. It was suggested ‡ by Parke, B., at Nisi Prius, that the plaintiff could recover special damages if laid in the declaration; as in trover for the conversion of a horse, that the plaintiff could recover for money paid for the hire of other horses. And it has been so since decided by the Queen's Bench, in trover brought by a carpenter for his tools; the declaration containing an allegation, that by reason of the conversion the plaintiff was prevented from working at his trade.‖[1] In this country, however, it seems doubtful; the doubt resulting from the technical form of the action, as well as from the question as to remoteness [476] or consequentiality of damages.¶[2]

QUALIFICATIONS OF GENERAL RULE.—The general rule, mak-

* Finch *v.* Blount, 7 Car. & Payne, 478.

† "The value of the goods which have not been returned," says Patterson, J., in Cook *v.* Hartle, 8 Car. & Payne, 568, "is the proper measure of damages."

‡ Davis *v.* Oswell, 7 Car. & Payne, 804.

‖ Bodley *v.* Reynolds, 21 April, 1846, 8 Q. B. 779. See also, Moon *v.* Raphael, 2 Bing. (N. C.) 310, an action of trover, in which Tindall, C. J., said, "The injury of which the plaintiffs complain not being a damage necessarily consequent on the wrongful conversion of the goods, if it could in any shape fall within the remedy of an action of trover, ought at least to have formed the subject of a special allegation."

¶ See Brizsee *v.* Maybee, 21 Wend. 144; and in Pennsylvania, see Farmers' Bank *v.* McKee, 2 Penn. State R. 318; Starkie Evid. p. 2, 1165, Art. Trover. In Stevens *v.* Low, 2 Hill, 132, where goods having been sold at an agreed price, to be paid in notes, and delivered conditionally, and the condition being broken, trover was brought for the goods, the court said that if assumpsit had been brought, the plaintiff would have been entitled to the *agreed* value; but that in trover the *value* and interest was the true measure, and that the defendant was at liberty to show that the value of the property was much less than the agreed price. And this is in accordance with the analogous cases brought on implied or express warranties of chattels.

Court of Exchequer held that the jury were rightly instructed to presume it to have been of the lowest denomination. Lawton *v.* Sweeney, 8 Jur. 964. See Jones' Appeal, 62 Penn. St. 324.

[1] See France *v.* Gaudet, L. R. 6 Q. B. 199, *infra*, 481 n.

[2] So in Connecticut, they are not allowed. Hurd *v.* Hubbell, 26 Conn. 389. And see Saunders *v.* Brosius, 52 Mo. 50; also *post*, 534; also *post*, 495, note. But there are cases where, by rule in some of the States of the Union, additional damages immediately proximate to the defendant's wrong act may be proper, as where the plaintiff being the true owner, has been subjected to expense and loss of time in searching for property unlawfully taken. In such a case, a reasonable allowance may be made for the time and expense beyond the value and interest. McDonald *v.* North, 47 Barb. 530; Forsyth *v.* Wells, 41 Penn. St. 291.

ing the value of the property the measure of damages, is, as has been said, subject to many qualifications; and the questions that arise as to compensation in this action, may be regarded in six points of view. *First*, as to the time when the value of the property is to be estimated, in a case of simple conversion. *Secondly*, how far this value is affected by the right in which the plaintiff claims. *Thirdly*, what is the rule when the property has been changed, or increased in value, as where logs have been made into plank, cloth into clothes, or the defendant has otherwise bestowed his labor on it. *Fourthly*, what the rule is where the controversy relates to negotiable paper, or other choses in action. *Fifthly*, as to interest; and *lastly*, as to mitigation. It should be noticed here that it is well settled in this country that the rule of damages in this form of action is a pure question of law. "The jury," said the Supreme Court of New York,* "are to ascertain the quantum of damages, according to the rules of law:" such is the language of all the cases, and such, indeed, the reasonable rule; for trover, though nominally an action of tort, is usually brought to establish a mere right of property, and does not, like trespass, admit of evidence in aggravation.†

RULE WHERE THE PROPERTY FLUCTUATES IN VALUE.—Where a particular chattel has been wrongfully appropriated by the defendant, if the chattel is of fixed value, there seems no [477] difficulty in arriving at a correct measure of damages;[1] but if the property be of fluctuating value, and its value or price has actually varied between the period of the wrongful appropriation, or conversion, and of the trial, a question at once arises, *at what time* should the value be estimated. And several analogies of the subject, which we have already considered,

* Savage, C. J., in Baker *v.* Wheeler, 8 Wendell, 505.

† In England, however, as we shall see, this seems by no means clear; and from the cases of Greening *v.* Wilkinson, 1 Car. & Payne, 625, and Whitehouse *v.* Atkinson, 3 Car. & Payne, 344, cited hereafter, it would appear that very much is left to the jury in each particular case.

So in Alder *v.* Keighly, 15 M. & Wels. 117, Pollock, C. B., said, "If this had been an action of trover for the bill, no doubt it would have been altogether a question for the jury as to the amount of damages."

[1] Where the value of the property is fixed, it is well settled that the rule is the value, to which in this country is added as matter of law, interest from the time of the conversion. No other rule in these cases indeed could be adopted, and it is only where this obvious standard does not exist, that the question arises which the author proceeds to consider. Andrews *v.* Durant, 18 N. Y. 496; McCormick *v.* Penn. Cent. R. R. Co. 49 N. Y. 303; King *v.* Orser, 4 Duer (N. J.) 431; Robinson *v.* Hartridge, 13 Florida, 501; Tenney *v.* State Bank of Wisconsin, 20 Wis. 152; Hurd *v.* Hubbell, 26 Conn. 389; Cook *v.* Loomis, 26 Conn. 483; Vaughan *v.* Webster, 5 Harring. (Del.) 256; Thrall *v.* Lathrop, 30 Vt. (1 Shaw), 307; Yater *v.* Mullen, 24 Ind. 277; Polk *v.* Allen, 19 Mo. 467; Ryburn *v.* Prior, 14 Ark. (Barb.) 505; Cutter *v.* Fanning, 2 Iowa, 580; Hayden *v.* Bartlett, 35 Me. 203; Repley *v.* Davis, 15 Mich. 75.

at once suggest themselves to the mind. The rightful proprietor in these cases is deprived of the use of his property to the time of trial; and we have seen, upon sales of chattels, where the price is paid in advance, and also in regard to stock contracts, that the defendant has on this ground been sometimes compelled to pay the highest value during his unlawful possession; while in other cases, this consideration has not been allowed any weight. The same doubts exist in regard to the rule of damages in the form of action which we are now considering.

ENGLISH RULE.—This question was early considered by Lord Mansfield,* where a motion was made to stay proceedings on bringing the chattel into court with costs to that time. The rule was refused on the circumstances of the particular case; but his Lordship said,—

"Where trover is brought for a specific chattel, of an ascertained quantity and quality, and unattended with any circumstances that can enhance the damages above the real value, but that its real and ascertained value must be the sole measure of damages, there the specific thing demanded may be brought into court; where there is an uncertainty either as to the quantity or quality of the thing demanded, or that there is any tort accompanying it that may enhance the damages above the real value of the thing, and there is no rule thereby to estimate the additional value, then it shall not be brought in." . . . "In trover for money numbered or in a bag, the jury may give more in damages; they may allow interest, and in some cases they ought." . . . . "When the thing clearly remains of the same value, yet the jury may give damages for the detention; and this ought to be done, because at the trial, when the thing remains in the same condition, there generally is a rule to deliver it."†

A good deal of latitude is here evidently taken as to [478] the *value* of the property, though nothing is said as to the *time* at which the estimate is to be made. The discussion also seems to assume that additional damages may be given for any tort accompanying the conversion, a point which we shall have occasion hereafter to notice; and interest and damages for detention are both spoken of as proper in particular cases.‡

* Fisher *v.* Prince, 3 Burrow, 1363 (1762).

† It may be remarked on this case, that this practice of staying proceedings on delivery of the property, though still in use in England, Earle *v.* Holderness, 4 Bing. 462; Tucker *v.* Wright, 3 Bing. 601, and 1 C. & M. 544, is, it is believed, little known in this country (Shotwell *v.* Wendover, 1 J. R. 65), the courts not exercising such summary power over the proceedings.

In Stevens *v.* Low, 2 Hill, 132, Cowen, J., said, however, "It is quite common for the courts to make a rule stopping the action on a redelivery and payment of costs." The reports of our decisions would not seem to warrant the remark.

‡ The case of Whitten *v.* Fuller, 2 W. Black, 902, was a motion by defendant in an action of trover for a bond, to have proceedings stayed on delivering up the bond and

At Nisi Prius, Lord Ellenborough in an action of trover* for bills, limited the plaintiff's recovery to the amount of principal and interest at the time of the conversion.[1] But in another case,† where trover was brought for East India Company warrants for cotton, which had risen from sixpence per pound at the time of the conversion, to tenpence-halfpenny, Abbott, C. J., pronounced the case of Mercer *v.* Jones to be "hardly law," and said,—

"The amount of damage is for the jury, who may give the value at the time of the conversion or any subsequent time in their discretion; because the plaintiff might have had a good opportunity of selling the goods if they had not been detained. My opinion is, that the jury are not at all limited, in giving their verdict, by what was the price of the article on the day of the conversion."

In a subsequent case ‡ the same eminent judge said, that the plaintiff was not bound by the sum at which goods were sold by the defendant at auction, "but where the plaintiff is an assignee, who must have sold the goods if they had come to his hands before any sale by the sheriff, it *often happens that a jury considers* the sum at which the goods were actually sold at auction, as a fair measure of damages."[2]

These decisions seem to leave the rule of damages in England, as to the time at which the value is to be estimated,

paying costs. But the plaintiff objecting that he had sustained great loss by the detention of the bond till after the death of the obligor, and insisting on his right to go for special damages, the motion was denied.

And in Parker *v.* Norton, 6 Term R. 695, an action of trover, Lawes said, *arguendo* in support of a demurrer to a plea of a bankrupt discharge,—"In some actions of trover, indeed, the specific value of the thing converted may be a criterion, but in others it is by no means the measure of damages." And the demurrer was held good.

* Mercer *v.* Jones, 3 Camp. 476.

† Greening v. Wilkinson, 1 Car. & Payne, 625.

‡ Whitehouse, Assignee, *v.* Atkinson, Sheriff, 3 Car. & Payne, 344.

[1] Such is held to be the rule in the late case of Falk *v.* Fletcher, 18 C. B. 403 (1865); although it does not appear in the report of this case that there was any subsequent enhancement of the market value of the goods, and the motion for a new trial which was made by the defendant and denied, was on the ground of surprise as to their amount. And where the plaintiffs contracted with R. to build a ship for them, and made advances from time to time in respect of her; and R. gave them, as security for the advances, a bill of sale of the ship, which stated that he (R.) thereby did sell, transfer, etc., to the plaintiffs a certain ship in process of building (describing her), to have and to hold the ship, etc., to the plaintiffs forever, when she should be completed; the defendants having converted the vessel before she was finished, and having finished her, the plaintiffs were held entitled to recover as damages in trover, the value of the vessel at the time of her conversion, but not her value at a subsequent time, nor as special damage the value of freight which the plaintiffs might have earned with her if R. had completed her and delivered her to them. Read *v.* Fairbanks, 24 Eng. L. & E. 220; s. c. 13 C. B. 692. Compare Wood v. Bell, 6 Ellis & B. 355; reversing, in part, s. c. 5 *Ibid.* 772. And it does not appear that in any of the English cases an intermediate higher value, not maintained to the day of trial, has been adopted as the measure of damages. See the review of the English decisions in Suydam *v.* Jenkins, 3 Sandf. 614; *ante*, 266. The prevailing English rule in the case of stock is the value at the trial (*vide infra*); in other cases it seems to be that at the time of conversion.

[2] As to effect of sales at auctions in determining the value of chattels, see The Columbus, 1 Abbott's Adm. 37; s. c. *Ibid.* 97.

and even as the value itself, very much to the discretion [479] of the jury. And such is the apparent construction of the recent statute,* by which it is declared that in all actions of trover, the jury may, if they shall think fit, give damages in the nature of interest over and above the value of the goods at the time of the conversion. But if we were to adhere to the analogy of the cases that have been decided there as to stock contracts,† [1] we should say that the rule of damages, when the value of the chattel is fluctuating, ought to be the highest value between the conversion and the trial.

NEW YORK RULE.—And this appears to be the rule in New York. In one case, ‡ indeed, it was said that it was undoubtedly correct to give, as the damages in trover, the full value of the property, *at the time of conversion*, and interest thereon from that time.[2] But this, it seems, is not now the rule in that State where the value is fluctuating. ‖

In an action of assumpsit,¶ brought to recover the value of a pledge given and appropriated, and which we have already had occasion to cite more at large, Kent, J., said,—

"The value of the chattel *at the time of the conversion*, is not in all cases the rule of damages in trover. If the thing be of a determinate and fixed value, it may be the rule; but where there is an uncertainty or fluctuation attending the value of the chattel, and it afterwards rises in value, the plaintiff can only be indemnified by giving him the price of it at the time he calls upon the defendant to restore it; and one of the cases even carries down the value to the time of the trial."

Again in an action of assumpsit,** on a note payable in specific articles, the court held the measure of damages to be the highest market price of the articles in question, at any time between the notes falling due and the time of the trial, saying, "In trover, if the chattel be not of a fixed determinate value, its worth at the time of conversion is not the rule of damages, but they may be enhanced according to the increased value of the chattel subsequent to that time." ††

* 3 & 4 W. IV, c. 42, § 29 (Aug. 14, 1833).

† Shepherd *v.* Johnson, 2 East, 211; *ante*, 261.

‡ Dillenback *v.* Jerome, 7 Cowen, 294.

‖ In Shotwell *v.* Wendover, 1 J. R. 65, the court said, the plaintiff has a right to claim damages for the use of the articles (tools, etc.), and for their deterioration while in the possession of the defendant.

¶ Cortelyou *v.* Lansing, 2 Caines' Cases in Error, 200; *ante*, 384.

** West *v.* Wentworth, 3 Cowen, 82.

†† The case of Kennedy *v.* Strong, 14 J. R. 128, is therefore to be taken, subject to the

[1] See Vaughan *v.* Wood, 1 M. & K. 403; Owen *v.* Routh, 14 C. B. 327; Forrest *v.* Elwes 4 Vesey, 491.

[2] Such is the rule where the value is fixed. *Ante*, p. 477, note 1.

[480] RULE IN MASSACHUSETTS.—In Massachusetts, on the other hand, the value of the goods at the time of the conversion seems to be the rule.* The Supreme Court say, "We see no reason for departing from the rule which we think has been invariably practiced upon in this State, that in actions of trover, the value of the article sued for at the time [481] of the conversion is to fix the damages." †[1]

foregoing observations. That was an action of trover, and the plaintiff proved the value of the goods at the time of conversion, but gave no evidence of the price they actually brought. A point being made as to the measure of damages, Thompson, J., said, "It is a general rule in trover, that the measure of damages is the value of the property at the time of the conversion."

See, also, to S. P. Baldwin's Administrators *v.* Harvey, Anthon's N. P. 214.

In Hallett *v.* Novion, 14 J. R. 273, where trover was brought for a vessel illegally captured on the high seas, the judge who tried the case held, that the measure of damages was the value of the cargo at the time and place of capture, with such additional damages as would be equal to the interest thereon, and that the jury in determining such value, ought to allow the prices of cargo at New York, for which port the vessel was bound when taken, deducting a reasonable premium of insurance from the place of capture to New York; the restoration of the brig, and the avails of the cargo, or any part of it which the plaintiff had received, of course going in mitigation of damages. This case, so far as it takes the time of capture as establishing the rule of damages, does not agree with those above cited; but as the case was reversed in error, 16 J. R. 327, on the ground that the capture was a matter of exclusive admiralty jurisdiction, it can hardly be regarded as an authority.

* Kennedy *v.* Whitwell, 4 Pick. 466.

† See also, Sargent *v.* Franklin Insur. Co. 8 Pick. 90; and Greenfield Bank *v.* Leavitt, 17 Pick. 1; and Johnson *v.* Sumner, 1 Metcalf, 172. "The general rule of damages," says Morton, J., in Pierce *v.* Benjamin, 14 Pick. 356, "in actions of trover, is unquestionably the value of the property taken at the time of the conversion." See also, Fowler *v.* Gilman, 13 Met. 267. In Barry *v.* Bennett, 7 Metcalf, 354, it was held in Massachusetts, that in trover by a mortgagee of property against one who purchased it of the mortgagor after it was mortgaged, and sold it to a stranger, the damages are the value of the property and interest thereon from the time of the sale by the defendant, and not from the time of his purchase.

So also in Kentucky, the rule takes the time of conversion. Lillard *v.* Whitaker, 3 Bibb, 92; Sproule *v.* Ford, 3 Littell, 25. See also, Outton *v.* Barnes, Litt. Selected Cases, 137.

In Georgia, when the property is of an undeviating value, what is proven to be its worth when converted, seems to be the criterion of damages. When the value fluctuates, the rule seems in that state unsettled. Foster *v.* Brooke. 6 Georgia, 287. But evidence may be given of the value at the time of trial, as well as of conversion. Schley *v.* Lyon, 6 Georgia, 530.

In Watt *v.* Potter, 2 Mason, 77, the rule of the value at the time of the conversion was laid down by Story, J. Watt, the plaintiff, sent a cargo of rum to Quebec. The master went into Newport, and there fraudulently (as was alleged) sold the vessel. The cargo in question (the importation of goods by British vessels from British colonies being prohibited), was landed and stored with the defendant. He refused to deliver to the plaintiff's agent, and claimed in the suit to deduct from the market value, the amount of duties on the rum. Story, J., said to the jury: "The last question is, what is the rule by which the damages, if the plaintiff be entitled to recover, are to be assessed. I am of opinion that the rule is the value of the property at the market price, at the time of the conversion. The defendant claims to have a deduction made of the amount of duties which would accrue on the rum if regularly imported. At first I inclined to think this deduction was reasonable; but on reflection, I have changed my opinion. No duties have been paid upon the rum; no duties are by law payable, for the rum was prohibited from importation from Jamaica in a British vessel, by the recent act of Congress. The defendant never gave any bonds for the payment of duties, and is in no shape liable to pay them. The rum was landed for re-exportation, and the plaintiff was desirous, with the consent of government, of re-exporting it; but the defendant has wrongfully prevented the re-exportation. What right, then, can the defendant have to an allowance for duties which he has never paid, and is not liable to pay? What reason is there, that the plaintiff should suffer a loss which has been occasioned by a tortious conversion of the defendant? In my judgment, it does not lie in the mouth of a wrong-doer to set up such a

[1] RULE OF INTERMEDIATE HIGHER VALUE.—It has been held in several cases in New York,

ON PRINCIPLE, THE VALUE AT THE TIME OF CONVERSION SHOULD CONTROL, UNLESS THE PLAINTIFF IS DEPRIVED OF SOME SPECIAL USE OF THE PROPERTY ANTICIPATED BY THE WRONG-DOER.—I have

claim. The duties may never yet become payable, and but for the wrongful act of the defendant would not become payable; and if any loss be sustained, it should be borne by the party through whose instrumentality it has occurred, and not by an innocent shipper."

Where trover was brought for slaves, the rule of damages seems to have been their value at the time of the conversion, and the value of their labor from that time in addition to the value of the property. Banks *v.* Hatton, 1 Nott & McCord, 221; Schley *v.* Lyon, 6 Georgia, 530.

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that in actions for the actual conversion not only of stock, but of any personal property of fluctuating value, as also for the breach of executory contracts for the purchase of goods which are paid for in advance, the measure of the damages is the highest market price which the property may have had from the date of the conversion, to the end of the trial, provided the action be brought and pressed with due diligence. This rule, which had been substantially adopted by the Supreme Court of the State in the first district (Wilson *v.* Mathews, 24 Barb. 295), was held by the Court of Appeals, on a review of the cases, in an action for the wrongful conversion of railway shares pledged with the defendant as collateral security for a loan. Romaine *v.* Van Allen, 26 N. Y. 309. In this case, which was decided in March, 1863, Mr. Justice Rosekrans, delivering the opinion of the Court, says: "Independent of the authorities, the rule appears to me to be reasonable and necessary to protect the owners and pledgers of the stock against the tortious acts of pledgees, if the plaintiff commences his action within a reasonable time after the conversion, and prosecutes it with reasonable diligence." The reasoning, however, on which the decision is based, applies broadly to all cases of the conversion of chattels, the learned justice using the following language: "Although the general rule of damages in trover may be the value of the chattel at the time of its conversion with interest, or that value when the chattel has a determinate or fixed value, yet, when there is any uncertainty or fluctuation attending the value, and the chattel afterwards rises in value, the plaintiff can only be indemnified by giving him the price of it, at some period subsequent to the conversion; and the necessary result of all the decisions, in my judgment, is that in such cases the plaintiff is entitled to recover the highest market value of the property at any time intermediate the conversion and the trial."

In the case of Brass *v.* Worth, 40 Barb. 648, decided in September of the same year, which was also an action for the conversion, by a wrongful sale, of stock which, by special arrangement of the parties, had been purchased, and, as was adjudged, should have been held by the defendant for the plaintiff's account, a somewhat different rule was adopted by the Supreme Court of the State. The measure of damages was held to be, in reference to certain stock, its value on the day when the plaintiff demanded a return of it, and in reference to certain other stock which had not been demanded, the difference between its market value on a certain day, which was "a reasonable time after the sale, and the cost price of the defendant's purchase thereof, with the interest."

But the case of Romaine *v.* Van Allen, was adhered to by the court of last resort in that of Burt *v.* Dutcher, 34 N. Y. 493, which was an action for the conversion of hops, and was followed by the Supreme Court of the State, in an action for the conversion of grain. Morgan *v.* Gregg, 46 Barb. 183. The same rule was also recently applied by the Superior Court of the city of New York, to the case of a railroad bond lent by the plaintiff to the defendant, by whom it was converted to his own use. Naumann *v.* Caldwell, 2 Sweeny, 212.

The main question now before us, was again very fully considered by the New York Court of Appeals, in an action by a principal against his factor, for the conversion of wheat by a sale in violation of instructions.

In this case the plaintiffs, who resided in Cleveland, Ohio, having certain wheat in the defendant's store at Buffalo, on the 12th day of July, 1853, telegraphed to the defendants at that city to sell it the same day at $1 08 a bushel, and if it were not sold on that day, to ship it to New York. The defendants accordingly offered the wheat the same day to a person who desired to be allowed, until the following morning, to inspect it, and decide on the purchase. To this the defendants assented, provided no news were received in the meantime affecting the value, and at eight o'clock the next morning, he took the wheat at the price named. The case having been tried by the court at Nisi Prius without a jury, the sale was found to have been in good faith, but not having been made on the day to which the defendants were limited by their instructions, was adjudged a conversion of the wheat by them. The court fixed the 29th of November, in the same year, as the time within which the plaintiff might reasonably have brought the action.

In the Court of Appeals, the case was twice argued. On the first argument the court was

already had occasion to notice the claim of damages for the rise of property, which has been sold and its price paid, between the

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equally divided. On a re-argument before a court differently constituted, the four judges who opposed the severer rule, being no longer on the bench, the following conclusions were adopted in an opinion delivered in September, 1864, the court considering that in the absence of fraud, misrepresentation, or wilful misconduct, there is no difference in the rule of damages, whether the action be for breach of a contract or for a violation of duty.

Where damages are sought for the breach of a contract, for the sale of personal property, wholly executory on both sides, the true rule is the difference between the price named in the contract, and the market price at the time fixed for performance. This is on the ground that as nothing has been paid by the plaintiff, he can, if he still wish the property, buy it in the market at the contract price, with such further sum as the rise in the market compels. And if he prefer not to buy it at the advanced rate, he can, without doing so, recover a sum equal to the above difference. But where the executory contract has been performed on the part of the plaintiff by the payment of the price, and broken by the defendant by not delivering the property, the true rule is to allow the plaintiff the highest market price between the time of the conversion and that of the beginning of an action brought within a reasonable time, and perhaps up to the trial of a suit thus begun, and diligently pressed. This is on the principle that it might be inconvenient or impossible, and is unjust to oblige the plaintiff in order to procure an article like that illegally converted, to pay the contract price a second time, with the added amount which the market value may then require, and that it is more equitable to hold the defendant responsible for the fluctuation in the market, as long as he continues to deprive the plaintiff of the article, up to the period when, by the legal effect of a verdict, the title is transferred from the plaintiff to the defendant.

What is a reasonable period, after the conversion, within which the damages must be estimated, is not definitely settled, and probably depends on the circumstances of the case. The plaintiff should not be permitted to range through the whole time between the conversion and the period when the statute of limitations would attach, for the purpose of discovering the highest price at which the property might sell in the market. This would give the transaction the color of a mere speculation and not of a just ascertainment of the actual damages. But where the party holds the property for the purpose of sale, a reasonable period, *according to the course of trade*, should be allowed for the purpose of making such sale. If there were no evidence as to what is a reasonable period, it would probably be a question of law; if there were such evidence, it might be a mixed question of law and fact. Scott *v.* Rogers, 31 N. Y. 676. See opinion of the court per Hogeboom, J.

In answer to the objection that the fluctuating rule conflicts with the principle that prospective and uncertain profits ought not to be permitted to enter into the assessment of damages, it was said by Denio, J., in an opinion delivered on the first hearing of the case, that the price to be obtained for a given article of merchandise, cannot be said to be of an uncertain or speculative character within the sense of the rule by which such profits are excluded.

The case of factors or other agents who, by their wrongful acts, have deprived an owner of his right to dispose of his property according to his own notions of his interest, stands on the same footing in this respect (it was said by the same learned justice in the same opinion) with that of a purchaser by contract who has paid the price in advance. Both have an absolute right to judge whether they will dispose of it at one time or another, and if they are limited to the value at the time of the wrongful act or omission which creates the cause of action, they will, in many cases, fail to receive an adequate indemnity for the injury.

On the first argument of the cause, the views thus finally adopted were combated by Marvin, J., in a very full and careful opinion, in which it was held that the defendants had put themselves in the position of a carrier who, having received goods and undertaken their carriage to a certain market, fails to deliver the goods at such destination, and that the true criterion of damages was the value of the wheat in New York, at the time it would have arrived, had the plaintiff's instructions been obeyed, less the amount the plaintiff had realized, and the expenses which would have attended the transportation to and sale in New York, adding interest on the difference to the time of trial. All damages beyond this, the learned judge held to be speculative, contingent, and remote, and not the natural and proximate consequence of the tortious act. He also held, on a very careful examination of the authorities, that in the case of the breach of an executory contract for the delivery of goods at a future day, there should be no distinction in the rule of damages, founded on the payment of the price in advance, and that the rule sought to be established in those actions and in trover, by which, where the value of the property is fluctuating, the damages are enhanced according to the increase of its value subsequent to the conversion, is not fairly justified by authority, not sound in law, and in practice is uncertain, inequitable, and dangerous.

In Pennsylvania, the general rule as to the conversion of chattels is their value at the time

time when the cause of action accrues and that of trial,* and the analogous question where the use of property is withheld; †

* *Ante*, 260, *et seq.* † *Ante*, 385, *et seq.*

of the conversion, with interest. Neiler *v.* Kelly, 69 Penn. St. 403. But in the case of the conversion of stock, this rule is to some extent modified. Where the consideration for the stock has been paid, its highest market value between the breach and the trial, together with the bonus and dividends received in the mean time, is the rule. Where the consideration has not been paid, the plaintiff should be allowed the difference between it and the value of the stock, together with the difference between the interest on the consideration and the dividends on the stock. The general rule in trover is said not to apply "where the article could not be obtained elsewhere, or where from restrictions on its production or other causes its price is necessarily subject to very considerable fluctuations." In the case of bank stock which is within this exception, the ordinary rule would hold out temptations to acts of wrongful conversion, by making them profitable to the wrong-doer, since the bank or any other trustee might deprive the owner of the very advantage he had in view when he made the investment. Bank of Montgomery *v.* Reese, 26 Penn. (2 Casey) 143; *ante*, 269, note 1. So in an action to replace borrowed stock, where the value of the stock was highest at the time of the trial, that value was held the proper measure of damages. Musgrove *v.* Beckendorff, 53 Penn. St. 310. But the principle of these decisions applies only to the case of a refusal to perform the contract, whereby the plaintiff suffers the loss in the advance of the price of the stock. Phillips' Appeal, 68 Penn. St. 130; and see Neiler *v.* Kelly, *supra*. In a case where a plaintiff, who had paid for stock, formally tendered it back to the defendant, and demanded the return of the money, or the defendant's note for the amount, pursuant to one of the terms of sale, the measure of damages was held to be the amount paid, and not the market price at the time of the refusal. Laubach *v.* Laubach, Sup. Ct. Penn. March 27, 1873, 1 Pottsville Legal Chronicle, p. 111.

In Mississippi (Whitfield *v.* Whitfield, 40 Miss. 352), the high court of errors and appeals, while rejecting the fluctuating rule, maintained the following exceptions to the fixed rule of the value and interest. First, where the original act was wrongful; second, where it was *bona fide*, but the defendants subsequently disposed of the property wrongfully, and with knowledge of the plaintiff's claim; third, where the taking and disposition of the property were both in good faith, but the plaintiff seeks to retain the excess of the proceeds of the sale over the market value at the time of the conversion "as a speculation;" and fourth, where the property has some peculiar value to the plaintiff, and is wilfully taken or withheld by the defendant. In the several classes of cases thus excepted by the learned court, the rule of compensation, in its opinion, is abandoned, and the damages are left at large to the jury. The last exception, however, as we think, with deference, might be properly included in the preceding ones. See same case, 44 Miss. 254; Bickell *v.* Colton, 41 Miss. 368. The fluctuating rule is adopted in Wisconsin, Weymouth *v.* Chicago & Northwestern Railway Co. 17 Wis. 550; Iowa, Cannon *v.* Folsom, 2 Iowa, 101 (*ante*, 260); but see for a qualification of the rule in Iowa, p. 280, note; South Carolina, Kid *v.* Mitchell, 1 Nott & M'Cord. 334; and Alabama, Ewing *v.* Blount, 20 Ala. 694; Jenkins *v.* McConico, 26 Ala. 213. In the latter State the same rule obtains in an action of detinue. Johnson *v.* Marshall, 34 Ala. 522; Freer *v.* Cowles, 44 Ala. 314. In Indiana, "the highest price of the property at any time between the taking and the sale" is approved as the rule. Ellis *v.* Wire, 33 Ind. 127.

But in New Hampshire, in the case of Pinkerton *v.* Manchester and Lawrence Railroad, 42 N. H. 424, after a review of the cases, this rule is disapproved, and the value of the articles which should have been delivered, at the time of the failure to deliver them, is held to be the just and convenient one. The court say that "to hold that the plaintiff might elect as the rule of damages in all cases, the highest market price between the time fixed for delivery and the day of trial, which is often many years after the breach, would in many cases be grossly unjust, and give to the plaintiff an amount of damages disproportionate to the injury. For, in most of these cases, had the articles been delivered according to contract they would have been sold or consumed within the year," in which case, the plaintiff would have reaped no benefit from the future increase of prices. "So there may be repeated trials of the same case, by review, new trial, or otherwise Shall there be a different measure of value at each trial?" The learned court then proceed to say that both in the case of stocks purchased for permanent investment, and of those intended to be sold soon, the fluctuating rule would be unjust. In the one case, a profit is given to the purchaser not contemplated by him in making his purchase, and in the other, the right to elect their value during the years which may often elapse before the trial, "would be giving him not indemnity merely, but a power in many instances of unjust extortion." And the rule, thus settled in that State, is adhered to in the subsequent case of Frothingham *v.* Morse, 45 N. H. 545.

In California, although the "highest value" rule was for a time adopted (Douglass *v.* Kraft, 9 Cal. 562), it was soon said that "some qualification of the rule may be found necessary

and we have seen that different rules have been prescribed by

where there has been an unreasonable delay in bringing suit, or under certain special circumstances." Hamer *v.* Hathaway, 33 Cal. 117. And in a later case, the rule was accordingly seriously modified.

In May, 1863, the defendant had wrongfully replevied hay crops, then not worth over $2,500. The following year, in consequence of a drought, the price of hay rose enormously, and the jury, having been allowed to assess the plaintiff's damages at any market rate prevailing after the conversion, with interest, found a verdict for $25,763 37. The court, after reviewing the history of the fluctuating rule, say that it is an exceptional one of American origin, and that, if unqualified, it is unjust. Rejecting, however, as illogical and unreasonable, the particular qualification of it sometimes adopted as to diligence in bringing and prosecuting the suit, they conclude that, in the class of cases in which it has been applied, the correct measure is the highest market value within what, under the circumstances of each case, is a reasonable time after the property was taken, with interest "from the time when the value was estimated." As the action had not been brought till 1869, they thought that too wide a range had been allowed the jury, and therefore set aside the verdict. Page *v.* Fowler, 39 Cal. 412.

So in Massachusetts, Maine, Maryland, Illinois, Kentucky, Louisiana, Michigan, Mississippi, and Nevada, the rule of an intermediate higher value is rejected. See Wyman *v.* American Powder Works, 8 Cush. 168; Hussey *v.* Manufacturers' and Mechanics' Bank, 10 Pick. 415; Robinson *v.* Barrows, 48 Me. 186; Hayden *v.* Bartlett, 35 Me. 203; Smith *v.* Dunlop, 12 Ill. 184; Keaggy *v.* Hite, 12 Ill. 99; Otter *v.* Williams, 21 Ill. 118; Cushman *v.* Hayes, 46 Ill. 145; Bates *v.* Stansell, 19 Mich. 91; Freeman *v.* Luckett, 2 J. J. Marsh, 390; Vance *v.* Tourne, 13 Lou. R. 225; Symes *v.* Oliver, 13 Mich. 9; Whitfield *v.* Whitfield, 40 Miss. 362, *supra;* and see Bickell *v.* Colton, 41 Miss. 368; *ante*, 382, n.; O'Meara *v.* The North American Mining Co. 2 Nevada, 112; Carlyon *v.* Lannan, 4 Nev. 156; Boylan *v.* Huguet, 8 Nevada, 345. (In this case, the rule is held to be the value, with interest, and any special damages which may legitimately arise out of matters in existence at the date of the tort.) The rule in question also appears to be disapproved in Connecticut and Missouri. Hurd *v.* Hubbell, 26 Conn. 389; Walker *v.* Borland, 21 Mo. 279; and also in Georgia, where the conversion is not a continuing one, but begins and ends in a single act as a sale. Dorsett *v.* Frith, 25 Geo. 537.

It is true that the objections of the Supreme Court of New Hampshire to the fluctuating rule are, in theory, to some extent met by the qualification of it, which holds the purchaser to a reasonable time in bringing his suit, and due diligence in its prosecution; although, as was held in Page *v.* Fowler, *supra*, and has been also lately observed by the chief justice of the present Court of Appeals of New York, this qualification of the rule does not relieve it of its objectionable character. Matthews *v.* Coe, 49 N. Y. 57 (*infra*). And practically, for reasons, some of which we shall presently give, this qualification is of little value. And, with great deference, we are constrained to say, in reference to this vexed point, that the rule in Romaine *v.* Van Allen, and similar cases, seems to us unsatisfactory, both because of its incompleteness, uncertainty, indefiniteness, and want of uniformity, and because it departs from the principle of compensation for actual loss. The decision in the case of Scott *v.* Rogers was of a negative character. The rule in that case allows the plaintiff to fix his own damages after a retrospect of the market since the conversion, by selecting the highest market rate of the property during that time, provided within a reasonable time after the conversion he, by bringing the action or otherwise, gives the defendant notice of the day thus selected. But the court simply approved the measure adopted in that case by the judge before whom it was tried, as not unreasonable in itself and not unjust to the defendant. They considered that they could not say that "four months" after the time when the wheat, if duly forwarded, would have reached its destination, was, as matter of law, an unreasonable time for bringing the suit, and that, as matter of fact, they had no power to review the finding of the judge. But the decision does not undertake to reverse or modify the still wider rule previously adopted in the case of Romaine *v.* Van Allen. That rule, in the later case of Burt *v.* Dutcher (*supra*), was re-affirmed by the same court. The latter case, as we have observed, was an action for the conversion of merchandise; and in the former, as we have also noticed, the court does not proceed upon the ground of any distinction between stocks and other personal property, in the application of the rule.

Whether such a distinction should be in fact recognized, is a matter of much nicety. In England, it exists so far that in the case of stocks, their value at the time of the trial instead of that of the conversion, furnishes the measure, and we have seen that it is adopted in Pennsylvania and Connecticut (*supra;* see also, pp. 268 and 269), as is seen in the text. So in the case of Suydam *v.* Jenkins (3 Sandf. 614), it is justified on the ground, "first, that as chancery could decree a specific execution of a contract for replacing stock, and the defendant, when such a decree is made, must of necessity purchase the stock at its then market price, he can have no right to complain when he is compelled to pay the same sum as damages, by the judgment of a court of law; and second, that as stock is usually held not for sale, but as a permanent investment, it is a reasonable presumption that had it not been replaced at the stipulated time, the plaintiff

different tribunals. The same analogies should govern in tro-

would have retained its possession until the day of trial, and hence its price at that time, whatever it might be, is no more than an indemnity." These are doubtless the reasons commonly assigned for the distinction. But it may be observed that it is more than questionable whether a decree can be had for the specific performance of an agreement for the delivery of shares in the public funds, or such other stocks as, from their well known and permanent character, are usually sought for investment. Breaches of such contracts are readily compensated in damages, and are not therefore the subject of equitable relief. Story Eq. Jur. §§ 717, 717*a*, eighth ed. by Redfield; Buxton *v.* Lister, 3 Atk. 383; Sullivan *v.* Tuck, 1 Md. Ch'y Decisions, 59.

And in regard to such stocks as are of fluctuating value, we think the presumption may be quite as applicable to them as to any other property, that they were bought for speculative purposes rather than to hold for investment, so far as this is a question of usage or law, independently of the facts of a particular case. We are inclined, therefore, to agree with the author that there is, on principle, no solid ground for the distinction.

However this may be, the rule we are considering, as we have seen, is not based upon such a distinction if it exist, and to this rule we find serious objections.

In the first place, as we have said, it is indeterminate. What is a reasonable time for bringing the suit may depend on considerations quite independent of indemnity to the plaintiff, and in cases of wilful conversion quite independent also of punishment to the defendant. Is the question for the court or for the jury? If for the court, on what basis can it intelligently lay down a uniform rule on the subject? If for the jury, how can the jury be competent to deal with it? If it be a question of mixed law and fact, as suggested by the learned judge who delivered the opinion of the court in Scott *v.* Rogers, where is the line to be drawn, and what are the elements of a rule on the subject?

In the case of Scott *v.* Rogers, the period of four months and sixteen days was determined by the court as a reasonable time within which to bring the suit, which was, in fact, not brought until March, 1858, four years and eight months after the conversion. What were the data for this conclusion, nor why it was a more reasonable period than exactly four months or any other period would have been, does not appear, except that it was suggested by the learned judge who delivered the opinion of the Court of Appeals, that the termination of canal navigation in the winter "might perhaps be supposed to have some probable influence in raising the market price of the property in New York, and therefore not unlikely to induce the plaintiff to retain the property until that time." With great deference, this conjecture seems a very uncertain basis for the action of the court below. Perhaps the fact that on the 29th of November, the last day of the period fixed, the market, as appears, actually reached a higher point than in any preceding fluctuation since the conversion, may have equally influenced the judgment of the court below, although that fact was quite irrelevant.

In the case of Romaine *v.* Van Allen, the action was brought seven months after the conversion, which period seems to have been thought a reasonable time for doing so. In that case the stock between the time of the conversion and the beginning of the trial, rose from $3,937 50, which was its full market price on the day of the conversion, to $5,962 50 before the trial began. The trial, which was before a referee, was a protracted one, and during its progress the stock happened to rise in the market to the price of $8,175, which was the highest reached before the trial ended, and was the amount allowed. Here we have this remarkable result of the application of the rule adopted, that from the circumstance that the trial was had before a referee, instead of the court, or a court and jury, the plaintiff gained upwards of $2,000 in the amount of the judgment. It is difficult to see how the principle of compensation could justify this windfall. Again, if the action were brought in the city of New York, where the courts are often oppressed with business, it might be that the suit, although prosecuted with proper diligence, could not be tried within a much longer time than if it were in a contiguous county. On the principle of this case, the verdict for the same conversion, although obtained with proper diligence, might be double if the suit were brought in one county what it would be in another where the same obstacles to an immediate or speedy trial did not exist.

The same result may follow if the action is brought in one of several coördinate tribunals in which, from the greater pressure of business or the lesser amount of judicial force, the suit cannot be so soon determined as if it had chanced to be instituted in another. What a lottery does our system of determining the compensation in this class of cases become, if the amount is on the one hand doubled or trebled, or on the other divided or decimated by the accident of venue!

So, many other circumstances, examples of which will occur to every lawyer, might, without the plaintiff's fault, affect the time when the case should be tried, and therefore the amount of damages, which, on any principle of justice or compensation, would be utterly irrelevant to its merits.

Another serious objection to the rule is, that the reason of it does not apply where the

ver; and it appears to me, that, on principle, unless the plaintiff

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goods were purchased for use, or for some other purpose than for sale, nor even when they were bought for sale, unless the advance occurred within the period during which they would have been sold in the ordinary course of business. In the case (in which the rule is least objectionable), that of goods intended for sale, indemnity would require that it be confined to such as were or may be presumed to have been meant for sale indefinitely in point of time. Where goods were to have been sold either immediately or within a certain fixed period, the range of the plaintiff's right of selection should, on the same principle, be narrowed to the time of the intended sale. So in the case of property which from its nature would have perished, or in the case of articles intended for consumption which would have been consumed within a limited period, the time of the fluctuation of the market within which the price is to be determined, ought not on any principle of compensation to go beyond such period. In each case, the facts and circumstances showing what would have been the probable disposition of the property by the owner should seem material in showing his actual loss, and therefore in ascertaining the proper indemnity. It is grossly inequitable that the owner should have the advantage of a chance rise in value, which it is certain he had never contemplated, and would not have taken advantage of had the property remained in his possession. The want of uniformity in the rule and the numerous exceptions which must be engrafted on it, seem grave objections.

So again, the rule departs from the analogy of the general principle by which interest on a debt from the time it became due, or on the value of property wrongfully withheld from the time of the taking, is the measure of damage. Such interest, as we have seen, is allowed in America as a legal right, and for this legal right it substitutes the chance of winning a prize.

Again, the conversion may have been purely technical, the result of a misapprehension of the rights of the parties, or, as in the case of Scott *v.* Rogers, an act of perfect good faith, and yet without any actual loss to the one party, the other may be made to suffer a penalty which should only be paid by a wilful wrong-doer.

But especially is the rule to be deplored as a departure from the principle of indemnity, which ought never to be lost sight of. It is adopted, it is true, nominally as a rule of indemnity (see opinion of Hogeboom, J., in Scott *v.* Rogers), but it is contrary to the great theory by which the damages to be recovered are confined to such as have been already sustained, such as are the natural and direct consequence of the defendant's act, or such as both parties should have expected to ensue, and adds an unnecessary exception to the wise rule by which the commencement of the suit limits the rights of the contending parties. Direct profits, it is true, are sometimes recoverable, and in the case of carriers, we have seen they are sometimes held for such gains as were lost by the plaintiff as the direct result of their failure to deliver the goods. But this rule goes further, and embraces profits which are purely uncertain and speculative.

Again, in actual practice, it is extremely rare that the holder of stock or other fluctuating property sells it at the right moment—at the highest pinnacle of the market. The stockholder has to deal with what is future, what is contingent and wholly beyond his own control. He has all the known circumstances and unknown chances—all the probabilities and possibilities near and remote, acting on his fears and hopes as well as on his judgment; and as every stock-broker knows, for one successful "hit," in what are called "speculative" stocks, there are twenty misses. To permit the plaintiff to look back over a series of years, or even of months (the length of the time does not affect the principle), and to select deliberately as his indemnity the highest price which a retrospective scrutiny can detect, when in all probability he could never have obtained that price as the result of a prospective calculation, and, if he got it at all, would have rejoiced in his stroke of good fortune rather than credited himself merely with the fairly earned results of his prudence and wisdom, conflicts with a true rule of indemnity, and, as we think, is unjust. The proverb says, that is a bad rule which will not work both ways—a homely criticism which applies here. Where the stock steadily declines instead of advancing, the fluctuating rule is necessarily abandoned. In such a case no other than the fixed one gives the plaintiff indemnity. And it has been lately held by the Court of Appeals in Virginia, in the analogous case of the breach of a contract to deliver stock where the stock had been depreciated since the breach, that the damages were the value at the time it should have been delivered. The Ohio and A. R. Co. *v.* Fulvey; Same *v.* Cowherd, 17 Grat. (Va.) 366.

On the other hand, in the rule in all cases, except those proper for exemplary damages, of giving the value of the property with interest from the time of the conversion, we have one which is uniform, definite, and which usually affords exact indemnity. It fails, not to compensate in any case for actual loss, but only to make good the non-acquisition of possible profits—profits often not anticipated by the parties, and the temporary result, it may be, of the operations and combinations of speculators, of which they are ignorant, and which as contingent

has been deprived of some particular use of his property, of

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and uncertain, ought not, on principles already considered, to be allowed as part of actual indemnity. In the case of the conversion of goods intended for a particular market, there seems strong reason for adopting the analogy of the case of carriers, which is approved by Marvin, J., in the opinion to which we have referred, and taking as the measure the net value of the goods at the place of destination at the time when they should have arrived, with interest. See Eby *v.* Schumacher, 29 Penn. St. 40.

If the plain and definite rule, which we prefer, should in any other case be enlarged, in our view, that modification of it laid down in the case of Suydam *v.* Jenkins (3 Sandf. 614, *supra*), which conforms to the English rule (p. 475), and is approved by the author (p. 494), by which damages beyond the value of the property and interest, are allowed only where they are proved, and not merely presumed to have been sustained, is the most satisfactory which has been suggested. See Meshke *v.* Van Doren, 16 Wis. 319; *post*, 550, note. We should be disposed further to qualify this enlargement of the rule, where it is adopted, by the English practice, which regards such damages as special, and requires them to be substantially laid in the declaration (p. 475). This modification of the general rule may be, to some extent, liable to the criticism that it opens a collateral inquiry as to whether the plaintiff did or did not in fact incur a loss beyond the value of the property, but it hardly goes beyond the range of investigation in other cases, where by the settled practice of our courts, special damages are rightfully claimed. In the case of Suydam *v.* Jenkins, however, an intermediate or third principle seems to be recognized, by which damages may be allowed, which are neither a compensation to the wronged party, nor a punishment to the wrong-doer, in illustration of which is given the case where the wrong-doer makes a profit out of the converted property, which he should not be permitted to retain, although the other party, in receiving it, will obtain more than compensation for his actual loss. We think, however, that the principle of compensation will fairly cover all cases not proper for exemplary damages. In that suggested, for instance, this principle demands that the injured party should be put in the position of the other so far as regards the question of any advantage to be derived from the property in question; and the actual realization of such profits, by the trespasser, defines them with the certainty required in the allowance of profits. On the other hand, such damages are in a sense "exemplary;" as it punishes the wrong-doer to strip him of his profits.

There are cases in which the time of the conversion may admit of controversy. "In the dissenting opinion of Marvin, J., to which we have elsewhere referred, a qualification of the rule of taking the value at the time of the conversion, with interest, in these cases is suggested, growing out of the right of election, which in cases of a continuing conversion the plaintiff may exercise, to fix the value of the property." "As an actual conversion does not change the title of the property," says the learned judge, "the plaintiff may sometimes fix, by a demand of his property, the time of the conversion. If the property remains in the possession of the defendant, he may demand it, and if not delivered, commence his action the same day, and regard that as the day of conversion, and in this way recover the value of the property on the day the action was commenced, with interest thereafter. And this, I have no doubt, is so, though there was an actual conversion of the property by the defendant, long prior to the time of the demand."

So, where the conversion was not known to the plaintiff at the time it occurred, it is said by the Supreme Court of Nevada, in the case of O'Meara *v.* The North American Mining Co. (*supra*), that the time when it became known to the plaintiff may properly at his election be taken as that for fixing the market rate for which the defendant is liable.

We have reprinted the foregoing part of this note as it appeared in the fourth and fifth editions of this work, with but few changes, of which the addition of the notice of the recent case of Page *v.* Fowler is the principal one. But since the last edition, the subject has been thoroughly considered by the Court of Appeals of New York, especially in reference to a class of actions in which the fluctuating rule is most objectionable.

A common mode of speculation in great markets like that of New York is briefly as follows. The person who wishes to "speculate" enters into an agreement with a broker, by which the broker undertakes to buy certain stocks for the customer's account within a stipulated price—the broker advancing the money for the purpose, and agreeing to "carry" them, as it is called—that is, hold them subject to the customer's order till the termination of the agreement, provided the customer during the same time keep on deposit with the broker a small stipulated percentage of the par value of the stocks, called a "margin." Similar agreements are made with reference to produce or other property of peculiarly varying value; but the subject is of special importance as regards operations in stocks, because it is in them that the speculations to which such bargains lead are most frequent; and it may be added, owing to the circumstance that the actual values which stocks represent are less certainly known or less easily ascertainable than that of merchandise, most violent and pernicious.

In two cases decided in December, 1869, arising out of a sale of stocks "carried" under

which the other party was apprised, and which he may be thus

agreements of the kind we have described, the fluctuating rule as laid down in Romaine *v.* Van Allen, 26 N. Y. 309, was sustained by the late Court of Appeals of New York, Grover and Woodruff, JJ., dissenting. Markham *v.* Jaudon, 41 N. Y. 235; Stillwell *v.* Meigs, not reported.

Under the amendment of the State Constitution, however, adopted in November, 1869, the Court of Appeals was replaced by a new tribunal of the same name, and a temporary court of co-ordinate jurisdiction was organized for the despatch of the unfinished business of the old court, under the name of the Commission of Appeals. In a decision pronounced in September, 1872, in an action for the conversion of grain, the Commission of Appeals adhered to the rule adopted in Romaine *v.* Van Allen (*supra*). Lobdell *v.* Stowell, 51 N. Y. 70.

But the present Court of Appeals has very lately taken a different view. In the case of Matthews *v.* Coe, 49 N. Y. 57, which was an action to recover for an alleged conversion of warehouse receipts for corn, pledged by the plaintiff's assignor as security for advances made by the defendant, decided by that court in March, 1872, it appeared that the defendant had acted in good faith, and moreover that the plaintiff had intended to sell the corn at a dollar a bushel. The price, however, allowed by the referee before whom the action was tried, was fixed by him at the market rate prevailing a year and a half after the action was brought, which was a dollar and forty-five cents a bushel. Church, C. J., delivering the opinion of the court, observed that whatever might be propriety of a rule giving the plaintiff the benefit of the highest market price between the conversion and the trial, in a case not exceptional in its circumstances, such a rule could have no application to one like that before the court. The learned chief judge closed with the significant intimation that the rule referred to was not so firmly settled as to be beyond the reach of review whenever necessary.

Such a necessity arose in an action decided by the same court in September, 1873, concerning a speculation in stocks like that in Markham *v.* Jaudon, and in which the precise questions there presented were again raised. Baker *v.* Drake, 8 Albany Law Journal, 340. In this case the plaintiff had advanced but $4,240 on account of the purchase of various railway shares, which in November, 1868, had cost the defendants upwards of $66,300 beyond the plaintiff's advances. In that month the shares, at a sale of them made by the defendants in good faith at the market rates to pay their advances, produced less than $67,000. Between this time and that of the trial the stock fluctuated heavily, and in August, 1870, rose in the market to 170, which was its culminating point, and from which it declined. The jury, instructed in accordance with the rule in Markham *v.* Jaudon, found a verdict for the plaintiff of $18,000, which was the difference between the average price at which the defendant sold and 170.

In a very elaborate opinion delivered by Rapallo, J., the court held that the supposition, unsupported by evidence, that a plaintiff who had failed to keep his margin good up to the sale, would have continued to supply it during the time necessary to carry the stock to its highest point, and then have been fortunate enough to sell it at that precise point, was an unreasonable one, and that the award of a measure of damages based on such a conjecture was a wide departure from that rule of simple indemnity which should control the damages, except in cases where punitive damages are allowable.

The learned judge then pointed out what in such a case would be a proper measure of damages to an aggrieved speculator. As he had not paid for his stocks, and did not hold them as an investment, the loss, if any, which he sustained was simply that of the chance of their subsequent rise in the market, and this chance was accompanied by the corresponding one of their decline, and also by the further contingency in case of a rise of his not availing himself of it.

"A continuation of the speculation," observes the learned judge, "also required him to supply further margin, and involved a risk of ultimate loss. If upon becoming informed of the sale, he desired further to prosecute the adventure, he had the right to disaffirm the sale and require the defendants to replace the stock. If they failed, or refused to do this, his remedy was to do it himself and charge them with the loss reasonably sustained in doing so. The advance in the market price of the stock from the time of the sale up to a reasonable time to replace it, after the plaintiff received notice of the sale, would afford a complete indemnity. Suppose the stock instead of advancing had declined after the sale, and the plaintiff had replaced it, or had full opportunity to replace it, at a lower price, could it be said that he sustained any damage by the sale? Would there be any justice or reason in permitting him to lie by and charge his broker with the result of a rise at some remote subsequent period?"

Under the rule in Markham *v.* Jaudon, as the learned judge proceeds to show, "the plaintiff is "in a position incomparably superior to that of which he has been deprived." It leaves him relieved both from risk and from the necessity of supplying "margin," "with his venture out for an indefinite period, limited only by what may be deemed a reasonable time to bring a suit and conduct it to its end." Meanwhile obstacles and delays in the progress of

said to have directly prevented, the rights of the parties are

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the suit are for the interest of the fortunate suitor, since they extend the period for his retrospective selection of the rate of his own damages.

By a thorough examination of the cases, it is shown that the reasoning of those decisions which sanction the rule of a higher intermediate value, being founded on the idea that the plaintiff having been wrongfully deprived of his property or the price agreed to be paid for it, cannot be justly expected to procure it a second time, is necessarily inapplicable to the case of property purchased for speculation, not with his funds, but the defendant's. The case of Markham *v.* Jaudon, is accordingly overruled as to the measure of damages.

We venture to close the discussion with the following conclusions, not perhaps as altogether justified as yet by the later and better decisions, but as in accordance with the principles on which such decisions proceed. Actual indemnity, as nearly as it can be ascertained, and nothing beyond this, where there is no propriety in punishing a defendant, will furnish the rule in each case. The inquiry should always be, what has the plaintiff actually lost by the defendant's act or default, and what sum will make this loss good, according to what is proved or shown most probable by the evidence.

Actions to recover the value of stock borrowed and not returned, or of stock indefeasibly owned by the plaintiff, and converted by the defendant, where it was held by the plaintiff for permanent investment, are equivalent to suits to cause such stock to be replaced. In such a case the plaintiff should recover the sum which will enable him to replace the borrowed or converted stock, that is, its value at the trial; and he should also have the equivalent of any dividends upon it of which he had been deprived by the conversion. But if the stock, although paid for and owned by the plaintiff, were held not for investment but for speculation, and with the design of taking advantage of the rise in the market, this rule would not always furnish a full indemnity, since the stock at the time of the trial might be worth less than on previous occasions after the conversion, and even less than at the date of the original taking. In such a case, if any other rule be adopted than that of the value at the time of the conversion, with interest, it should go to the extent of giving the highest price of the stock within what, under the circumstances of the case, may be a reasonable time for fixing the value. But, if again the plaintiff's only interest be a speculative one; if he have not paid for the stock, and his chance of making money in the speculation be counterbalanced or at least correlated by that of losing it, and also by the inconvenience or impracticability of furnishing the funds necessary for continuing the adventure—his recovery should still equally include the profit actually lost as the direct consequence of the wrongful act, so far as that can be definitely ascertained. How to ascertain these profits so as to give the plaintiff full indemnity, but to exclude such as are purely speculative and uncertain, is the difficult question. The rule laid down in the above case of Baker *v.* Drake, furnishes a just and exact rule, provided the customer follow the prudent and excellent suggestion there made. If he repurchase the stock at an advanced rate within a reasonable time after the conversion, he ought certainly to recover the amount of his loss, which would obviously be the difference between the price paid by him and that before obtained by the broker, with interest on the sum, if any, which he had paid on account. But on the other hand, if he were not in default during the period within which the broker's obligation to "carry" the stock continued, as must be assumed where the action is maintainable, he should not be deprived of the profit he would have made had the broker fulfilled his agreement, even although he should not have it in his power to buy the stock back. As the broker had agreed to buy and carry the stock for him, he of course did not anticipate being called on to do this himself, provided he should fulfil his part of the bargain, and he should not, as we think, lose the compensation he would otherwise be entitled to, merely because he cannot command the means to make this unexpected outlay. Setting aside then the element of an obligatory repurchase as not properly belonging to the mere question of the rule of damages, and which, perhaps, could not be as matter of law in all such cases required as a condition precedent to any recovery, we are brought to the rule prescribed in the above case of Page *v.* Fowler. By this rule the damages are fixed at the highest price prevailing within a reasonable time *after the conversion* subject, however, to the proofs and probabilities disclosed by the trial, as to what would, under the circumstances of each case, have been the actual disposition by the injured party of the property or his interest in it. This rule has the advantage of uniformity by making no distinction between the case of the actual conversion of stock belonging to the customer, and cases where the customer without being entitled to the possession of the stock has a clear legal right to the profit to be made from it. But if the value at the conversion, with interest, be abandoned as a measure in these cases, the rule, however otherwise limited, must always leave much to be determined by the circumstances of the particular case to which it is applied.

For reasons before suggested with reference to the selection of the time for bringing the suit, we are inclined to regret that it has been found necessary, in order to give full indemnity in this class of cases, to allow a plaintiff any range in the selection of the time for fixing his

fixed at the time of the illegal act, be it refusal to deliver, or actual conversion, and that the damages should be estimated as at that time.* [1]

CASES OF PLEDGE.—There are many cases, however, where the plaintiff, though entitled to recover, is not at liberty to re-

* I am happy to find this language approved by the Supreme Court of Louisiana, in Arrowsmith *v.* Gordon, 3 La. Ann. R. 105, where an action analogous to the common-law action of trover was brought for an alleged conversion of cotton. See also, Badillo *v.* Tio, 7 La. Ann. 487.

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damages, even within comparatively moderate limits. There can be no standard or absolute criterion as to what is a "reasonable time," and the allowance of discretion on the part either of the suitor or the court in regard to it to any extent, makes the rule to that extent undefined and proportionately unsatisfactory. It dispenses to the same extent with the certainty as to the amount of profits to be allowed, which is usually the condition of allowing them to be recovered at all. We think, therefore, that a reasonable time for fixing the value after the conversion should mean simply the time necessary for the plaintiff to act as promptly as the circumstances of the case will fairly admit. Where the plaintiff, without improper delay, notifies the defendant to replace the stock, the date of such notice would fix a suitable time for estimating the lost profit.

It may be further observed that although the distinction is constantly taken between property of fixed and that of fluctuating value in respect to the rule of damages, yet in time *all* values fluctuate more or less. The difference is one of degree, not of kind. The substantial identity in the character of all property in this respect disclosed by a broad and general survey, perhaps affords an additional reason why the rule should be essentially uniform.

Whenever a plaintiff is unjustly deprived of a profit on property, or on an interest in property, we think, also, that on principle, as regards the right to that profit, no distinction in the rule of damages ought to be drawn between property which is not paid for and that which is. In the case of the breach of executory contracts for the delivery of goods paid for in advance, however, such a distinction is favored by the weight of authority in New York, the plaintiff being generally allowed in such cases to recover the highest market price within a reasonable time after the breach, instead of the value at the time, according to the general rule. But even in such cases, although the presumption should be against a wrong-doer, there should not be a recovery of what is called the profit where it appears certain or even probable that this profit would not have been actually earned. If the property has been sold at an advance by the defendant, this advance should be recovered by the injured plaintiff; and on the other hand any definite damage sustained by the plaintiff as the natural and direct consequence of the defendant's wrongful act, such as the loss of a favorable sale of the converted property, contracted for before the conversion, and defeated by it, although in the nature of special damages may perhaps be also recovered. But if the defendant has made no profit in fact, he should not by an abstract rule of law, independently of the facts of the case, be made to pay the plaintiff the equivalent of a supposed profit, merely because it might possibly have been made by a shrewd and unembarrassed observer of the market.

[1] In a late case in the Court of Queen's Bench, brought for the conversion of some champagne, it appeared that the plaintiff had bought the champagne at fourteen shillings per dozen and resold it at twenty-four shillings to the captain of a ship about to leave England. The defendants, at whose wharf the wine was lying, refused to deliver it, and the plaintiff could not fulfil the contract, there being no other champagne in the market of the same quality. It was held that the plaintiff was entitled to recover the price at which he had sold the champagne. Miller, J., in delivering the opinion of the court, after citing the passage in the text, and in reference to the argument of the defendant's counsel, that, "in analogy to the cases of special damages arising out of the breach of contract, notice of the special circumstances ought to have been given the defendant, in order to entitle the plaintiffs to recover anything beyond the value of the goods converted," uses the following language: "We are not prepared to say that there is any analogy between the case of the contract alluded to, in which the parties making a contract for the sale and delivery of a specific chattel, the vendee gave notice to the vendor of the precise object of the purchase, and a case like the present. In the case of contract, special damages reasonably resulting from the breach of it may be considered within the contemplation of the parties. In the case of trover, it is not in general special damages which can be recovered, but *a special value* attached by special circumstances to the article converted; the conversion consists in withholding from another property to the possession of which he is *immediately* entitled, and the circumstances which affix the value are thence determined. France *v.* Gaudet, L. R. 6 Q. B. 199.

ceive the full value of the property.[1] So in cases of pledge, if the pledgee tortiously sell the pledge or otherwise wrongfully put it out of his power to return the article pledged, the pledger's right of recovery is clear; but the pledgee in [482] such action has a right to have the amount of his debt recouped in the damage.* [2]

* Bac. Abr. Bailment B.; Jarvis *v.* Rogers, 227; Story on Bailments, 2d ed. pp. 315, 15 Mass. 389; Stearns *v.* Marsh, 4 Denio, 349.

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[1] See Cooper *v.* Newman, 45 N. H. 339.

[2] From the increasing disposition to adjust all questions between the same parties relating to the same cause of action in one controversy, it has resulted in actions of trover; first, that where both parties have an interest in the property itself as owners, the measure of damages is the loss which the plaintiff has sustained by having been wrongfully deprived of its possession; and second, that where the defendant has such a lien on the property or other equitable interest in it, as security for a debt, as would have rightfully entitled him to effect a sale of it in case of the debtor's default, the measure is the residuary value of the chattel after deducting the amount of the debt. Indeed, wherever the defendant, although in the wrong in assuming or retaining a possession which rightfully belongs to the plaintiff, has yet a legal or equitable interest in the chattel, the action is now treated on equitable principles, and the recovery limited to the actual net amount of the plaintiff's claim. Balt. Marine Ins. Co. *v.* Dalrymple, 25 Md. 269.

Thus in Chinery *v.* Viall, 5 H. & Norm. 288; 2 L. T. R. (N. S.) 466, where one having bought sheep on credit left them in custody of the vendor, and without default of the vendee the vendor resold them, it was held by the English Court of Exchequer that the measure was not their value but merely the actual damage sustained.

So it was lately held by the English Court of Common Pleas, citing and approving Story on Bailments, § 315, and Jarvis *v.* Rogers, 15 Mass. 389, that the damages for the wrongful conversion of a pledge, are to be measured by the loss actually sustained, taking into account the pledgee's interest in the pledge at the time of the conversion. Johnson *v.* Stear, 15 C. B. (N. S.) 330; 33 L. J. (N. S.) C. P. 130. In this case, a bankrupt had deposited certain dock warrants for brandy in dock as security for a loan, and it was agreed that the pledgee might sell the brandy if the loan were not repaid on the 29th of January following. The pledgee sold the brandy on the 28th, and on the 29th delivered the warrants to the purchaser, who took possession of the brandy on the 30th. This was held by all the court to be a conversion, although the bankrupt could not have redeemed the property. But the majority of the court held that the wrongful acts of the pawnee did not annihilate the contract between the parties nor the interest of the pawner in his goods under it. The pawnee had the right to have his debt recouped in damages. Mr. Justice Williams dissenting, held that the bailment having been terminated by the wrongful act of the pledgee, the property reverted to the pledger as its absolute owner, and as such absolute owner he was entitled to full damages. See Briggs *v.* Bost. and Lowell R. Co. 6 Allen, 246. But where the conversion is by an unlawful sale of goods by one having a lien on them, the expenses of the sale cannot be allowed the defendant. *Ibid.*

The principle of avoiding circuity of action, which we think is the one on which this class of decisions properly rests, was not in terms enlarged upon in the case of Johnson *v.* Stear. But it has been very clearly stated by the New York Court of Appeals. In an action in the nature of trover by the mortgagee of chattels against the mortgagor, that court lately held that even after forfeiture, to avoid circuity of action, the damages should be limited to the amount of the debt secured by the chattel. For the mortgagor, notwithstanding the forfeiture, would have an equitable right to redeem on payment of the debt, and if on the mortgagee's action he should recover the entire value, he would be liable in equity to the mortgagor for the surplus, after the satisfaction of the debt. Parish *v.* Wheeler, 22 N. Y. 494.

And in an action by the mortgagee of goods against an officer who has taken a part of them out of his possession under an attachment against the mortgagor, the defendant may show in mitigation that the mortgagee has collected his debt out of the residue. Ward *v.* Henry, 15 Wis. 239. And see Saxton *v.* Williams, 16 Wis. 292.

But it must be borne in mind that to apply the rule of mitigation now under consideration, although it be in effect but an application of the doctrine of recoupment, the defendant must have a legal or equitable interest in or claim upon the specific property in question. Otherwise, in the absence of any statute authorizing the determination of mutual claims in actions of this nature, the plaintiff will be allowed to recover the full value, notwithstanding any independent demand of the defendant against him.

OTHER CASES OF SPECIAL PROPERTY.—The value of the goods also ceases to be the measure of relief when the plaintiff brings his action by virtue of a special property, as for instance a lien. Here the measure of damages is the *lien*. So * where trover was brought for fifty hogsheads of tobacco, the master claiming by reason of his lien on the freight for advances and wages.† This supposes, however, that the value of the goods exceeds the lien; for if it is otherwise, still the recovery cannot go beyond that value, and the amount recovered, therefore, must in such a case be less than the plaintiff's lien.[1]

DISTINCTION WHERE THE LIENOR'S SUIT IS AGAINST A STRANGER.—This is still subject, however, to a further consideration. Where the lien creditor sues a stranger, the plaintiff may recover the full value of the goods, holding the balance beyond his own claim as trustee for the general owner.[2] But where

* Ingersoll *v.* Van Bokkelin, 7 Cow. 670.

† This case was reversed in error, 5 Wend. 315, on the ground that the master had no lien for his wages; but the right as to his advances was affirmed; and the rule of damages was not touched by the reversal.

In a late case taken by appeal to the English Court of Common Pleas, the defendant had obtained a judgment in a county court against the plaintiff. At the time of its recovery he had in his possession some looms belonging to the plaintiff, which, although having no lien upon them, he refused to give up to the owner on demand, before execution, but after the judgment caused them to be seized and sold under an execution upon it, and applied the proceeds in satisfaction of the debt. It was held, in an action for the conversion, that the plaintiff was entitled to recover the full value of the goods, and that the jury should not consider in mitigation the application of their proceeds to the judgment. The court, per Willes, J., said: "Subsequent to the conversion the defendant acquired a right to the goods, but this is a right he could not have exercised but for a wrongful act of his own, and it would be against the plainest principles to allow a man to take advantage of his own wrong." Edmundson *v.* Nuttal, 17 C. B. 280; 34 L. J. R. (N. S.) C. P. 102.

Again, where unredeemed pledges deposited with the plaintiff in the way of his trade as a pawnbroker, and which were held under the English law to be protected from distress, had been seized by his landlord under a distress warrant, it was held by the same learned tribunal, in an action of trover for the goods, that as the defendant was an absolute wrong-doer, without color of right, the bailee was entitled to recover their full value. Swire *v.* Leach, 18 C B. (N. S.) 479.

So, again, where personal property has been delivered under an agreement of sale by which the title is not to vest in the vendee till the payment in full of the purchase money, but is sold or mortgaged by him to a third party or attached by his creditors, the general rule remains unqualified, and the vendor is entitled to recover the full value and interest from the time of the conversion, without any deduction for payments made on account by the original vendee. Brown *v.* Haynes, 52 Maine, 578; Angier *v.* Taunton Paper Manufacturing Co. 1 Gray (Mass.), 621. See Pomeroy *v.* Smith, 17 Pick. (Mass.) 85; Soule *v.* White, 14 Me. 436; Ullman *v.* Barnard, 7 Gray, 554; Cram *v.* Bailey, 10 Gray, 87; Adams *v.* O'Conner, 100 Mass. 515.

[1] In an action of trover by a mortgagee of chattels against one who had bought them from the mortgagor, the defendant may show in diminution of the mortgagee's special interest in the property, that other property was embraced in the mortgage, and that the plaintiff had reduced the same to possession. Bailey *v.* Godfrey, 54 Ill. 507.

[2] See Hayes *v.* Riddle, 1 Sandf. 248. Other circumstances may affect the the application of the rule. And where articles belonging to the plaintiffs had come into the defendants' possession eight years before the action was brought, and the plaintiffs had permitted the defendants to use them till a part of them had been rendered valueless, the defendants could not be charged with their value as for a tortious conversion. All the plaintiffs were entitled to was the value of the use for six years before the action was brought, and there was no presumption of law that such value was equal to that of the articles. Rider *v.* The Union India Rubber Co. 4 Bosw. (N. Y.) 169.

the party claiming a lien endeavors to enforce it against the true owner in this form of action, he can only recover the amount of his lien.* [1]

So in Vermont, where the defendant leased the plaintiff a farm for a year, and was to provide a horse to use on the farm during the term. He furnished one, but took him away and sold him. It was held that the plaintiff acquired a special property in the horse, and in an action of trover could recover damages for the use of him during the residue of the term.† [2]

In New York, where a constable having levied on certain goods by virtue of executions, on which $81.30 was due brought trover for them, and recovered their full value, $108, it was held on a motion for a new trial that he could only recover to the amount of the executions, and the verdict was reduced to that sum.‡ This case may appear to conflict with the rule above laid down; but the defendants were purchasers of the property, and if the plaintiff had recovered the [483] full value he must have held the balance beyond his execution for their benefit. It was an action against the general owner, and not against a stranger.‖ So where the plaintiff had been endeavoring to baffle his creditors by an ostensible transfer of the property sued for, it was left to the jury to find a verdict for the plaintiff's real and *bonâ fide* interest; and though the goods were worth £21, the verdict was for one-fourth of a penny.¶ [3]

* See Jarvis *v.* Rodgers, 15 Mass. 389, where the rule of damages in cases of lien was much discussed; and also Lyle *v.* Barker, 5 Binney, 457–60.

† Hickok *v.* Buck, 22 Verm. 149.

‡ Spoor *v.* Holland, 8 Wend. 445.

‖ So in Connecticut, in an action of trover brought by a second mortgagee against a stranger it was insisted that the plaintiff could only recover the value of his interest, *i. e.* its value after deducting the amount due on the prior mortgage; but it was held otherwise, and the court said, "In actions of trover and trespass for property taken and converted by the defendant, where there is no malicious motive on his part, but he takes the property under a claim of right, and the real dispute is as to the title, the rule of damages is the value of the property at the time of the conversion or taking, and interest on that sum to the time of judgment. If, however, the suit is brought by a bailee or special property man against the general owner, then the plaintiff can recover the value of his special property only; but if the suit is against a stranger, then he recovers the value of the property and interest according to the general rule, and holds the balance beyond his own interest in trust for the general owner." White *v.* Webb, 15 Conn. 502.

¶ Cameron *v.* Wynch, 2 Car. & Kir. 264.

[1] And the rule here stated in reference to suits by a lienor against the owner, applies equally to such a suit against one claiming under the true owner. Chadwick *v.* Lamb, 29 Barb. 518.

If the goods converted are of less value than the amount of the lien, no more can be recovered than their value. Davidson *v.* Gunsolly, 1 Mich. 388.

[2] During the existence of slavery in this country the same principle of damages was adopted where the owner of a slave had hired him out, and afterwards wrongfully retaken him. Campton *v.* Martin, 5 Rich. (S. C.) L. 14; Horton *v.* Reynolds, 8 Tex. 284; Calvit *v.* Cloud, 14 *Ibid.* 53. But see Blakely *v.* Duncan, 4 *Ibid.* 184; Haughton *v.* Benbury, 2 Jones (N. C.) E. 337.

[3] And where a sheriff had levied on certain articles as the property of a judgment debtor, and replevin having been brought against the sheriff for the articles by a third party claiming

CONFUSION.—The action of trover, as well as that of trespass, often presents interesting questions connected with what is technically termed confusion.* "If," says Blackstone,† "one wilfully intermixes his money, corn, or hay, with that of another man, without his approbation or knowledge, or casts gold in like manner into another's melting pot or crucible, our law to guard against fraud allows no remedy in such a case, but gives the entire property, without any account, to him whose original dominion is invaded and endeavored to be rendered uncertain without his own consent."[1] The same principle has been applied to cases where subsequent to the illegal taking or conversion the defendant increases the value of the property by bestowing his labor in any way on it. It seems to be well settled, that, as a general rule, personal property illegally or tortiously held, can be retaken by the rightful owner in any new form into which it may be put by the labor of the defendant, [484] without reference to the increase of value by such change of form. Thus, cloth made into garments, leather into shoes, trees hewn or sawed into timber, and iron made into bars, may be reclaimed by the original owner, in their new and improved state. The increased value belongs to the rightful owner of the property. The action of trover does not, it is true, recover the specific property. But the same principle has been applied to this form of action, and the value of the property in its new and improved state thus becomes the measure of damages.[2] Nor is the rule departed from, unless the thing con-

* Confusion, Lat. *Confusio. Confundi dicitur, quod aliis ita commiscetur ut deduci et se parari non possit, aut certe difficilis sit ejus separatio. Vicat. Vocab. Utriusque Juris in voc.* The term is applied also to the merger of different interests, and in this sense the analogous word is used in the French law. —*Crivelli, in voc.*

† Comm. 2, ch. 26.

to own them, they were delivered to such party in the action, the court properly refused to instruct the jury, if they found for the defendant, to limit their verdict to the amount of the execution on which the property had been taken. Buck *v.* Remsen, 34 N. Y. 383.

[1] Popham, 38 pl. 2; Warde *v.* Eyre, 2 Bulst. 323. See Stephenson *v.* Little, 10 Mich. 433. If, however, the mixture be accidental or not wrongfully made, each party will be entitled to his own property or to its value, provided the separation can be made, or the values be apportionable. If by the intermixture the property be destroyed, the loss falls on him whose fault occasioned the destruction. 2 Black. ch. 26; Ryder *v.* Hathaway, 21 Pick. (Mass.) 298. But it is said that the relative value of the different kinds of goods which are mixed and confounded together, or that of the goods and the work bestowed on them, is very important in determining the question of title in this class of cases. And where timber of the value of $25, had in good faith and in the exercise of what was wrongly thought to be proper authority, been converted into hoops worth $700, it was held that the title passed to the party who had in good faith expended his labor. Wetherbee *v.* Green, 22 Mich. 311 (see Weymouth *v.* Northwestern R. Co. 17 Wisc. 550, and *infra*, 485, note). And we think that, if the conversion were made in good faith, the value of the goods in their original state only could be recovered. Dresser Mfg. Co. *v.* Waterston, 3 Metc. 9; *post*, 487. Such is the rule also in replevin. See *post*, 501, n.

[2] Rice *v.* Hollenbeck, 19 Barb. 664; Walter *v.* Wetmore, 1 E. D. S. 7. But see Forsyth *v.* Wells, 41 Penn. 291, cited *post*, 495, note, where the Supreme Court of Pennsylvania, reversing the judgment of the Court of Common Pleas, held that the plaintiff suing in trover to

verted has been annexed to and made a part of some other thing, of which it becomes the principal, or its nature is changed from personal into real property.*

This principle was adhered to in New York, in an action of trespass,† where timber had been converted into shingles. And again in an action of trover,‡ brought for wood converted into coals; the court there saying, "a *wilful trespasser* cannot acquire a title to property, merely by changing it from one species to another." And again in an action of trover,‖ where black salts were converted into pearl ashes.

The doctrine has, however, been much questioned in the same State,¶ where certain logs had been cut on the plaintiff's land, drawn to the defendant's mill, and converted into boards (the value of the logs being $187 56, of the boards $309 46, and the difference $125 90); and the judge charged that the measure of damages would be the value of the boards without reference to the price of the defendant's labor, and the jury gave $309 46. It was insisted, on a motion for a new trial, that in trover, where the conversion was the gist of the action, and the character of the original taking not inquired into, the damages should be confined to the value of the thing as taken, or the value of the defendant's labor deducted; and that even if the rule laid down at the trial were sound in *trespass*, it could not apply here, because the plaintiff had elected to [485] bring trover. The court held otherwise, on the authority of the previous cases. But Sutherland, J., dissented. He

* This seems the doctrine since the Year Books. *Si home prist arbres and puis il fait boards de eux, uncore le owner poit eux reprender, quia major pars substantiæ remanet.* F. Moore. Rep. 20 pl. 675; 5 Hen. VII, 15; 12 Hen. VIII, 10; Viner Abr. Property (E.) pl. 5. Silsbury *v.* M'Coon, 6 Hill, 425; 4 Denio, 332.

† Betts *v.* Lee, 5 J. R. 348.

‡ Curtis *v.* Groat, 6 J. R. 168.

‖ Babcock *v.* Gill, 10 J. R. 287.

¶ Brown *v.* Sax, 7 Cowen, 95.

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recover the value of coal dug out of his bed by mistake, could recover only the value of the coal before it was mined. So in trover for petroleum, where the action can be maintained, the measure of damages is its value at the instant of its separation from the freehold, exclusive of the labor of obtaining it. Kier *v.* Peterson, 41 Penn. St. 357.

There is some uncertainty in the rule of damages recoverable for the destruction of trees. In Maine, in an action of trover for the conversion of timber, where the defendant's possession has been uninterrupted, the measure of damages is its value when first separated from the freehold. Moody *v.* Whitney, 38 Me. 174.

In California, however, it was held, in an action for cutting down trees growing on the plaintiff's land, that the measure of damages was not the value of the trees as fire-wood, etc., but the injury done to the land by their destruction. Chipman *v.* Hibberd, 6 Cal. 162. In general, the proper rule is the value of the trees as they stood on the land before the trespass. Whitbeck *v.* N. Y. Cent. R. R. Co. 35 Barb. 644. The value is to be ascertained by the price of such timber in the vicinity, and not by the net value in a distant market, of the logs cut from it, unless there is really no other market than this. Coxe *v.* England, 65 Penn. St. 212; Young *v.* Lloyd, 65 Penn. St. 199. But in trespass, damages for the whole injury measured by the diminution in the value of the land, together with the value of the trees as they stood, it seems may be recovered. This would certainly be the rule where there is no embarrassment from the different forms of action. See *ante*, 134, 136, and *post*, 537, 538.

admitted that where the taking was *wilful and tortious*, this rule would not be oppressive or unjust. But that as the mode of taking could not, in trover, be inquired into, no such general rule could be laid down. He put the case of jewels lodged with a banker for safe custody, and pawned by him, and set at great expense by the pawnee; could the rightful owner in trover against the pawnee obtain the jewels as set, without deduction for the labor of setting? The question is very pertinent, and difficult of reply, on the authorities. But a new trial was denied.

Tortious Taking.—The same point was again decided in the same State,* in an action of trover for logs converted into boards. But it is to be remarked, that in both these cases the court noticed the fact, that there was undoubtedly a tortious taking by the defendant. How the question would be disposed of in a case where the taking appeared to be *bonâ fide*, and how the principle could be got over, that in trover the taking is only inducement not be traversed, and the conversion the gist of the action, remains yet to be decided.†[1]

It is expressly said in the old books, that no allowance can be made in trover for the tortious taking.‡ Thus, "if the goods of I. S. have been taken by I. N., in such a tortious manner that an action of trespass would lie, an action of trover will likewise lie; but I. S. can recover in the latter action, damages for the conversion of the goods, inasmuch as he does, by electing to bring an action of trover, waive his right to recover damages for the tortious taking." Although Lord Mansfield, as we have above seen, in Fisher *v.* Prince, intimated a contrary opinion.[2] The question, it will be seen, is very material. It is not whether the plaintiff has or has not a right to follow his property in its altered state; but whether having waived a form of action which enables him to prove [486] malice, he shall, in this proceeding, prevent the defendant from setting off or recouping expenses which

* Baker *v.* Wheeler, 8 Wend. 505.

† In Pierce *v.* Schenck, 3 Hill, 28, trover for logs partially converted into boards, Nelson, C. J., and Bronson, J., said, the question whether the plaintiff could recover as damages the value of the boards, was not distinctly raised. They agreed that the plaintiff was entitled to recover the value of all the logs. See this case commented on in Gregory *v.* Stryker, 2 Denio, 628.

‡ Bacon Abr. Trover, A. 3.

[1] It is now settled we think against the allowance of the increased value (*ante*, 484, n.) And see Hyde *v.* Cookson (21 Barb. 92), where the additions to the value having been made under a contract with the owner, it was held that the value of the additions should be allowed to the defendants.

[2] *Ante*, 477.

he has laid out *bonâ fide* on the property, and which have actually enhanced its value.[1]

RULE OF THE CIVIL LAW.—The civil law does not in any case appear to recognize the severe rule of our system: *Quod si frumentum Titii frumento tuo mistum fuerit, siquidem voluntate vestrâ, commune est, quia singula corpora, id est, singula grana, quæ cujusque propria fuerint, consensu vestro communicata sunt. Quod si casu id mistum fuerit, vel Titius id miscuerit sine tuâ voluntate, non videtur commune esse, quia singula corpora in suâ substantiâ durant. Sed nec magis, istis casibus, commune sit frumentum quam grex intelligitur esse communis, si pecora Titii tuis pecoribus mista fuerint.** Nor should the analogous case in regard to real property be overlooked. In trespass for mesne profits, the *bonâ fide* occupant of lands without notice, who has improved them, is allowed to set off or recoup the value of his improvements. And such, as we shall see, is equally the case in regard to personal property, when trespass is brought. Why should not the same equity be extended to the action of trover? I apprehend that whenever the question is distinctly presented, the milder rule will be maintained. Indeed, it has been so intimated in England.

DEFENDANTS' LIEN.—Where goods were sent to a dyer,† who dyed them, and then insisted on a right to retain them, not only for the charges on them, but for a debt due for dyeing other goods, the Court of King's Bench held that he he had no lien, but for the price of dyeing the particular goods, and the plaintiff recovered; but the report adds, "The price of dyeing was deducted at the time of taking the verdict, the value of the goods in white being only thereby given to the plaintiff."

And the principle of this decision has been followed in Massachusetts, in a case where the plaintiffs made a conditional sale of brown cotton goods to a printing company, who, [487]

* Inst. lib. ii, tit. i, § 28. A different rule necessarily prevailed where separation was impossible. *Sed et id quod in charta mea scribitur aut in tabula pinxitur, statim meum fit; licet de pictura quidam contra senserint propter pretium picturæ; sed necesse est ei rei cedi quod sine illa esse non potest.* Dig. lib. vi, De Rei Vindi, p. 23, § 3.

† Green *v.* Farmer, 4 Burr, 2214.

[1] In Pennsylvania, it is settled that the alleged malice and wilfulness of taking may be inquired into, and where they are found additional compensation may be allowed in this form of action. Forsyth *v.* Wells, 41 Penn. 291 (*post*, 495, note). See also, Neiler *v.* Kelley, 69 Penn. St. 403, 408; *ante*, 481, *n.*; Backenstoss *v.* Stahler's Adm'rs, 33 Penn. St. 251.

So in Indiana, in the case of Pribble *v.* Kent, 10 Ind. 325, the court, after saying that the value of the article, which was corn, "would seem to be the natural measure of damages," add, "Perhaps circumstances might justify the infliction of more."

after printing them, transferred them to the defendant, but did not comply with the conditions; and it was held that the plaintiffs could recover in trover, but the court was of opinion "that the plaintiffs were not entitled to recover the full value of the goods in the printed state. The value of them in their brown state appears to us a more just and equitable measure of damages, under all the circumstances of the case."*[1]

And in the same State, it has been said generally, that "where the plaintiff admits that the defendant has a lien on the property to a certain amount, that amount may be deducted by the jury in assessing damages."† In this case the plaintiff had admitted the defendant's lien by tendering its amount.‡

In Alabama, where wood had been converted and made into coal by the defendant, the owner was held entitled to bring trover for the coal. As to the question we are now considering, it was said, "It is possible the jury might consider the value of the defendant's labor on the rough material;" but as this point had not been presented, it was not decided.‖

Partnership Property.—Where the property is owned by partners, and one partner sues, he is entitled to the value of his share without reference to the state of matters between him and his co-partner. So where on an execution against one of two partners, the sheriff illegally sold the interest of both, he was held liable in trover, and the measure of damages was held to be the value of the property converted, irrespective [488] of the question whether the partnership was or was not solvent, and without regard to the state of the partnership accounts.¶

* Dresser Manufacturing Company *v.* Waterston, 3 Met. 9.

In Maine, this doctrine of confusion of goods has been applied to a case where the defendant had taken the plaintiff's logs, and manufactured them into boards, and intermixed these boards with a pile of his own, so that they could not be distinguished, with the *fraudulent* intent of depriving the plaintiff of his property. And it was held that the owner of the logs might maintain replevin for the whole pile. Wingate *v.* Smith, 20 Maine, 287. The question as to the propriety of making allowance for the labor of the defendant in such cases was considered by the Superior Court of Connecticut, in Benjamin *v.* Benjamin, 15 Conn. 347, where grass had been converted into hay, but without arriving at any conclusion; the court thinking, on the particular facts of the case, that no such allowance should be made.

The original rule in England has been recently said (*obiter*, however) still to hold in trover. Martin *v.* Porter, 5 Mees. & Wels. 351. But see, *contra*, Wood *v.* Morewood, 3 Q. B. R. 440, in notes; and *post*.

† Fowler *v.* Gilman, 13 Met. 267.

‡ See also, Chamberlin *v.* Shaw, 18 Pick. 283.

‖ Riddle *v.* Driver, 12 Ala. 590.

¶ Walsh *v.* Adams, 3 Denio, 125.

[1] See Wetherbee *v.* Green, 22 Mich. *ante*, 483, note. But this rule is disapproved in Indiana, as too lenient to the wrong-doer. The Supreme Court of that State, lately held in an action for the conversion of wheat, of which the defendant had forcibly taken possession, as it stood in his field, that proof of the value of the defendant's labor in harvesting and threshing the crop, for the purpose of reducing the damages had been erroneously admitted. Ellis *v.* Wire, 33 Ind. 127 (*ante*, p. 481, n.)

SECURITIES FOR MONEY.—Where the property sued for in trover is a chose in action, as a bill, note, bond, or other security for the payment of money, it seems that the measure of damages is *primâ facie* the amount due on the security, the defendant being at liberty to reduce that valuation by evidence showing payment, the insolvency of the maker, or any fact tending to invalidate the security.*[1]

Lord Ellenborough held, as we have seen,† that the damages in actions for bills of exchange were to be estimated at the amount of the principal and interest due on the bills at the time of the demand and the refusal; in other words, at the time of conversion. No doubt seems to have been entertained that the face of the bills was the *primâ facie* measure of damages; and the same point was ruled in New York, with no limitation, however, as to the time to which interest was to be computed.‡

Where ‖ trover was brought to recover a bill of exchange for £1,600, which the bankrupt had deposited with the defendant, and on which, after a demand had been made for it and refused, he had raised the sum of £800, it was insisted that the damages should be only this latter sum; but it was held otherwise at the trial; and upon argument for a new trial, Lord Abinger, C. B., said, "If the defendant will bring £800 into

* Evans *v.* Kymer, 1 Barn. & Adol. 528. In this case it is said that the ancient form of proceeding in these cases was to bring detinue to recover the specific chattel, whereas in trover damages only are recovered. See in Louisiana, New Orleans Draining Co. *v.* De Lezardi, 2 La. Ann. R. 281, a suit for State and city bonds. In Tennessee, damages may be recovered in trover for the unlawful detention of a note, and the note itself may be recovered in detinue. Seals *v.* Cummings, 8 Humphreys, 442.

† *Ante*, 478; Mercer *v.* Jones, 3 Camp. 476 (1813).

‡ Ingalls *v.* Lord, 1 Cowen, 240.

It should, perhaps, be noticed, that, in this case, the defendant was a constable, who had illegally levied on the note in question; and the court said, "that it viewed with great jealousy the conduct of officers holding executions against defendants." I have already considered the question how far the character of the taking can come into consideration in this form of action. But the judgment was reversed by the plaintiff, on error, for the smallness of the damages.

‖ Alsager, Assignee, *v.* Close, 10 Mees. & Wels. 576.

[1] Decker *v.* Mathews, 12 N. Y. 313, affirming 5 Sandf. 439; Bredow *v.* Mutual Savings Institution, 28 Mo. (Jones) 181; Potter *v.* Merchants' Bank, 28 N. Y. 641; Latham *v.* Brown, 16 Iowa, 118; Nininger *v.* Banning, 7 Minn. 274; O'Donoghue *v.* Corby, 22 Mo. 393; Menkens *v.* Menkens, 23 *Ibid.* 252. The same rule is applied in an action against a common carrier for the loss of a draft. Zeigler *v.* Wells, Fargo & Co. 23 Cal. 179. But although in an action for the wrongful conversion of a promissory note, the recovery may be reduced below the amount of the note and interest, which is the *primâ facie* measure, by proof of the maker's insolvency, yet if from special circumstances the note was available to the plaintiff to its full amount, that amount will remain the measure of damages. Rose *v.* Lewis, 10 Mich. 483. See also, Farrel *v.* Colwell, 1 Vroom (N. J.), 123, where, in trespass for selling the plaintiff's horse, the measure was what he was worth to the plaintiff in his business; though in this case we venture to doubt the propriety of the modification of the general rule. See also, Williams *v.* Phelps, 16 Wis. 80. So, where an officer had wrongfully taken from the plaintiff a promissory note, the maker of which was then solvent, but who became insolvent before the officer offered to return it, the measure of damages was held to be the value of the note at the time of the conversion, and interest. King *v.* Ham, 6 Allen, 298.

court and deliver up the bill, the verdict may be entered for a nominal sum; but he converted the whole bill, and the [489] plaintiffs are entitled to recover the value of the whole at the time of the conversion. The defendant cannot be less liable, for having destroyed the property to the amount of one half."[1]

In an action of trover for certain *billettes*,* being Peruvian paper money, it appeared that the billettes were at a great discount; but the matter being referred to the prothonotary for adjustment, the plaintiffs insisted, on affidavit, that the billettes were worth *to them* the value expressed on their face, and claimed a recovery to that amount. And the court allowed it. This, however, hardly seems in analogy to other cases; for the general rule which we have laid down is to be taken with the qualification that the note, or other chose in action, is still an available security for the amount claimed.

Where† trover was brought for a £300 check, drawn by the bankrupt on his bankers, and delivered after his bankruptcy to the defendant, a creditor, and paid by the drawees, the jury found a verdict for the face of the bill. On a motion to set aside the verdict and enter a nonsuit, Chambre, J., said, "How can you sue for a piece of paper of no value?" and Mansfield, C. J., said, "The plaintiffs proceed on the ground that the check is worth nothing, being drawn without authority; how can they recover on it the sum of three hundred pounds?" and a nonsuit was entered.

Other Securities and Written Instruments.—The principle of these cases has been applied to securities of other description,[2] as leases, and bonds not conditioned for the payment

* Delegal *v.* Naylor, 7 Bing. 460.

† Matthew and Cousins, Assignees of Moore, *v.* Sherwell, 2 Taunton, 439.

[1] See Robbins *v.* Packard, 31 Vt. (2 Shaw) 570.

[2] The rule of damages in trover for title deeds has not been much discussed in the reports. Regarding the value of the deed as the consideration expressed in it, or the value of the land conveyed by it, there can be little doubt that in this country the ordinary rule of damages in trover would not apply, both because the judgment would not, as in actions for the conversion of goods, effect a transfer of the title to the defendant, and because the title of the plaintiff, if recorded, as is generally the case, would be unaffected by the conversion, and if not recorded, the deed would still be unavailable to the defendant, and the plaintiff can usually have redress in equity. "No case can be found, I think," says Dixon, C. J., in delivering the opinion of the Supreme Court of Wisconsin, "where the recovery and satisfaction of a judgment for the conversion of them (title deeds) have been adjudged to pass the legal title." "I should think that in those cases where the title is unaffected, and the conduct of the defendant has not been fraudulent or oppressive, but where the deed or other written instrument was lost or destroyed through his mistake, negligence, or slight omission, the more just rule of damages would be such sum as would recompense the defendant for any actual loss he may have sustained and for his trouble and expenses in going into a

of money. Where the defendant* agreed to purchase of the plaintiff for £73 19*s.* the unexpired term of a lease of twenty years, and the plaintiff delivered to him the indenture of lease for the purpose of having an assignment made out, the defendant subsequently made an agreement with the original landlord, and broke off the bargain with the plaintiff, and declined to accept an assignment. The plaintiff demanded the lease (but not the purchase money), which being refused, he brought trover. The jury found a verdict for £73 19*s.*, the price agreed on as the value of the lease, deducting the amount of some fixtures which the plaintiff's under-tenant had removed, and no question was made but the measure of damages [490] was correct. So, where† the defendant had executed a bond to one H. Clowes, which was assigned to the plaintiff, in the penalty of $1,000, conditioned to convey a lot of land. Trover was brought for this instrument, and the conversion proved. The plaintiff having been nonsuited at the trial, on the ground that none but nominal damages could be given, the court set the nonsuit aside, saying that the plaintiff, as the assignee of the obligee, having been entitled to the performance of the condition, the damages sustained would be the value of the land.‡

RULES IN PENNSYLVANIA.—In Pennsylvania, it is held,‖ that trover cannot be maintained for a chose in action, as a share of stock, but may for the paper or evidence of debt.[1] And that in such case, the measure of damages is the debt of which the paper is the evidence.¶[2]

* Parry *v.* Frame, 2 Bos. & Pull. 451.

† Clowes *v.* Hawley, 12 J. R. 484.

‡ In Towle *v.* Lovet, 6 Mass. 394, trover was brought for title deeds, but the quantum of damages was settled by consent.

In Loosemore *v.* Radford, 9 Mees. & Wels. 657, Lord Abinger said, "The case resembles that of an action of trover for title deeds, where the jury may give the full value of the estate to which they belong, by way of damages; although they are generally reduced to 40*s.* on their being given up."

‖ Sewall *v.* Lancaster Bank, 17 Serg. & R. 285.

¶ Romig *v.* Romig, 2 Rawle, 241.

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court of equity or elsewhere to establish and perpetuate the evidence of his title, with the costs of the action." Mowry *v.* Wood, 12 Wis. 413.

And in England, where the plaintiff had already recovered possession of the land from the defendant in ejectment, the court, after a recovery of £2,500 in an action of trover for the title deeds, permitted satisfaction of the damages to be entered on the roll on delivering up the deeds, and paying costs as between attorney and client, and otherwise placing the plaintiff in as good a situation as before the cause of action. Coombe *v.* Samson, 1 D. & R. 201.

[1] See Connor *v.* Hillier, 11 S. C. L. R. (Rich.) 193, where in an action for a conversion of a certificate of bank shares, by which the plaintiff was prevented from transferring or otherwise availing himself of them, their full value was held to be the measure of damages. Also Delany's Adm'rs *v.* Hill, 1 Pittsburgh, 28.

[2] A note payable two months after date, given to an insurance company for premiums was pledged by the company as collateral security for a loan less than its face. The maker

In the same State it is held, that the damages in this action are the value or current price of goods at the time of the demand, and the jury may give interest by way of further damages.*[1] And where the value is incapable of being ascertained with precision, as where it depends on the taste, fancy, or attachment of the owner, or on a contingency, the court will rarely disturb the verdict on the ground of excessiveness of damages. And the jury may go beyond the value, when there has been outrage in the taking, or vexation or oppression in the detention.†[2]

Policies of Insurance.—A stringent application of this form of action has been made to the fraud of an agent, who [491] had represented to his principal that he had effected an insurance, when in fact he had not. In trover for the policy, Lord Mansfield would not permit the defendant to contradict his own representation, and laid down the rule of damages as being the same as if the policy had been actually effected. "I shall consider," he said, "the defendant as the actual insurer, and therefore the plaintiff must prove his interest and loss," ‡ So, on the Pennsylvania circuit, ‖ in an action of trover for a policy of insurance, by consent of parties, the rule of damages was considered the same as if the suit had been on the policy.

But where an action of trover was brought ¶ for a policy which it appeared was canceled, a verdict was recovered and sustained for 2*d.*, the value of the parchment only.

Interest.—Interest seems to be usually given by way of damages for the detention of the property.[3] But whether the

* Jacobs *v.* Laussatt, 6 S. & R. 300.

† Dennis *v.* Barber, 6 S. & R. 420; Berry *v.* Vantries, 12 S. & R. 89; Harger *v.* McMains, 4 Watts, 418; Taylor *v.* Morgan, 3 Watts, 333.

‡ Harding *v.* Carter, Park on Insurance, 5.

‖ Kohne *v.* The Insurance Co. of North America, 1 Wash. C. C. R. 93.

¶ Wills *v.* Wells, 8 Taunt. 264.

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of the note paid the loan, taking up the note before its maturity. The company becoming insolvent, assigned their property to assignees, who brought trover for the note. The action was held maintainable, as the note was liable for the company's losses up to its maturity, and the measure of the recovery was the balance of the note over the amount of the loan. Fell *v.* McHenry, 42 Penn. 41. See also, Craig *v.* Henry, 35 Penn. 120.

[1] Whenever a demand is necessary to change a lawful possession into a wrongful detention, so as to terminate a bailment, no damages can be recovered except from the service of the writ. But where the possession is originally unlawful, and a demand therefore unnecessary the plaintiff is entitled to damages from the beginning of the defendant's possession. Hall *v.* Chapman's Adm'rs, 35 Ala. (N. S.) 553; Lawson's Adm'r *v.* Lay's Ex'r, 24 Ala. (N. S.) 184.

[2] See Backenstoss *v.* Stahler's Adm'rs, 33 Penn. 257.

[3] In the earlier cases the allowance of interest was generally left to the jury. See Williams *v.* Crum, 27 Ala. 468, and Jenkins *v.* M'Conico, 26 Ala. 213. But it can no longer be questioned that in ordinary cases in this country, interest is recoverable as matter of law. "It is as necessary a part of complete indemnity," says Johnson, C. J., in delivering the opinion of

giving of interest is a rule of law or a matter left in the discretion of the jury, does not clearly appear. I infer the former. In trover for rum,* the Supreme Court of New York said, "The jury were competent to allow interest on the value of the chattel from the time of conversion, by way of damages."

So † interest was allowed on a judgment in trover; and it was said that "in trover, interest is recoverable on the value of the goods from the time of the conversion." And ‡ in an action of trover for furniture, farming utensils, etc., the judge at the circuit told the jury "that *they might allow* interest by way of damages." But the Supreme Court said, on a motion for a new trial, "The plaintiff was *entitled* to interest by way of damages, from the time of the conversion."[1] So also in Louisiana. ‖ And in a case ¶ already cited, it was said that "interest *is properly given* in trover, as well as the value of the property converted." ** And again,†† the Court, per Cowen, J., said, "The action is trover, which goes for the actual value and interest.‡‡ In Connecticut, also, the rule of damages in this [492] action has been declared to be the value of the property converted, with interest from the time of the conversion.‖‖[2]

MITIGATION OF DAMAGES.—In trover, as we have said, the conversion is the gist of the action; and it follows that the recovery of the property, or its repossession by the plaintiff, only goes in mitigation of damages. And this is true, as well in regard to this action as in regard to that of trespass for personal

* Wilson *v.* Conine, 2 J. R. 280.

† Bissel *v.* Hopkins, 4 Cowen, 53.

‡ Hyde *v.* Stone, 7 Wend. 354.

‖ New Orleans Draining Co. *v.* De Lezardi 2 La. Ann. R. 281.

¶ Baker *v.* Wheeler, 8 Wend. 505.

** See also Dillenback *v.* Jerome, 7 Cowen, 294; *ante*, 479.

†† Stevens *v.* Low, 2 Hill, 132.

‡‡ In the note to Mercer *v.* Jones, 3 Campb. 476, in the New York edition of these Reports (1821), it is said that "in Massachusetts it is the uniform rule to allow interest on the value of the chattel, from the time of the conversion until the trial."

In England this matter has recently been settled by statute; the 3 & 4 W. IV, c. 42, § 29 (14th Aug. 1833), declaring that in all actions of trover "the jury on the trial of any issue, or on any inquisition of damages, may, *if they shall think fit*, give damages in the nature of interest, over and above the value of the goods at the time of the conversion." See *ante*, 505.

‖‖ Clark *v.* Whitaker, 19 Conn. R. 320.

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the Court of Appeals in the case of Andrews *v.* Durant, 18 N. Y. 496, "as the value itself. There is no sense in the idea that interest is any more in the discretion of the jury than the value." So in Massachusetts, interest was allowed on the value of a chronometer which was not returned. Negus *v.* Simpson, 99 Mass. 388. In an action against bankers for damages for the loss of United States coupon bonds, deposited with them for safe keeping, the measure of damages was the value of the bonds at the time of the demand for them, and the value of the gold interest thereon on the days when the interest was payable, besides interest on the instalments of gold interest, and interest on the principal calculated from the day prior to the trial when an instalment of interest last fell due. Maury *v.* Foyle, 34 Md. 235. See the cases cited under note p. 477, *supra*.

[1] See Andrews *v.* Durant, 18 N. Y. 496, *supra*.

[2] So also in California, Hamer *v.* Hathaway, 33 Cal. 117. See page 477, note, *supra*.

property, as we shall have occasion hereafter to see. And on the same principle, if the property has been redelivered to the plaintiff before suit brought, he can recover nothing but nominal damages.[1] This is the original English rule, and has been also repeatedly held in this country.*[2] The only modification

* The language of the oldest authority on this point is as follows: Si home prist mon cheval et ceo chevaucha et puis ceo redeliver al moy uncore jeo poio aver cest action vers luy; car ceo est un convercion, et le redelivery nest ascun barr del action mes solement serra un mitigacion de damages. Per Cur. in the Countess of Rutland's case, 1 Roll. Abr. 15.

Baldwin *v.* Cole, 6 Mod. 212; 5 Bac. Ab. Trover, D. § 39; Esp. N. P. 190, 191; Cook *v.* Hartle, 8 Car. & Payne, 568. So in Murray *v.* Burling, 10 J. R. 172, Thompson, J., said, "It is every day's practice to sustain this action for the injnry suffered, although the owner has repossessed himself of his property." And the same point was held in Reynolds *v.* Shuler, 5 Cowen, 323.

The same has been held in Massachusetts. Wheelock *v.* Wheelright, 5 Mass. 104; Gibbs *v.* Chase, 10 Mass. 125; Greenfield Bank *v.* Leavitt, 17 Pick. 1.

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[1] Cook *v.* Loomis, 26 Conn. 483. And the court has power to permit by order the return in mitigation. Rutland and Washington R. R. Co. *v.* Bank of Middlebury, 32 Vt. 639. And where the alleged conversion consisted in a direction not to allow the plaintiff to remove on demand the machinery of a workshop, but to use no force to detain it, the shop being at the time in the rightful possession of the defendant, who did not appropriate or remove the machinery, it was held that a subsequent notice to the plaintiff by the defendant that he relinquished all claim to the machinery, should be considered in mitigation. Delano *v.* Curtis, 7 Allen, 470. So where by the defendant's procurement, the plaintiff's wife had left the plaintiff, taking a quantity of his personal property, but afterwards returned to the vicinity of his house, and delivered to him the baggage checks given by the railway for his goods, so that these came under his control, it was held that this delivery should go in mitigation of his damages, and a verdict for the full value of the property was held wrong. Dailey *v.* Crowley, 5 Lansing (N. Y.) 301.

[2] In such case the measure of damages is the sum paid to get back the property. Ford *v.* Williams, 24 N. Y. 359; Hurlburt *v.* Green, 41 Vt. 490. So in England, where the goods are given up, but by a course of dealing by which the plaintiff has been obliged to pay a sum of money to regain them, the jury are entitled to consider that sum in estimating the damages. Tamvaco *v.* Simpson, 19 C. B. (N. S.) 453.

And in general, in case of return, the plaintiff is entitled to damages equal to the value of the use or service of the goods, the amount of injury done them, and the expense of regaining them otherwise than by suit. Ewing *v.* Blount, 20 La. 694.

Where an officer had paid freight due on goods attached by him, and afterwards on demand of a person who had a lien on them for advances, refused to pay either the amount of the lien or to release the attachment, it was held in an action against him for conversion of the property, that the amount he had paid for the freight must be deducted from its value. Clark *v.* Dearborn, 103 Mass. 335.

So in an action for trespass *vi et armis* for taking away certain machinery belonging to the plaintiff, and it appearing that the property had been bought by the plaintiff at the sale made by the constable for the defendant, the measure of the plaintiff's damages was held to be, not the value of the property, but what it cost him to regain its possession—what he lost by his deprivation of it, and such other damages as were commensurate with the injury. McInroy *v.* Dyer, 47 Penn. 118. See *post*, 548, note. But it was held in Vermont, in an action of trover for a pair of oxen, which had been stolen from the plaintiff, and were found in the defendant's possession in New York, that the expenses incurred by the plaintiff in regaining possession of the cattle by legal process in New York, could not be included in the damages recoverable for the conversion. Harris *v.* Eldred, 42 Vt. 39.

An offer to return the property, which the plaintiff rightly declined, does not affect the damages. Stickney *v.* Allen, 10 Gray, 352.

And if a defendant has repudiated the possession of goods under a contract, and claimed by a wrongful conversion, he is not entitled to the benefit of the contract to reduce the damages. Backenstoss *v.* Stahler's Adm'rs, 33 Penn. 251.

In a peculiar case in Connecticut, a farm with the stock thereon had been conveyed by a father to his sons in consideration of love and affection, and on condition of their undertaking to support their mother during her life, and pay certain debts of the grantor. The deed contained a provision that the grantees "were not to reduce or impair the value of the stock" conveyed. This clause, in the opinion of two of three judges, disenabled the sons from

that can be said to exist of this rule is, perhaps, in those cases where intermediate the conversion and the return of the property claimed, special damage has been sustained by the plaintiff; and in such cases the special damage demanded must be distinctly alleged in the declaration.* Upon this general principle it has been held in Massachusetts, that where the property has been sold, and the proceeds applied to the payment of the plaintiff's debts, or otherwise to his use, the facts may be shown in mitigation of damages.†[1] So, if they are taken by an attaching creditor of the defendant out of the plaintiff 's hands, after he has promised to return them.‡

PROPERTY IN A THIRD PERSON IS NO DEFENCE.—Whether the defendant can go further, and show that the property belonged to a third person, is more doubtful. It has been said by very high American authority, "that in this [493] action the defendant may disprove the plaintiff's title by showing a paramount title in a stranger." ‖ But it may well be doubted whether the doctrine can be maintained to the extent in which this language lays it down. In New York it has been held, that the defendant cannot set up property in a third person, without showing some claim, title, or interest in himself derived from such person; ¶ and a plea of property in

* Moon *v.* Raphael, 2 Bing. N. C. 310.
† Pierce *v.* Benjamin, 14 Pick. 356.
‡ Kaly *v.* Shed, 10 Met. 317.
‖ Greenleaf on Evidence, ii, § 648; Rotan *v.* Fletcher, 15 J. R. 207.
¶ Duncan *v.* Speer, 11 Wend. 54.

selling the stock, even with a view to the thrifty management of the farm, and although replacing it by other stock; and in an action of trover against the sons for the conversion and sale of the stock, it was accordingly held, in opposition to the opinion of the chief justice, that neither their payment of the debts nor fulfilment of the other conditions of the deed, nor the purchase and keeping by them of other stock of a value equaling or exceeding that sold, could be taken in mitigation of the damages. Munson *v.* Munson, 24 Conn. 115.

This, we think, will be regarded, at the present day, as a severe carrying out of the theory of trover, which being an action for the value of specific property of which the owner is wrongfully deprived, allows in reduction of the amount of the recovery only the return to the owner of the same property, or proof that the plaintiff had but a qualified interest in it, the remaining interest being in the defendant. But we think the profession will incline to dissent with the chief justice. The disposition to take all the circumstances into account is now carried so far, even where forms of action still prevail, that it would scarcely be generally tolerated, that a plaintiff, under facts like those in this case, and without sustaining any damage from the sale of the stock, should recover its full value.

[1] So in Ohio, New Hampshire and Vermont. Doolittle *v.* McCullough, 7 Ohio St. 299; Howard *v.* Cooper, 45 N. H. 339; Stewart *v.* Martin, 16 Vt. 397. This is the general rule, where the property without any agency of the wrongdoer has gone to pay his debts, or been otherwise applied to his benefit. In Connecticut, the seizure and sale of the converted property can be shown in mitigation, even where the process was in favor of the wrongdoer himself. Curtis *v.* Ward, 20 Conn. 204. But in New York, to protect the wrongdoer, the seizure must be at the instance of a third person, and not at that of the wrongdoer or on process in his favor. Ball *v.* Liney, 48 N. Y. 6. See *post*, 548, 549, and *ante*, 482, n.

Where property attached on mesne process remains in the plaintiff's possession until judgment and execution in the attachment suit, the measure of his damages is the value of the property at the time it was taken on execution, with interest. Henshaw *v.* Bank of Bellows Falls, 10 Gray, 568.

a third person has been held bad.*[1] And in England it has been held in several cases, that where by his acts or acknowledgments the defendant had admitted the title to be in the plaintiff, he shall not be received afterwards to deny it.†[2]

SUITS BY PART OWNERS.—The plaintiff either in this action or in trespass, may sue separately for his aliquot share or proportion of interest in a chattel, and the defendant may give the joint interest of others in evidence, in mitigation of damages. If the plaintiff is a tenant in common, and the defendant wishes to avail himself of the plaintiff's omission to join his cotenants in the suit, he may plead in abatement.‡ But even if he neglect to make such plea, he may still avail himself of the plaintiff's want of title to the whole property, for the purpose of reducing the damages.[3]

Where ‖ a creditor of the husband having taken in execution and sold trust property of the wife, and the husband having purchased it at the sale for less than its value, in an action of trover brought by the trustee against the [494] creditor, it was held in Connecticut, that proof of this matter was admissible in mitigation of damages.¶

In Tennessee, where (during the existence of slavery) a slave hired for general and common service was employed in any hazardous business without the consent of the owner, it was a conversion, and the hirer was liable for the value; or, if the owner did not choose to consider it a conversion, he was liable in damages for any injury the slave received while engaged in such business.**[4]

* Hurst *v.* Cook, 19 Wend. 463.

† Hawes *v.* Watson, 2 Barn. & Cres. 541; Gosling *v.* Birnie, 7 Bing. 339; Stonard *v.* Dunkin, 2 Camp. 344. See on this point also, King *v.* Richards, 6 Whart. 418; Ogle *v.* Atkinson, 5 Taunt. 759; Lacouch *v.* Towle, 3 Esp. Cases, 114; Kennedy *v.* Strong, 14 J. R. 128.

‡ Nelthorpe *v.* Dorrington, 2 Lev. 113; Brown *v.* Hedges, 1 Salk. 290; Addison *v.* Overrend, 6 T. R. 766; Sedgworth *v.* Overrend, 7 T. R. 279; Heath *v.* Hubbard, 4 East, 110, 121; Bloxam *v.* Hubbard, 5 East, 407 and 420; Scott *v.* Godwin, 1 Bos. & Pull. 67–75; Wheelwright *v.* Depeyster, 1 J. R. 471; Chandler *v.* Spear, 22 Verm. 388.

In the King's Bench, in Mountford *v.* Gibson, 4 East, 441 and 447, which was an action of trover, it was said that in trespass, payments made by an executor *de son tort*, in due course of administration, should be recouped in damages. See also, Buller's N. P. 48.

‖ Baldwin *v.* Porter, 12 Conn. 473.

¶ But in Alabama, where a sheriff seized the property of the plaintiff, and sold it under execution against H. and by direction of H. paid over the surplus, after satisfying the executors, to G. (the plaintiff), or his agent,—it was held that the surplus thus paid over could not go in reduction of damages. Locke *v.* Garrett, 16 Ala. 698.

** Mullen *v.* Ensley, 8 Humphreys, 428.

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[1] See Prosser *v.* Woodward, 21 Wend. 205.

[2] An officer who has wrongfully attached the plaintiff's oxen, cannot, when sued in trover for their value, mitigate the damages by showing that he delivered them to the plaintiff's assignee in bankruptcy. Wilkinson *v.* Wait, 44 Vt. 508.

[3] And the plaintiff in such case can recover damages only in proportion to his interest, Sherman *v.* Fall River Iron Works Co. 5 Allen (Mass.), 213.

[4] And if the slave died while engaged in such business, the lowest measure of the dam-

DIFFERENT ASPECTS OF THE CLAIM.—As has been already noticed, some confusion appears to have been introduced into the rule of damages in this action, owing to the different aspects in which the suit is brought; it being sometimes analogous to an action in an ordinary case of contract, as to test a right of lien, and sometimes in the nature of a suit to redress a wilful trespass.*

ON PRINCIPLE THE RULE SHOULD NOT DEPEND ON THE FORM OF THE ACTION.—An effort might be made to render the rule of damages in trover and trespass identical, without reference to the form of the remedy resorted to, and dependent only on the character of the defendant's act.[1] But as the law at present stands, there seems no warrant for a distinction between tortious conversions and *bonâ fide* takings, except so far as the malice goes to prove a conversion. If that fact be established, the character of the taking is put out of view. It seems, however, that were the thing to be settled on principle, the rule might be thus laid down.

GENERAL CONCLUSIONS AS TO THE PRINCIPLES WHICH SHOULD CONTROL THESE ACTIONS.—Where the original conversion is wholly unaccompanied by malice, in other words, where it is not wilful, the rule of damages is a pure question of law, on which the jury is to be controlled by the court.[2] In these cases, the jury should be directed to give the value at the time of conversion, with interest, unless the plaintiff has been deprived of some particular use of the property of which the defendant had knowledge; in that case, if such use would have increased its value to the plaintiff, the jury should give the highest value of the chattel at any time between the conversion and the trial, with interest from such time, [495] *i. e.*, the time of highest value, by way of damages for the detention.[3] But even this, it is apparent, is a very feeble

* Whenever trespass for taking goods will lie, that is, where they are taken wrongfully, trover will also lie; for one may qualify, but not increase a tort. 2 Saunders, 47 *k*.

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ages was his value. Traynor *v.* Johnson, 3 Head (Tenn.), 44. In an action brought by the hirer of a slave against the owner, to recover damages for the detention of the slave, it was competent for the owner to show, for the purpose of reducing the damages claimed, or of preventing a recovery of anything, that by the unjustifiable treatment of the slave by the plaintiff, a permanent injury was done to the slave, diminishing his value. Trotter *v.* M'Call, 26 Miss. 410.

[1] "The rule of damages should not depend on the form of the action." Per Rapallo, J. Baker *v.* Drake, 8 Albany Law Journal, 340. *Ante*, 481, note.

[2] The motive by which a defendant was influenced in converting to his own use the property of another, is admissible only when introduced to repel an attempt by the plaintiff to recover from him, in an action of trover, exemplary damages. Parker *v.* Dement, 9 Gill (Md.), 8.

[3] See *ante*, 481, note. In the case of Dorsett, Adm'r, *v.* Frith, 25 Geo. 537, Lumpkin, J.,

protection for property which has no market price or commercial value, and where, from the necessity of the case, the jury must be left to a large discretion.

If the property converted be a chose in action, as a bill or note, or the security for the payment of money, the measure of damages is *primâ facie* the face of the bill or note. If the instrument or security sued for be not for the payment of money, but a contract for the transfer of property or the performance of some act, then the value of the property or of the act will furnish the rule of damages.

If the taking be wilful, more difficulty presents itself. We have seen that where the chattel was altered and increased in value, damages have been given in some cases to the full value of the increased article, on the ground that the taking was *malâ fide*. If this be right, then it ought always to be competent for the plaintiff to show malice on the part of the defendant, to aggravate the damages. But this would be irreconcilable with the numerous cases* which hold that the conversion is the gist of the action, and the taking immaterial.[1] The true rule would appear to be, to make the measure of damages depend not on the form, but upon the nature of the action; and where trover is brought as a substitute for trespass, to make the rule of damages correspond.[2] If this were so, then if the conversion were wilful the measure of damages would be as above laid down, with the exception that they might be increased in the discretion of the jury for the malicious act. If the property had been altered and increased in value, the rule would again depend on the character of the conversion. If that were wilful, then the value of the articles so increased would be the rule. But this should never be, where the act was *bonâ fide;*[3] and in such case

* Wilbraham *v.* Snow, 2 Saunders, 47.

says: "Upon examination I apprehend it will be found that whenever the books speak of the highest value from the date of the conversion to the time of the trial, as the measure of damages, they refer to cases where it is possible to deliver the property in discharge of the verdict." The defendant cannot avail himself of anything diminishing the value of the property, which occurs while it is in his wrongful possession. Carter *v.* Streator, 4 Jones (N. C.) L. 62.

[1] Moffatt *v.* Pratt, 12 How. P. R. 48.

[2] Such is the rule in Pennsylvania. Forsyth *v.* Wells, 41 Penn. St. 291, *infra;* see p. 208, note 1. See also Long *v.* Lamkin, 9 Cush. (Mass.) 361, where, in an action of trespass against a deputy sheriff for wrongful seizure and sale of personal property, the principle of the rule of mitigation in trover was applied by allowing judgment for the plaintiff only on condition of his remitting from the damages the price of a cow, which, although among the property wrongfully seized, had been returned to the owner. See also Kaley *v.* Shea, 10 Met. (Mass.) 317.

[3] Where one having tortiously cut and carried away trees from another's land, sells a part of them to a person who had no knowledge of the wrong, the owner, even if he can maintain

the true rule would be to allow the defendant for whatever value his labor had actually conferred on the property.[1]

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an action of trover against them jointly, will be entitled, in such action, to recover of the *vendee* only to the value of the part which he purchased. Moody *v.* Whitney, 38 Me. 174.

[1] We can hardly add anything more to what has been said by the author on this subject. See p. 41, note *. Perhaps we have already said too much. *Ante*, 41, note 1. But, before leaving the subject of trover, we cannot refrain from a reference to some cases which illustrate how keenly even the judges of the Supreme Court of Pennsylvania, one of the most conservative States of the Union in its adherence to the traditional practice and pleading of the common law, feel the embarrassment of that system in relation to this and cognate actions. Without contemplating the abolition of forms of action, it will be seen that they strive to bend them so as to reach in part the object which, as we humbly think, can be completely attained only by that radical reform. To us, the effort to show the practicability of stating the actual facts of the case and obtaining the same relief in various forms, seems to that extent to show the inutility of those forms. In McInroy *v.* Dyer, 47 Penn. St. 118, which was an action of trespass *vi et armis* for taking away certain machinery belonging to the plaintiff, the Supreme Court of that State, after applying in mitigation of the damages the rule in trover (see p. 481 note), and after citing the following cases: Curtis *v.* Ward, 20 Conn. 204; Pierce *v.* Benjamin, 14 Pick. 356; Greenfield Bank *v.* Leavitt, 17 *Ibid.* 1; Reynolds *v.* Schuyler, 5 Cowen, 323, and Ewing *v.* Blount, 20 Ala. 694, use the following language (per Strong, J.): "These were actions of trover it is true, but there is no reason for a different rule in trespass. In both, the general principle is, that a plaintiff is entitled to such damages as he has actually sustained. In both, the value of the property lost by the plaintiff is the general standard of measurement of damages, laying out of consideration what may be recovered in trespass for acts of outrage and oppression accompanying the taking. What will make the plaintiff whole is the same in one form of action as in another. No distinction is recognized by the courts." But as we shall see in the case next cited, the learned court elsewhere reject any distinction between the two forms of action growing out of the consideration as to the mode of the taking here passed over. That case (Forsyth *v.* Wells, 41 Penn. St. 291), which so well illustrates our subject that we shall cite from it somewhat at large, was an action of trover for mining and carrying away coal from the plaintiff's lands. On the trial, the Court of Common Pleas, having decided against the argument of the defendant that trover would lie, held further that the measure of the plaintiff's damages was not simply the value of the coal in the ground, but its value after it had been "dug," or what was called "knocked down," the difference having been about as one to eight.

On error the Supreme Court agreed that the action was properly brought, since the defendant below, as it appeared, had not claimed a line which would include the coal taken out, but had gone beyond the proper limit by mistake. But the learned court sent the case back for a new trial, on the ground that the measure of damages should have been the same as in trespass for mesne profits, and that if, as the jury appeared to have found, the defendant below had been guilty of no intentional wrong, he ought to have been charged, not with the value of the coal after he had been at the expense of mining it, but only with its value in place, and with such other damage to the land "as his mining might have caused, which would manifestly be the measure in trespass for mesne profits."

The learned chief justice, in delivering the opinion of the court, discusses the rule of damages as affected by the form of the action as follows: "The plaintiff insists that because the action is allowed for the coal as personal property—that is, after it had been mined or severed from the realty—therefore, by necessary logical sequence, she is entitled to the value of the coal as it lay in the pit after it had been mined; and so it was decided below. It is apparent that this view would transfer to the plaintiff all the defendant's labor in mining the coal, and thus give her more than compensation for the injury done. Yet we admit the accuracy of this conclusion, if we may properly base our reasoning on the form rather than on the principle or purpose of the remedy. But this we may not do, and especially we may not sacrifice the principle to the very form by which we are endeavoring to enforce it. Principles can never be realized without forms, and they are often inevitably embarrassed by unfitting ones; but still the fact that the form is for the sake of the principle and not the principle for the form, requires that the form shall serve, not rule the principle, and must be adapted to its office.

"Just compensation in a special class of cases is the principle of the action of trover, and a little study will show us that it is no unyielding form, but adapts itself to a great variety of circumstances. In its original purpose, and in strict form, it is an action for the value of personal property lost by one and found by another, and converted to his own use. But it is not thus restricted in practice, for it is continually applied to every form of wrongful con-

SATISFACTION OF A JUDGMENT FOR THE VALUE OF THE PROPERTY TRANSFERS THE TITLE.—It would not be proper to leave this subject without noticing the question how far the recovery of a judgment in trover vests the property in the defend-
[496] ant. If the plaintiff recovers the value of the property, and the judgment is satisfied, there would seem to be no doubt that the title to the property should and does vest in the defendant, he having paid its value.* But how far this transfer of title depends on the judgment, and how far on its satisfac-

* Morris *v.* Robinson, 3 B. & C. 196.

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version and of wrongful taking and conversion, and it affords compensation not only for the value of the goods, but also for outrage and malice in the taking and detention of them. 6 S. & R. 426; 12 *Ibid.* 93; 3 Watts, 333. Thus form yields to purpose for the sake of completeness of remedy. Even the action of replevin adapts itself thus. 1 Jones, 381. And also does trespass. 7 Casey, 456.

"In very strict form trespass is the proper remedy for a wrongful taking of personal property and for cutting timber, or quarrying stone or digging coal on another man's land and carrying it away; and yet the trespass may be waived and trover maintained without giving up any claim for any outrage or violence in the act of taking. 3 Barb. 13. It is quite apparent, therefore, that this form of action is not so uniform and rigid in its administration as to force upon us any given or arbitrary measure of compensation. It is simply a form of reaching a just compensation, according to circumstances, for goods wrongfully appropriated. When there is no fraud, or violence, or malice, the just value of the property is enough. 11 Casey, 28. When the taking and conversion are one act, or one continued series of acts, trespass is the more obvious and proper remedy; but the law allows the waiver of the taking, so that the party may sue in trover, and this is often convenient. Sometimes it is even necessary, because the plaintiff, with full proof of the conversion, may fail to prove the taking by the defendant. But when the law does allow this departure from the strict form, it is not in order to enable the plaintiff, by his own choice of actions, to increase his recovery beyond just compensation, but only to give him a more convenient one for recovering that much. Our case raises a question of taking by mere mistake, because of the uncertainty of boundaries, and we must confine ourselves to this. The many conflicting opinions on the measure of damages in cases of wilful wrong, and especially the very learned and thoughtful opinions in the case of Silsbury *v.* McCoon, 4 Denio, 332, and 3 Comst. 379, warn us to be careful how we express ourselves on that subject.

"We do find cases of *trespass* where judges have adopted a mode of calculating damages for taking coal, that is substantially equivalent to the rule laid down by the Common Pleas in this case, even where no wilful wrong was done unless the taking of the coal out by the plaintiff's entry was regarded as such. But, even then, we cannot avoid feeling that there is a taint of arbitrariness in such a mode of calculation, because it does not truly mete out just compensation. 5 M. & W. 351; 9 *Ibid.* 672; 3 Queen's B. 283; and see 28 Eng. L. & E. 175.

"Where the defendant's conduct, measured by the standard of ordinary morality and care which is the standard of the law, is not chargeable with fraud, violence or wilful negligence or wrong, the value of the property taken and converted is the measure of just compensation. If raw material has, after appropriation and without such wrong, been changed by manufacture into a new species of property, as grain into whiskey, grapes into wine, furs into hats, hides into leather, or trees into lumber, the law either refuses the action of trover for the new article, or limits the recovery to the value of the original article. 6 Hill, 425, and note; 21 Barbour, 92; 23 Conn. 523; 38 Maine, 174. Where there is no wrongful purpose or wrongful negligence in the defendant, compensation for the real injury done is the purpose of all remedies; and so long as we bear this in mind we shall have but little difficulty in managing the forms of actions so as to secure a fair result."

In the case of Pennsylvania R. Co. *v.* Zug, 47 Penn. St. 480, Agnew, J., in delivering the opinion of the same learned tribunal, says (p. 483): "It is a source of great regret to judges that, after days spent in the trial, they are compelled to say to a jury they cannot decide a cause upon its merits, but the plaintiff must fail because he has misconceived his form of action. It is also often a cause of regret in the Supreme Court, that a case otherwise well tried, must be reversed on this technical ground. It would be a wise provision to confer the power of amendment over the form of action with such an equitable control of the costs as

tion, seems by no means clear; and the better opinion would appear to be that if the judgment is not for the value of the property, or if it remain unpaid, the title is unaltered.* [1]

* So in Indiana, a recovery of nominal damages does not divest the plaintiff's title. Barb *v.* Fish, 8 Blackf. 481, where the cases are all well reviewed. See Cooper *v.* Shepherd, 3 C. B. 266. In New York, see Osterhout *v.* Roberts, 8 Cowen, 43; Betts *v.* Lee, 5 J. R. 348; 2 Kent Com. 388, note *c*, 5th edition.

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would prevent injustice." This power, which exists in Massachusetts, the author thinks too dangerous. *Ante*, 41. See, for an illustration of the new system in its most radical form, Jones *v.* Steamship Cortes, 17 Cal. 487, cited 208, note 1.

[1] The *obtaining* of the value by the plaintiff operates as a transfer of the title from the time of the conversion. Hepburn, Adm'r, *v.* Sewall, 5 H. & J. 211; Stirling *v.* Garritee, 18 Md. 468. See Arnold *v.* Kelly, 4 West Va. 642; Brinsmead *v.* Harrison, L. R. 6 C. P. 584.

CHAPTER XX.

THE RULE OF DAMAGES IN ACTIONS BROUGHT FOR THE RECOVERY OF SPECIFIC PERSONAL PROPERTY; THE COMMON-LAW ACTIONS OF DETINUE AND REPLEVIN.

Detinue.—Nature of the Proceedings of Replevin.—In this Action Damages can be Recovered by both Parties.—Where the Defendant Succeeds, he is Entitled to Interest upon the Value of the Property during its Detention.—How the Value is to Estimated.—Damages Recoverable by the Plaintiff.

Two forms of action are prescribed by the common law for the recovery of specific personal property—detinue and replevin; the first being generally used where there was a tortious detention only, the latter where there was a tortious taking.

DETINUE.—In detinue, as in debt, no damages were generally given for the thing itself, that being recoverable in specie; but merely for its detention. If, however, the property was not finally returned, then damages might be given for its value.* "The action of detinue," says the Supreme Court of Tennessee, "is for the thing detained and damages for detention: the value of the property is ascertained by the jury; and the judgment is in the alternative for the sum so found, as the value in case the thing recovered cannot be had." † The question on the issue of *non detinet* is whether the chattel be detained, and if so, what is its value and what the damages for its detention; and so the ordinary modern form of verdict in detinue finds the value of the property and damages for its detention.[1]

But as has been said, if for any reason the property cannot be returned, the plaintiff is entitled to its full value. So in the early cases, where we often find detinue brought for charters

* Sayer on Damages, ch. xiv, pp. 69 and 70.

† Waite *v.* Dolby, 8 Humphreys, 406.

[1] Damages for the detention may, without proof of a demand, be recovered in this action from the commencement of the defendant's unlawful possession. Gardner *v.* Boothe, 31 Ala. 186; Whitfield *v.* Whitfield, 44 Miss. 254. If the property were destroyed while in the defendant's possession, and without his fault, no part of its value should be included by the jury in their estimate of damages; but if the destruction resulted from the defendant's fault or culpable neglect, the jury may include that value in their estimate of damages. Bethea *v.* McLennon, 1 Iredell, N. C. 523.

or title deeds, if the charters were destroyed or made [498] way with (eloigned), the plaintiff recovered all in damages.[1] And so in a recent case where detinue was brought for stock certificates, which had been returned *pendente lite*, it was held that the jury might confine themselves to an assessment of damages.* In this case the property was demanded; the stock was worth £3 5*s.*; when it was delivered it had fallen to £1, and the plaintiff was held entitled to to recover the difference. A plaintiff in detinue, whose title to the property sued for is legally divested before the trial of the cause, can recover nothing beyond his damages for its detention to the time when his title was divested, and the costs of suit.†

REPLEVIN.—The action of detinue has, however, fallen into great disuse, and in some of the States of the Union it is abolished by statute. ‡ I proceed, therefore, to the action of replevin. And this action, also, has been so much altered and modified by special statutes, that it will only be proper here to treat of it very succinctly. As to the character of this action, it is sufficient to state, generally, that the plaintiff by his writ seizes the specific property, and at the same time gives a bond with proper sureties, conditioned to return it, or its value, provided it shall finally appear that he has no right of action. The bond, however, is only a cumulative security to the defendant; and if the plaintiff fails to establish his right, the court may proceed in the action itself to award damages against him, as the result of a claim declared to be unfounded, for the value of the property taken by him.[2]

The nature of the proceeding is well and briefly stated by Parsons, C. J.:—

"The plaintiff having by the service of the writ obtained the possession of the goods replevied, prosecutes it to obtain judgment for damages and costs against the defendant for the caption and detention. These are the objects of his suit. The defendant not only resists the plaintiff's claim, but he also com-

* Williams *v.* Archer, 5 Man. Gr. & Sc. 318. See Archer *v.* Williams, 2 Car. & Kir. 26.

† Cole *v.* Conolly, 16 Ala. 271.

‡ So in New York, by Revised Statutes, vol. ii, p. 553.

[1] In California, evidence was allowed in this action of the highest market value of the property between the taking and the verdict. Tully *v.* Farloe, 35 Cal. 302. But see *ante*, 481, n. head p. 594.

[2] The essential distinction between trover and replevin as regards the rule of damages, aside from the element of wilfulness in the taking or detention, is briefly this: In trover, the title to the property is regarded as having passed to the defendant, who is therefore liable for its value simply with interest. In replevin, the title is treated as still in the plaintiff, who is therefore to recover not only the chattel itself or its value, but also damages for its detention, of which interest may be the measure, but is not in all cases the necessary limit. See McGavock *v.* Chamberlain, 20 Ill. 219.

plains of an injury arising from the service of the writ. He demands back the chattels with damages, occasioned by the replevin, and his costs in the defence. . . . The distinction between replevin and other actions in which [499] the plaintiff demands a debt, or damages, or lands, is very clear, because the magnitude of the debt or damages, and the quantity of the land, is involved in the plaintiff's original demand, as well as his title to recover anything. But in replevin, the demand of the defendant is founded on the legal process sued and prosecuted by the plaintiff." *

The jury must find the value of the property; and in Arkansas (during the existence of slavery), in replevin for slaves where the property had not been replevied and delivered to the plaintiff, and the verdict was in his favor, the jury found the separate value of each slave, or a *venire de novo* was awarded.†[1]

Early English Statutes.—In this action the plaintiff had damages at common law; and by the statute of Gloucester, costs, as a consequence of such damage; but the avowant or defendant in replevin had no costs, although in many cases where an avowry or conusance was made, and a return prayed, the defendant was an actor. ‡ In consequence of this hardship two statutes were passed ‖ giving such damages and costs to the defendant as the plaintiff would have had at common law.¶ These statutes have, I believe, been generally re-enacted in this country.

Defendant's Damages and Costs.—By virtue of these enactments, the general rule, where the defendant succeeds and has judgment in his favor for a return, is that he is also entitled to damages; and the decrease in value of the goods since the time of the replevin, with interest on their entire value, forms the proper measure of his damages.** So the defendant is entitled to damages for deterioration in the value of the goods from the time of the replevin, although it be not pretended that

* Bruce *v.* Learned, 4 Mass. 614, 617, and 618.

† Noland *v.* Leech, 5 English, 504.

‡ Bacon Abr. Costs, F. of Costs in Replevin.

‖ 7 Hen. VIII, cap. 4, and 21 Hen. VIII, cap. 19.

¶ James *v.* Tutney, Cro. Car. 497, Easter Term, case 2; Rowley *v.* Gibbs, 14 Johns. Rep. 385; Caldwell *v.* West, 1 Zabriskie, 411.

** Rowley *v.* Gibbs, 14 J. R. 385; Brizsee *v.* Maybee, 21 Wend. 144.

[1] So where the property cannot be returned, the analogy of trover is followed, and the measure is its value at the time of the conversion. Garrett *v.* Wood, 3 Kansas, 231. Interest is to be added. Berthold *v.* Fox, 13 Minn. 501. Where there is no evidence as to the value, nominal damages only can be recovered. Phenix *v.* Clark, 2 Gibbs (Mich.), 327. But in Texas, in an action for the recovery of specific property or its value, a valuation by the jury higher than the evidence warranted, with the view of inducing a surrender of the property, was sustained. Cochrane *v.* Winburn, 13 Tex. 143.

the decrease in value is attributable in any degree to the act or default of the plaintiff.[1]

DESTRUCTION OF PROPERTY BEFORE PAYMENT.—In a case in New York, it was decided in a suit on the replevin bond, that the non-return of the property was excused by its inevitable destruction before judgment.* This decision was based on the old rule that if the condition of a bond become impossible by the act of God, the penalty is saved.† But [500] it seems contrary to principle, and has been expressly disapproved of.‡ As between parties to a contract, it seems very reasonable that all interested in its execution should bow to the superior power which renders its performance impossible. But it cannot be tolerated that a wrong-doer should be excused by any subsequent accident. Nor do the analogies of the law justify any such decision. In trover or trespass for goods after the conversion or trespass was complete, the party in fault would certainly never be admitted to excuse himself by alleging that the property had perished in his hands without his fault. The court appears rather to have looked to the technical form of the action than to the substantial justice of the case.

VALUATION.—In an action of debt on a replevin bond, in Massachusetts, the original plaintiffs having been defeated, but refusing to restore the goods on the writ of restitution, the question was considered, whether the value of the goods should be computed—at the valuation in the replevin bond; the actual value of the property at the time of the service of the replevin writ; at the time of the verdict rendered; or at the time of the demand made under the writ of restitution; it seems from the report that the property at the time was still in the possession of the defendant; and the latter was held the true rule.‖ [2]

* Carpenter *v.* Stevens, 12 Wend. 589.

† Black. Com. b. 2, ch. 20.

‡ Suydam *v.* Jenkins, 3 Sandford Sup. Ct. R. 614.

‖ Swift *v.* Barnes, 16 Pick. 194. See this case commented on in Suydam *v.* Jenkins, 3 Sandford S. C. R. 614. In Maine, see Howe *v.* Handley, 28 Maine R. 241.

[1] And *e converso* in replevin for a yacht, a defendant who claimed her under a purchase was allowed in Massachusetts to show the amount of his expenditures in improving her after his purchase and before the service of the writ. Veazie *v.* Somerby, 5 Allen, 280.

[2] It is to be observed, however, that the Massachusetts rule is only applicable in cases where the defendant can show actual loss. Therefore, if it appears that the defendant claims no property in the replevied goods, or that the goods are not adapted to use and enjoyment, nominal damages only can be recovered. Bartlett *v.* Brickett, 14 Allen, 62.

Where the entire machinery of a cloth manufactory, including steam engines and apparatus, had been wrongfully replevied from a manufacturer, it was held in his suit on the

INTEREST ALLOWED DEFENDANT.—In the same State, also, interest is allowed the defendant on the value.*[1] But where the goods attached were subject to duties, and the plaintiff paid them, it was held in an action on the replevin bond, that the interest should be computed only on the difference between the amount so paid, and the valuation in the writ of replevin.†

THE PLAINTIFF IS BOUND BY THE VALUATION IN THE WRIT.—This is a correct application of the original doctrine of recoupment. It appears here that the valuation in the original writ was adopted, instead of the actual value of the goods; and it has been also so held in England, on the sound principle, that the plaintiff in the replevin suit is bound by the estimate of the property made by himself.‡[2]

[501] CASES OF INCREASE IN THE VALUE OF THE PROPERTY.—These damages are, it will be observed, only damages for the *detention* of the property,[3] and apply to cases where the property has not altered in value, or has deteriorated. But

* Wood *v.* Braynard, 9 Pick. 322.
† Huggeford *v.* Ford, 11 Pick. 223. See also, Mattoon *v.* Pearce, 12 Mass. 406.
‡ Middleton *v.* Bryan, 3 Maule & Sel. 155.

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replevin bond, the condition of which was, that "the plaintiff in replevin should pay all such costs and damages as the defendant in replevin should recover against him, and should also return the goods in like order as when taken, in case such should be the final judgment," that the measure of damages was the same which under ordinary circumstances attending a sale and purchase might reasonably be agreed on as a fair price for the property between a vendor desirous of selling and a purchaser desirous of purchasing the property as a whole, to be used in the place where it was situated, and for the purpose for which it was intended and arranged. Stevens *v.* Tuite, 104 Mass. 328.

[1] This accords with the American principle as to the allowance of interest, and is the general rule. Mayberry *v.* Cliffe, 7 Coldwell (Tenn.), 401. Woodburn *v.* Cogdal, 39 Mo. 222.

In Indiana it seems that the discretionary rule still prevails. It is there said that interest on the value of the property *may* be allowed by way of damages in an action on the replevin bond. Walls *v.* Johnson, 16 Ind. 374.

In replevin for a patented machine, no damages can be recovered for the loss of profits, or beyond interest on its cost value. Houghton *v.* Peck, 8 Pa. 42.

[2] Tuck *v.* Moses, 58 Maine, 461. But with the defendant it is otherwise. As he did not fix the value in the writ, he is not estopped from showing it to be greater than is there stated. St. Thomas *v.* Spofford, 46 Me. 408.

[3] Where the chattel is not returned, the damages must cover its value as well as the injuries done by the detention. Frazier *v.* Fredericks, 4 Zabr. (N. J.) 162. In Tennessee, if the property have increased in value since the seizure, and remain at the time of the trial at a higher point than when seized, the difference must be allowed the defendant as damages for the detention. Maybury *v.* Cliffe, 7 Coldwell (Tenn.), 401, *supra*. If the value be greater at the trial than it had been at the seizure, but the increase be temporary, it will be left to the jury to allow the temporary increase as damages or not. *Ibid.*

In replevin (as we think is the rule also in trover), where a return of the chattels in their condition at the time of the taking cannot be had,—their original value having been increased through labor of the defendant bestowed on them in good faith,—the measure of the plaintiff's recovery does not now usually include the additional value. Single *v.* Schneider, 30 Wisc. 570; 24 Wisc. 299; Hungerford *v.* Redford, 29 Wisc. 345; see *ante*, head p. 604, note 1. So in Pennsylvania, if the taking is *bona fide*, the defendant is allowed whatever value his labor has actually conferred upon the property. Herdic *v.* Young, 55 Penn. 176.

where the property has risen during the pendency of the proceedings, another principle is applied. Under the judgment for a return, the defendant is entitled to recover the value of the property;[1] and here the same question arises, although it is sometimes presented in a distinct suit on the replevin bond, which we have already examined in the action of trover, as to the time when the value should be computed: whether at the time of the replevin, or the highest price down to the time of the trial.[2] It has been suggested in New York,* that the former period is to furnish the rule. But this must, I think, be taken with many modifications.†[3]

MODIFICATIONS OF THE GENERAL RULE WHERE THE DEFENDANT HAS A SPECIAL PROPERTY ONLY.—So this rule in regard to the value of the property is also modified where the defendant has only a special property in it; for if the value exceed his demand, and he takes a verdict for the entire value, he will

* Brizsee *v.* Maybee, 21 Wend. 144. † See Suydam *v.* Jenkins, 3 Sandf. 614.

[1] Lutes *v.* Alpaugh, 3 Zabr. (N. J.) 165; Woodburn *v.* Cogdal, 39 Mo. 222.

[2] *Supra*, 481, note 1.

[3] "If the defendant, in the assertion and vindication of his supposed rights, and not for fraudulent purposes, or as a mere stranger, replevied the property, the measure of damages in this action is not necessarily the value of the property, but the extent of the plaintiff's injury by being deprived of such right as he in fact had in it when it should have been returned. . . . . The true question is, what has the plaintiff lost, or to what amount is he injured by the failure of the defendant to return the property? and to determine this, it is material to know the extent of his interest." Warner *v.* Matthews, 18 Ill. 82. So in New York, under the Revised Statutes and the present Code of Procedure, where the interest of the party entitled to the possession is less than the value of the property, to avoid circuity of action, the practice has long prevailed to direct the jury to assess the value as against the actual owner only at a sum which would be equivalent to such limited interest. Rhoads *v.* Woods, 41 Barb. 471; Fitzhugh *v.* Wiman, 9 N. Y. (5 Seld.) 559; Seaman *v.* Luce, 23 Barb. 240. So in Indiana, under the provisions of 2 Revised Statutes, 124 and 374—which enact that, in an action of replevin, where the property has been delivered to the plaintiff, judgment for the defendant may be for a return of the property, or for its value, if a return cannot be had, and damages for the taking and withholding—the amount of damage in such case depends on the value of defendant's interest in the property; whether he holds as absolute owner, or otherwise. Noble *v.* Epperly, 6 Ind. R. 468. Where, under an agreement between one Bitley and the defendant, the defendant was to buy, as Bitley's agent, certain timber standing, and to cut it and deliver it to him at Troy at ten and a half cents per cubic foot, and Bitley made a payment to the defendant on account of this contract, and out of the money thus received from Bitley, the defendant paid the original owner for the timber, the defendant was held to have a special property in it, to the extent of ten and a half cents a cubic foot, less the expense of getting it to Troy, to which extent the plaintiff was entitled to recover. Weaver *v.* Darby, 42 Barb. 411. In an action on the replevin bond, where the person for whose benefit it is made, is merely entitled to the possession of the property, the title to which is in the opposite party, it is erroneous to allow judgment for the value of the property. Hawley *v.* Warner, 12 Iowa, 42. And where the action is brought by one thus entitled to the possession only, and not the owner of the legal title, the measure of his damages will be the extent of the interference with his right of possession. Cumberland Coal & Iron Co. *v.* Tilghman, 13 Md. 74.

And in an action on the replevin bond by the defendant, who has had judgment in his favor, in the replevin suit, although the defendant in the second suit cannot show in mitigation of damages that the title to the property was in himself, this issue having been determined in the first suit, he can show in mitigation, nevertheless, that his adversary's title was of short duration, and was terminated soon after the judgment in the former suit. *Ibid.*

be liable to the plaintiff for the excess.* And on the same principle, if property be replevied from a sheriff holding it under execution, and who has no other interest in it than that of the creditor whom he represents, if the issue be found for the defendant and the value of the property be greater than the amount of the execution, the rule of damages is the amount of the execution with interest and the cost thereon;[1] but if the value of the property be less than the execution, then the rule of damages is the full value of the property.† It will be observed that the analogy of trover is here followed; for in that form of action if the plaintiff claims by virtue of a lien, he recovers only to the extent of his lien, provided always that the action is not against a mere stranger.[2]

Exemplary Damages in Replevin.—In New York and Pennsylvania, it has been declared, that if the writ be [502] sued out fraudulently, vexatiously, or maliciously, or the defendant's proceedings be of the same character, the jury may give exemplary damages against either plaintiff or defendant,[3] as in cases of wilful trespass.‡[4]

Mitigation of Defendant's Damages.—And on the other hand, it is competent for the plaintiff to show in mitigation that shortly after the delivery of the property to him, the defendants repossessed themselves of the greater part of it;‖ the Supreme Court of New York saying, that the action being in many cases a substitute for trespass *de bonis asportatis*, the rule of mitigation in that action was strictly applicable.

And so in Iowa and Maryland, it has been decided that the plaintiff, though nonsuited, may still offer testimony to prove ownership of property in himself, upon inquiry into the right of

* Scrugham *v.* Carter, 12 Wend. 131.
† Jennings *v.* Johnson, 17 Ohio, 154.
‡ Cabel *v.* Dankin, 20 Wend. 182; McDonald *v.* Scaife, 11 Penn. R. 381; Brizsee *v.* Maybee, 21 Wend. 144.
‖ Dewitt *v.* Morris, 13 Wend. 496.

[1] And in such case, if the execution be partly satisfied, the amount still due, with the interest and costs, will be the measure. Hayden *v.* Anderson, 17 Iowa, 158.

[2] *Ante*, 482. And, on the other hand, where the action is brought by a mere stranger, the same analogy is followed, and if the plaintiff fail in the action, the defendant, though having a special interest only, is entitled to recover the entire value of the property taken. Fallon *v.* Manning, 35 Mo. 271; Frei *v.* Vogel, 40 *Ibid.* 149.

[3] In replevin for a horse, where the circumstances did not authorize exemplary damages, it was held that the plaintiff could not recover the value of the horse, and damages for his use besides. Twinam *v.* Stewart, 4 Lans. (N. Y.) 263. But see *ante*, head p. 559, note 2.

[4] McDonald *v.* Scaife, 11 Penn. St. 381; Schofield *v.* Ferrers, 46 Penn. St. 438. It seems otherwise in this action in Illinois and Indiana. Butler *v.* Mehrling, 15 Ill. 488; Hotchkiss *v.* Jones, 4 Ind. 260. And the mere fact that the wrong doer acted wilfully does not justify such damages. There must be circumstances of fraud, malice, or wanton injury to entitle the plaintiff to recover them. Single *v.* Schneider, 30 Wisc. 570.

the defendant's possession, in order to show that the defendant would have sustained no substantial damage, as he was not the owner of the property.*

PLAINTIFF'S DAMAGES.—Thus much of the defendant. As to the damages recoverable by the plaintiff, they are for the detention of the property, of which interest on its value is ordinarily the measure.[1] He is also entitled to compensation for any deterioration in value of goods replevied while they were in the hands of the defendant;† [2] but the plaintiff who retains the articles replevied till judgment in the suit, cannot, if he succeed, claim damages for the depreciation in their value; because he may always convert them into money.‡

SPECIAL DAMAGES.—It has been intimated, in Massachusetts, that if special damage were shown to have been suffered by the defendant, it might be allowed.‖ [3] And it has been held in the

* Harman *v.* Goodrich, 1 Greene (Iowa), 13; Bell *v.* Worthington, 3 Gill & Johnson, 247. In Indiana, when the replevin bond is forfeited, the statute authorizes the defendant (in replevin) to recover, in a suit on the bond, such sum as shall be just and equitable; and if the plaintiff recover, he shall in like manner recover damages for the detention of the goods and chattels. An effort was made under this statute to obtain for the defendant in replevin, an allowance for his counsel fees and time lost in attendance on court in the replevin suit; but it was denied. Davis *v.* Crow, 7 Blackf. 129.

† Rowley *v.* Gibbs, 14 J. R. 385.

‡ Gordon *v.* Jenney, 16 Mass. 465.

‖ Barnes *v.* Bartlett, 15 Pick. 71.

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[1] Blackie *v.* Cooney, 8 Nevada, 41.

[2] It is unimportant whether such depreciation arise from the defendant's act or default or not. Young *v.* Willett, 8 Bosw. (N. Y.) 486. Nor need there be a special averment of this cause of damage to sustain a recovery on this ground. *I bid.*

[3] This is now the settled rule in that State. And where machinery in actual use in a factory was wrongfully replevied from the manufacturer, his damages were held to include, independently of the return of the property or its equivalent in money, 1. Interest on the value of the property. 2. Compensation for the general inconvenience and loss resulting from the interruption of his possession. 3. Compensation for the expense, trouble and del a f restoring the property to its former condition. Stevens *v.* Tuite, 104 Mass. 328. See Stevenson *v.* Smith, 28 Cal. 102. In replevin for a steam engine, it is is error to allow in lieu of interest on the value, the value of the use of the engine during the time it was detained, in the absence of proof that the plaintiff was prevented by the detention from using it. Barney *v.* Douglass, 22 Wisc. 464. Nor in such a case can the plaintiff recover the expense of an ill advised and ineffectual journey, taken with the object of repossessing himself of the property after it was in the sheriff's hands, without being prepared to take it by legal proceedings. *Ibid.* And it is said that in replevin for goods where there is no claim that they have fluctuated in value or advanced in price, testimony cannot be allowed as to their value *in view of the hazards of the plaintiff's business*, or what they are worth *to him* in the ordinary course of *his* business. Bonesteel *v.* Kemp, 22 Wisc. 522. But see as to the rule in the similar action of trover, Stickney *v.* Allen, 10 Gray, 352, *ante*, 474, note. In New York, the right of recovering special damages in this action has been doubted. Brizsee *v.* Maybee, 21 Wend. 144; although if the analogy of trover be followed, they would probably now be allowed to a limited extent. See McDonald *v.* North, 47 Barb. 530; *ante*, 476, note. So it is now held by the English Court of Common Pleas, that special damages may be recovered in this action. "When the goods were not redelivered by the sheriff, according to the books it would appear that the plaintiff could recover the full amount of the damages that he had sustained. * * * I see no reason in principle why there should be any limitation to the amount of damages recoverable in such a case. I do not know any ground in law for con-

analogous action of case for taking personal property, that the plaintiff was entitled to recover for his time and expenses incurred in pursuit of the property,* and in Maryland for [503] hire of slaves.† In Texas it has been said, "that where the suit is brought to recover the specific property and damages for its detention, if the property sued for be a slave, damages for the hire should be computed from the time of the demand to the rendition of the judgment; if no special demand is proven, the service of the writ is the time from which the damages should be computed." ‡[1] Where the plaintiff has but a life interest, as in slaves, the verdict cannot be for more than the value of such interest. ‖

Reciprocal Damages.—It is the peculiarity of this action, that both parties may be actors, and so if it is found that a part of the property claimed is the plaintiff's, and a part not, both plaintiff and defendant may recover damages against each other.¶

Mitigation of Plaintiff's Damages.—As to mitigation of the plaintiff's damages, it has been held that in a suit on the replevin bond, the defendant may show that the plaintiff had no title to the property, on the ground that the decision of the replevin suit might not be necessarily conclusive upon that question.**[2]

Analogy of other Actions at Law concerning Chattels. —The subject of this chapter is, as I have said, very much under the control of special statutes; and where those statutes, or the decisions founded on them, do not apply, a reasonable rule may

* Bennett *v.* Lockwood, 20 Wend. 223; Morris on Replevin, 139.

† Dorsey *v.* Gassaway, 2 Har. & J. 413.

‡ Robbins, Adm'r, *v.* Walters, 2 Texas R. 130.

‖ Lloyd *v.* Goodwin, 12 Smedes & M. 223.

¶ Powell *v.* Hinsdale, 5 Mass. 343.

** Wallace *v.* Clark, 7 Blackf. 298.

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fining the damages to the expenses of the replevin bond. In practice, these expenses are all that are recovered, merely because there is generally no other damage. * * Whatever damages have been actually sustained may be recovered." Per Bovill, C. J., Gibbs *v.* Cruikshank, L. R. 8 C. P. 454. So in Illinois, in addition to the value of the property, a reasonable compensation for its use, without, however, any speculative profits, is recoverable. Butler *v.* Mehrling, 15 Ill. 488.

[1] See *ante*, 475.

[2] In the action on the replevin bond, it may be shown in mitigation of damages that the action of replevin failed merely because it was prematurely brought. Davis *v.* Harding, 3 Allen, 302. And in such an action brought in the name of one of several owners by whom the replevied property was owned in common, the measure of damages was the value of that one's interest. Bartlett *v.* Cidder, 14 Gray, 449.

It has been held that where the goods have been delivered and accepted, pending the suit, only nominal damages can be given, unless, perhaps, the plaintiff may sometimes have interest on the value. Conroy *v.* Flint, 5 Cal. 327.

generally be deduced from the analogous cases decided upon the actions of trover, trespass *de bonis asportatis*, case for injury to personal property, and on sales of chattels.*

SEQUESTRATION PROCEEDING IN LOUISIANA.—In Louisiana, proceeding by sequestration is strongly analogous to the replevin or attachment of the common law, and the party plaintiff gives a bond with sureties "to pay all damages that may accrue in case it shall appear the sequestration was wrongfully sued out." In a suit on such a bond it has been decided in that State that the judgment in the original sequestration proceeding is conclusive of the question of property against the sureties to the sequestration bond, and that the counsel fees of the first suit can be recovered on such bond; nor is it material [504] to show that such fees have been actually paid; it is enough that the plaintiff has incurred a liability for them.†

* The sureties in a replevin bond are together liable only to the amount of the penalty in the bond, and the cost of the suit upon the bond. Hefford *v.* Alger, 1 Taunt. 218.

In Kentucky a plea in replevin alleging property in a stranger is good. Scott *v.* Hughes, 9 B. Monroe, 104.

† Jones *v.* Doles, 3 La. Ann. R. 588.

CHAPTER XXI.

THE MEASURE OF DAMAGES IN ACTIONS AGAINST SHERIFFS AND OTHER PUBLIC OFFICERS, AND THEIR SURETIES.

In Actions of Case or Trespass, against Public Officers, the Rule of Damages is usually a Question of Law.—The General Rule is the Injury actually sustained by the Plaintiff.—Actions for Escape.—Attorneys.—On whom does the Proof of Damage rest?—Cases examined.—In America, the Debt due the Plaintiff is *prima facie* the Measure of Damages.—Nominal Damages.—Value of Custody.—Insufficient Sureties.—If Aggravation is shown, the Jury may give Exemplary Damages.—Mitigation.—Receiptors.—False Returns.—Consequential Damages.—Suits against Collectors of Customs.—Suits against Sureties of Public Officers.

THE MEASURE OF RELIEF IS A QUESTION OF LAW, EXCEPT WHERE AGGRAVATION IS PROVED.—Having disposed of the actions of trover and replevin, we now approach the great head of *Case*, of which assumpsit is only a branch, and some other subdivisions of which we have already considered. I shall, adhering to the line of demarkation already adopted, treat first of those applications of the action, where no circumstances of aggravation are relied on; reserving for our ultimate consideration those where the evil motive of the defendant forms a substantial ground of complaint. We have already * had occasion to notice, that in actions against private agents the law affords two remedies: one *ex contractu*, upon the contract; and the other *ex delicto*, for the violation of duty; but that in both these cases, the measure of relief is a question under the entire control of the court, unless where the latter proceeding is adopted, and circumstances of aggravation are proved. We shall find the same general principles to hold good in regard to the actions which we are now about to consider.

TRESPASS AND CASE.—We have also, when discussing the subject of remote and consequential damages, had occasion to notice the distinction between trespass and case; the [506] former being originally used where the injury was direct, the latter where consequential. But the line of division between case and trespass is often so faint and difficult of delin-

* *Ante*, 335.

eation, that it will be better for our present purpose to consider rather the object of the suit than the form of the action.* Before examining the subject of trespasses or wrongs generally, we shall consider that class of cases which arise out of the acts of the public officers who are charged with the ministerial portion of the administration of justice.

MINISTERIAL OFFICERS ARE RESPONSIBLE TO THOSE INJURED BY THEIR VIOLATIONS OF DUTY.—It is well settled under the English system, that sheriffs and other ministerial officers, in case of neglect or violation of duty, are responsible to the party aggrieved in a civil action.[1] The mode prescribed is usually one of the great class of actions on the case; but the proceeding often takes the form of trespass. To this general remedy, which flows from the principles of the common law, is frequently superadded some special statutory relief, enforced by some particular penalty; but the addition of such particular remedy does not interfere in any way with the right of the party to his compensation for the actual injury done in a suit of trespass, or on the case.

THE ACTUAL INJURY FURNISHES THE GENERAL RULE.—The ordinary cases in which the questions arise which we are now about to examine, are presented in suits against sheriffs, or other ministerial officers, either for negligence, as the escape of parties arrested on *mesne* or final process, for taking insufficient security, for neglect to seize or preserve property on execution, or omission to make a true return to the writ; or on the other hand, for an excess of their powers, as for levying upon property which they are not authorized to by the process, excessive distress, etc. And in these cases we shall find the general principle to be, although the form of the action be in tort, that the party aggrieved is entitled, independent of any statutory relief, to recover only to the extent of his actual injury.

* As a general principle, it is well settled, in regard to all public officers, that although created by statute, and although liable to the infliction of penalties for violation of official duty, they are still equally responsible to the aggrieved party, in an action on the case. "Where the law," says the Supreme Court of Maine, "has affixed forfeitures for the infractions thereof, or for neglect in not conforming to its requirements, whereby individuals are injured, they are not in consequence thereof deprived of the remedy which would exist if no penalties were prescribed." Hayes *v.* Porter, 22 Maine R. 371; Beckford *v.* Hood, 7 T. R. 620; Farmers' Turnpike Co. *v.* Coventry, 10 Johns. R. 389.

[1] Clark *v.* Miller, 47 Barb. (N. Y.) 38. Public officers, however, vested by law with discretionary authority, and acting within its scope, are not answerable in damages for the consequences of their acts, unless done maliciously and with intent to injure. Burton *v.* Fulton, 49 Penn. St. 151.

[507] "It is not correct," however, says the Supreme Court of Vermont, to hold "that in actions of trespass for taking personal property, when the defendant is an officer acting under legal process, no damages can in any case be recovered beyond the actual value of the property. Courts usually in such cases instruct the jury that they ought to confine themselves within those limits. It is a rule of practice merely. Circumstances may require a departure from it." * [1]

Modifications of the General Principle.—The rule is, indeed, subject to many modifications; partly arising from the vagueness that we have often had occasion to notice in the early cases; † partly from the variety of the forms of action employed; and partly from the application of the rules of evidence; and partly from the general principle that in actions of tort the intent, disposition, and conduct of the defendant always bear largely on the question of damages. ‡ And these various questions we shall better understand by an examination of the cases.

As a general rule, however, it is settled, as I have said, that the measure of damages in suits of this class brought against a public officer by a creditor plaintiff, whose remedy against his debtor has been impaired by the neglect or other misconduct of the officer, is the actual injury sustained, this actual in-
[508] jury being measured by the amount of the original debt due the plaintiff, or the value of the property, and which has been lost or prejudiced by the neglect of the officer.[2]

* Joyal *v.* Barney, 20 Verm. 154.

† Ravenscroft *v.* Eyles, Warden of the Fleet, is very strong to show the power which the courts originally gave in these cases to the jury, 2 Wils. 295 (1766). It was case for a voluntary escape; and the question being whether the action lay, the debtor having returned to custody before suit brought, and judgment having been recovered against him, Lord C. J. Wilmot said, "The *quantum* of damages is nothing to the purpose; for if the jury had power in this case to give damages, we must now take it that they have done right; and I am of opinion that the jury were not confined to give the exact damages in the final judgment, but had a power and discretion to assess what damages they thought proper; *for this being an action upon the case, the damages were totally uncertain and at large.*"

In Sayer on Damages, 56, this case is stated to have been tried before Lord Camden, C. J.; that it was proved at the trial that the debt was *sperate;* and that on the argument, Bathurst, J., said, "Whether the debt was *sperate* or not, I take it to be a settled point, if the escape is a voluntary one, that it is the duty of the jury to assess damages to the amount of the whole debt." But by the report in 2 Wilson, above cited, no such point was made before the court on the subject of damages.

In Kent *v.* Kelway, case for rescue from arrest (Lane, 70; Sayer on Damages, 55), it is said that damages *may* be recovered to the amount of the debt for which the arrest was.

‡ In Bayley *v.* Bates, 8 J. R. 185, the Supreme Court of New York said, "An action for a false return sounds in tort and fraud, and it draws into consideration, in a greater or less degree, the *quo animo* of the defendant."

[1] See Dobbs *v.* The Justices, &c. 17 Ga. 624.

[2] Clark *v.* Miller, 47 Barb. (N. Y.) 38; Hanmer *v.* Griffith, 1 Grant's Cases (Penn.) 193; Marshall *v.* Simpson, 13 La. Ann. 437; Bogel *v.* Bell, 15 La. Ann. 163; Blodgett *v.* Brattleboro', 30 Vt. (1 Shaw), 579; Goodrich *v.* Foster, 20 N. H. 177; Phelps *v.* Owens, 11 Cal. 22;

NOTWITHSTANDING THE PROOF OF THE DEBT AND THE SHERIFF'S NEGLECT, THE INQUIRY IS PERMITTED WHETHER THE DEBT COULD HAVE BEEN COLLECTED.—The original debt is of course the

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Beveridge *v.* Welch, 7 Wis. 465; Plummer *v.* Harbutt, 5 Clarke (Iowa), 308; Briggs *v.* Gleason, 29 Vt. 78; Whitaker *v.* Sumner, 9 Pick. 308; French *v.* Snyder, 30 Ill. 339; Felberg *v.* Gorham, 23 Cal. 349; Commonwealth *v.* Lightfoot, 7 B. Mon. 298; Hogan *v.* Kellum, 13 Texas, 396. So in an action against the sheriff for wrongful seizure of goods, their retail value cannot be given in evidence, as it includes profits. Nightingale *v.* Scannell, 18 Cal. 315. And damages to the plaintiff's business from such seizure are not to be taken into account. *Ibid.*

In an action against the sheriff for neglect to levy an attachment, or levy and return an execution, the amount of the judgment or execution, or so much thereof as the value of the property which the officer neglected to attach would have been sufficient to satisfy, is the measure. Bowman *v.* Cornell, 39 Barb. (N. Y.) 69; Perkins *v.* Pitman, 34 N. H. 261; *post*, 516, 517. And where the value of the property lost by the neglect of the sheriff to execute the attachment equals or exceeds the amount of the plaintiff's demand, such amount becomes the measure of damages for which the sheriff and his sureties are liable. Smith *v.* Tooke, 20 Texas, 750. So in an action on the sheriff's official bond, for the conversion of notes taken by him for property sold on partition, the measure is the value of the notes. Brobst *v.* Skillen, 16 Ohio St. 382. And where a sheriff, under color of an attachment, had seized the plaintiff's books of account and returned them as attached in a suit against another person, in consequence of which they were delivered to that person's receiver, who collected the accounts, the measure of damages was held to be the amount collected, with interest from the time of the collection. Woodbourne *v.* Scarborough, 20 Ohio St. 57.

Interest on the value of the property taken by the sheriff, from the time it was taken until its restitution, and reasonable compensation for the depreciation in its value, if any there was, is the legal compensation in a case free from malice or vexatiousness on the part of the officer. Beveridge *v.* Welch, 7 Wis. 465. And where there is no restitution, in accordance with the American doctrine as to interest, it should be added to the amount of the debt or the value of the property. Hessing *v.* McClosky, 37 Ill. 341. Where a sheriff, without the direction of the creditors, made sales of property on credit, on some of which sales he received interest before the return day of the executions, and on others, the purchasers proved insolvent, he was held bound to account to the creditors, on the executions, to the full amount of the sales, but not for the interest. Chase *v.* Monroe, 10 Fost. (N. H.) 427.

Where, through the negligence of the officer, a slave arrested by him for a criminal offence escaped and was drowned, the damages recoverable by the plaintiff, who had but a life estate in the slave, was limited to the value of such estate. Tudor *v.* Lewis, 3 Metc. (Ky.) 378. See *ante*, 503.

Where goods are illegally seized by the sheriff *in transitu*, the measure of damages is analogous to that in the case of a carrier failing to deliver, and is said to be their value at the place of destination, deducting the necessary expenses of transportation thither. Eby *v.* Schumacher, 29 Penn. St. 40. In case against a sheriff for illegally selling goods lawfully seized and held by him, and which had deteriorated without his default, the measure of damages is said by the Supreme Court of Vermont not to be their value when taken, but at the time of the sale. Walker *v.* Wilmarth, 37 Vt. 289.

The sheriff has no ground for objection in an action against him for a wrongful attachment by his deputy, to an instruction to the jury that the plaintiff is entitled to recover the value of such property exempt from attachment as was attached and thereby wholly lost to him, with interest from the time of the attachment. And if the plaintiff thereby lost the temporary use only of such property, or of the property of other persons to the use of which he was entitled, then he should recover for the injury from such loss of use. Where attached property was kept in the plaintiff's barn, it was held that if the custody of it had been such as wholly or partially to exclude him from the barn, he was entitled to indemnity for such loss of the use of the barn, so far as it was not occupied by the attached property. But where the plaintiff occupied such barn under a lease, in which he had covenanted to "spend or consume on the premises all the hay or other fodder" produced thereon during the term, he could not recover from the sheriff, who wrongfully executed an attachment obtained by the lessor, damages for being disabled from the fulfilment of this covenant, since the plaintiff could not be answerable to his lessor, who caused the attachment, for not performing the covenant. Clapp *v.* Thomas, 7 Allen, 188.

It is held in Indiana, that on a sale of land on execution, the sheriff is bound to tender a deed to the purchaser; and where, without doing so, he resells for omission of the purchaser to pay the purchase money, the sheriff is himself liable to the execution defendant for the amount of the difference between the two sales. The State *v.* Lines, 4 Ind. 350.

ATTORNEYS.—Either because attorneys are a very faithful class, which we take a professional pride in believing, or are very skilful in covering the tracks of any devious steps, there

gist of the action, and it is perfectly well settled that the existence of such debt must be proved by the plaintiff.* But if that fact is established, the equally important inquiry remains, whether the recovery of the debt has been prejudiced by the acts of the defendant. In other words, whether under any circumstances it could have been collected of the defendant's property. The question sometimes arises on mesne, and sometimes on final process.

Actions for Escape.—In England, a remedy was originally given by statute, in an action of debt against the sheriff for the escape of prisoners charged in execution; and this statute has been re-enacted to some extent in this country. But under it no question could arise as to the measure of damages; for, the action being debt, and the provisions of the statute being peremptory, the officer was charged with the whole amount of the plaintiff's original claim, as ascertained by his judgment. Our present inquiry is directed to the measure of damages in the action on the case, or in trespass.† And the only remedy that now exists in England against a sheriff for escape on final proc-

* Gunter *v.* Cleyton, 2 Lev. 85; Alexander *v.* Macauley, 4 T. R. 611.

† Bonafous *v.* Walker, 2 T. R. 126; Rawson *v.* Dole, 2 J. R. 454. No distinction exists in New York as to mesne process, the statute giving the remedy against the sheriff for an escape, expressly declaring that the "sheriff shall be answerable in an action of trespass on the case to the extent of *the damages sustained* by the party at whose suit the prisoner shall have been committed." 2 R. S. 437, § 62. As to the final process, however,

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are few reported cases of actions against them for negligence or wrongs. Such decisions as there are, commonly turn on the right rather than the measure of recovery—the debt lost and costs sustained through their negligence furnishing, when the action can be maintained, the obvious measure of damages, where this measure definitely exists. Godefroy *v.* Jay, 7 Bing. 413; Hoby *v.* Built, 3 B. & Ad. 350. See Langdon *v.* Godfrey, 4 F. & F. 445; Simmons *v.* Rose, Re Ward, 31 Beav. 1; The Governor *v.* Raley, 34 Ga. 173; Nisbet *v.* Lawson, 1 Ga. 275. In other cases, where their negligence has been such as to furnish a right of action against them, the rule of damages is the same with that in like actions against sheriffs. The plaintiff is entitled to be in the same position as if the attorney had done his duty. *Ante*, 104, 105. See Tatham *v.* Lewis, 65 Penn. St. 65. So where an attorney who had been employed to complete a purchase of leasehold property which had been bought at auction by his client on conditions requiring that the purchaser should take an under lease and not demand an abstract of the vendor's title, nor inquire into that of the lessor, made no inquiries, but simply got what purported to be a lease executed by the pretended seller, but which recited no title, the pretended seller having none, and the purchaser was evicted by the real owner, it was held that the attorney had been guilty of negligence for which his estate was liable in damages, the proper measure of which was the sum which the plaintiff (who had bought back the property) had been obliged to pay to get the title, with interest, and without deduction for rent, as he was liable over for mesne profits during the time he had occupied the premises rent free. Allen *v.* Clark, Ex'r, 7 L. T. R. 781 (Q. B.); 11 W. R. 304. But where, owing to the attorney's neglect to charge the judgment debtor in execution at the proper time, the latter was discharged by *supersedeas*, there being evidence that the judgment debtor was not wholly insolvent, a direction to the jury to find the whole debt was held erroneous, and their verdict for that amount was set aside. Russell *v.* Palmer, 2 Wils. 325. Any fact which will tend to reduce the debt which the attorney failed to collect below the nominal amount, is proper to be considered by the jury. Crooker *v.* Hutchinson, 2 Chip. 117; Huntington *v.* Rumnill, 3 Day, 388. Where the declaration alleged that the plaintiff was forced to *pay* a sum of money by reason of the defendant's negligence, it was held he could not recover for a mere liability to make further payments in addition to what he had actually paid. Jones *v.* Lewis, 9 Dowl. Pr. 143. See Howell *v.* Young, 5 B. and C. 259; *ante* 105.

ess, is an action on the case for such damages as the plaintiff may have sustained by reason of such escape.*

When a prisoner for debt makes an escape† (says Lord Kaims), "the creditor is hurt in his interest, but sustains no actual damage; for it is not certain that he could have recovered his money by detaining the debtor in prison, and it is possible he may yet recover it, notwithstanding the escape. But it is undoubtedly a hurt or prejudice to be deprived of his expectation to obtain payment by the imprisonment; and [509] the common law gives reparation by making the negligent jailor liable for the debt, precisely as equity doth in similar cases. A messenger who neglects to put a caption in execution, affords another instance of the same kind." This appears, Lord Kaims observes, to be the infliction of uncertain consequential damage.

Burden of Proof.—It is an important question, where the breach of duty is clear, on whom does the proof of damage rest? Is the plaintiff to prove that he is damnified, or is the officer to disprove the fact? Our law, proceeding on a principle of evidence, throws the burden of proof on the negligent party, and assumes that the plaintiff is injured until the contrary appear. It might be urged that this should not be so, where there is mere ordinary negligence unaccompanied by any criminal intention; but as with common carriers, so with public officers, there are reasons of controlling weight, why the party to whom a great trust is confided, and in whose hands usually all the testimony must be, should be compelled to exculpate himself after a *primâ facie* case of negligence is made out against him.

Disparity between English and American Rule.—There appears, however, to be a discrepancy on this point between the English and American rule. In England, it would seem, though it is by no means clear, that the plaintiff must show affirmatively that he could have collected his debt but for the negligence of the defendant.

The earliest case on this subject‡ runs thus: "An action upon the case against a sheriff, upon an escape suffered by his baily upon a mesne process, and it was in evidence, as is neces-

if an escape takes place, the sheriff is still liable for *the debt*. § 63. But the distinction of action is destroyed by the Code of Procedure. [But see McCreery *v.* Willet, 23 How. Pr. R. 129, affirming s. c. 4 Bosw. 643; Renick *v.* Orser, 4 Bosw. 384; *ante*, 41, note 1. Ed.] In Massachusetts, by Rev. Stat. c. 97, § 71 the action of debt for escape has been abolished. West *v.* Rice, 9 Met. 564.

* 5 & 6 Vict. c. 98, § 31; Arden *v.* Goodacre, 11 C. B. (2 J. Scott) 371.

† Prin. of Equity, book i, ch. iv, § v, ed. of 1767, p. 159.

‡ Tempest *v.* Linley, Clayton, 34.

sary to make this case, that there was such a debt, that such a process and warrant was, and a due debt, and lastly, that the party arrested was become insolvent; otherwise he should not have recovered damages to the value of his debt, as he here did upon all this proved in evidence as aforesaid."

On the authority of this case, Mr. Peake* lays down the rule thus: "In order to show the amount of damages he has sustained, the plaintiff should also prove the circumstances of the defendant at the time of the arrest, and that he has since absconded, or become insolvent; for if the defendant were originally in bad circumstances, or he may be met with every day, and the plaintiff has not in fact been injured by the neg-
[510[1]] ligence of the defendant, the damages will be merely nominal." Mr. Starkie briefly says,† "The plaintiff must prove his debt and the damages which he has sustained from the sheriff's negligence."

In this country, it appears to be settled that the plaintiff, after proving his debt against the prisoner, the custody, and escape, is entitled to recover as his damages the amount of his debt, unless the officer can show that the defendant was insolvent, or in any other way prove that the plaintiff has sustained no actual loss.[2] "The body," says Mr. J. Cowen, in a case in New York,‡ "is considered the highest satisfaction in the law; that is, for the time, gone by the sheriff's negligence, and it is doing no violence to say, that a defendant who would escape had *primâ facie* secreted himself, or otherwise placed himself and property beyond the reach of execution."

* Norris' Peake, 608.

† Evidence — Sheriff — Escape. Vol. ii, 1016.

‡ Patterson *v.* Westervelt, 17 Wend. 543 and 548.

[1] Marginal paging in third edition, 512. (N. B. As the rearrangement of this chapter has seriously deranged the marginal paging, this paging is changed as far as necessary to preserve the sequence, and where the changes occur, the number of the former page is given in a note.)

[2] State use of Goddard *v.* Baden, 11 Md. 317; Loosey *v.* Orser, 4 Bosw. (N. Y.) 391. The true measure of damages is the value of the custody at the moment of the escape. That value must depend on the circumstances of each case. If a party is in custody on process for contempt, and is to be held in custody only till he pay a pecuniary fine, and is utterly insolvent, the damages must be merely nominal. If he is ordered to stand committed till he perform a specified act which he has the power to perform, the value of the custody must depend on the nature of the act, and the consequences to the aggrieved party of a failure to secure its performance. *Ibid.* See Dininny *v.* Fay, Sh'ff, 38 Barb. (N. Y.) 18, where the cases are reviewed; also Macrae *v.* Clarke, L. R. 1 C. P. 483; *post*, 513, note.

So, on the other hand, in an action *by* the sheriff on the undertaking or bond given to him on the arrest of a party for a tort in a civil action, in which action judgment has been obtained and the execution thereon returned unsatisfied, the measure of the sheriff's damages is *prima facie* the amount of the original bail which is the "*prima facie*" measure of the recovery to which also the plaintiff in the original action is entitled against him. Willett *v.* Lassalle, 19 Ab. Pr. R. (N. Y.) 272. So in Connecticut, in the sheriff's action for an "escape on the security taken by" him for the jail liberties, the rule is the debt and costs on the execution with interest. Seymour *v.* Harvey, 8 Conn. 63.

In this case, the question as to the burden of proof was distinctly presented. The sheriff of New York was sued for the escape of one Kelly, against whom the plaintiff had recovered a judgment for $10,722 98; the debt and escape being proved, the C. Judge (Edwards) charged, that to entitle the plaintiff to recover beyond nominal damages, it was incumbent on him to show the extent of the injury sustained by him; and a verdict for such damages only, was accordingly rendered. On motion for a new trial, the court held the burden to be on the defendant, and granted a new trial; admitting, however, that their decision was at variance with the English rule; but insisting that it was not unreasonable to assume that the plaintiff had lost his debt by the defendant's negligence, until the contrary should be proved.

The same point was decided in the same State,* in an action on the case for neglect in the execution of a writ of *fieri facias;* the court "holding the defendant *primâ facie* liable for the whole debt, and conclusively so unless he [511[1]] can mitigate the amount by showing that he was unable to collect it by an exercise of proper diligence,[2] as, if the defendant in the execution was insolvent, or the plaintiff himself have been the cause why the whole was not collected."†[3]

The same law was again laid down in an action brought against a sheriff for neglecting to return a *fi. fa.;* an omission of duty for which the Revised Statutes of New York‡ have declared that the officer shall be liable for *the damages sustained* by any party aggrieved.‖

* The Bank of Rome *v.* Curtiss, Sheriff, &c. 1 Hill, 275.

† Pardee *v.* Robertson, 6 Hill's Reports, 550.

‡ Vol. ii, p. 358, § 80 (2d ed.).

‖ But in Stevens *v.* Rowe, 3 Denio, 327,[4] case against a sheriff for not returning a *fi. fa.*, the two last cited cases were doubted, and it

[1] Former page, 517.

[2] Dunphy *v.* Whipple, 25 Mich. 10.

[3] Such is the general rule in the United States. Humphrey *v.* Hathorn, 24 Barb. 278; Carpenter *v.* Doody, 1 Hilt. (N. Y.) 465; Commonwealth *v.* Connor, 18 Penn. St. 439. And in such an action the sheriff may show in mitigation that other executions in his hands would have taken the proceeds of a sale. Forsyth *v.* Dickson, 1 Grant's Cases (Penn.), 26. Attachments are governed by the same rule as executions, and if the sheriff knowing of property enough to satisfy the demand, fails to levy to that extent, he is liable for the deficiency as ascertained by the result of the sale. It does not excuse him that the property levied on was appraised at a sum sufficient to satisfy the debt. Ransom *v.* Halcott, 18 Barb. (N. Y.) 56.

[4] The case of Stevens *v.* Rowe (3 Den. 327) was overruled in the New York Court of Appeals in Ledyard *v.* Jones, 3 Seld. 550, affirming s. c. 4 Sandf. 67. It was there held, that in action against a sheriff for neglecting to return an execution, the measure of damages is *prima facie* the amount required by the execution. It is not necessary for the plaintiff to allege or prove special damages. The sheriff may show in mitigation of damages, that the defendant in the execution had no property upon which he could have levied, but *not* that the judgment is still collectable. So in People *v.* Lott, 21 Barb. 130. And where the sheriff having levied on sufficient property, it is wrongfully replevied, and he without excuse neglects to prosecute the sureties in the replevin bond, he will not be allowed his expenses in the replevin suit, though they are within the terms of the bond to indemnify him. Sweeney *v.* Lott, 21 N. Y. 481.

NOMINAL DAMAGES.—It would seem, on the general principles which we have already considered, that even if it affirmatively appear that the plaintiff has sustained no damage, the officer guilty of a technical violation of duty would still be liable for nominal damages.*[1] And in case for not executing a *ca. sa.*, the jury found that the sheriff was in default, [512[2]] but that the plaintiff had sustained no damage; and a verdict was entered for the defendant. But on argument, verdict was entered for the plaintiff, with nominal dam-

was said, while admitting the rule that *prima facie* the officer in default was liable for the whole debt, still he might mitigate the amount not only by showing his inability to collect the money, but also by proof that *the debt is still safe and collectable.* As to the liability of the sheriff in cases of false return and neglect, see Hinman *v.* Borden, 10 Wend. 367, and Persons *v.* Parker, 3 Barb. S. C. R. 249.

* *Ante*, ch. ii, pp. 52 and 53.

It may be useful to collect here some conflicting authorities on this point. In an early case, where the sheriffs of Norwich sued the defendant, who had escaped by a rescue, on the ground of their liability over to I. S., at whose suit they arrested him, it was objected that the plaintiffs had not shown that they were charged, or in any way damnified; but the objection was held ill. Sheriffs of Norwich *v.* Bradshaw, Cro. Eliz. 53.

In Crompton *v.* Ward, 1 Str. 429, 436, it is said, "That the plaintiff has an interest, a sort of property, in the body of the prisoner, and sustains a damage by a rescue." But *what* damage is not said.

In Powell *v.* Hord, 1 Strange, 650, an action for a false return on mesne process, the court held, "That if the defendant were a man of estate, and could still be taken, and so no damage, they should think the debt too much to give; but that *not being this case,*" the jury found the whole debt as damages, with the opinion of the chief justice.

And so, again, in Planck *v.* Anderson, 5 T. R. 37, it was held that the sheriff is not liable to an action for an escape on mesne process, if the jury find that the plaintiff has not been delayed or prejudiced in his suit.

And in Beckford *v.* Montague, 2 Esp. 476, case for a false return of mesne process, the original defendant being still within the reach of process, Lord Kenyon told the jury that they were not called on to give the plaintiff the whole extent of the debt, if the original debtor was still solvent. See, also, White *v.* Jones, 5 Esp. 160.

In Barker *v.* Green, 2 Bing. 317, case for not arresting J. W., it was held that though the plaintiff had sustained no actual damage, it was still a case for nominal damages, and the court refused to enter a nonsuit.

But in Williams *v.* Mostyn, 4 Mees. & Wels. 145, where case was brought for the voluntary escape of one Langford, taken on mesne process, and *it was admitted* that the plaintiff had sustained no *actual damage or delay*, the defendant having returned to the custody of the plaintiff, a verdict was found for the plaintiff, with *nominal damages.* And on motion the court directed a *nonsuit* to be entered, saying, "that there had been *no damage in fact or law;*" and they disapproved of the case last cited—Barker *v.* Green.

In Bales *v.* Wingfield, 4 Q. B. 580, where case was brought against the sheriff for neglecting to sell under a *fi. fa.*, the writ was delivered to the sheriff, who seized on the 24th, and advertised a sale for the 6th of May; he did not, in fact, sell till the 27th. On the 15th of May a fiat in bankruptcy issued, and so the sheriff returned "no goods." The Q. B. held, that it lay on the plaintiff to show damage; and a verdict for nominal damages being entered, they refused to set it aside. S. C. Nev. & Man. 831.

But in Wylie *v.* Birch, 4 Q. B. 556, case for a false return, Lord Denman, C. J., assumed the principle that the action could not be maintained against the sheriff for breach of duty unless damage accrued thereby to the plaintiff, and cited the above cases; but said, also, that the breach of duty afforded presumption of some damage to the party who sets the sheriff in motion; and in such a case it seems, still in England that if the plaintiff offered no proof of actual injury, he would be entitled to nominal damages.

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[1] So where in Ohio the sheriff refused to levy on and sell under an execution in his hands, at the request of the plaintiff in the execution, certain personal property, which was wholly covered by mortgages to an amount far more than its value, it was held there should be a verdict for nominal damages only. Coe *v.* Peacock, 14 Ohio St. 187; Coopers *v.* Wolf, 15 Ohio St. 523.

[2] Former page 510.

ages; Lord Denman saying, "When the clear right of a party is invaded in consequence of another's breach of duty, he must be entitled to an action against that party for some amount. There is no authority to the contrary." * [1] So in Vermont, if the sheriff neglect to return an execution, although no injury appear to have resulted, judgment will still be [513[2]] given for nominal damages.† So in a case already cited in Massachusetts, against a sheriff, for neglecting to return an execution, the Supreme Court of that State said, "The plaintiff is entitled to nominal damages for the officer's neglect. No actual damages are proved, but where there is neglect of duty, the law presumes damages."‡ But in Vermont, in an action

* Clifton *v.* Hooper, 6 Q. B. R. 468, where a distinction was pointed out between mesne and final process, to which it may be proper to advert.

† Kidder *v.* Barker, 18 Verm. 454.

‡ Laflin *v.* Willard, 16 Pick. 64. See also, Goodnow *v.* Willard, 5 Met. 517.

[1] But a distinction was taken at a comparatively early day in England, between the liability of officers for default in the execution of writs of mesne and of final process, and which is sustained by a series of decisions. Where the writ relates to mesne process, it is held that, as it is uncertain whether the aggrieved party would recover at all against the original defendant, he can recover from the officer such damages only as he can show he has sustained. But in an action on the case for the sheriff's omission to arrest the debtor, on final process, or for an escape on such process, although no actual damage be proved, he is held liable, in any event, to nominal damages. His negligence in this case deprives the plaintiff of the satisfaction which, after judgment, is in law imported by the possession of the debtor's body. Planck *v.* Anderson, 5 T. R., 37; Clifton *v.* Hooper, 14 L. J. (Q. B.) 1; 6 Q. B. 468; Lewis *v.* Morland, 2 B. & Ald. 56; Scott *v.* Henley, 1 M. & Rob. 227, cited in the author's note, *supra.* Indeed, with the above exceptions of actions for not arresting a debtor on final process, or for allowing him to escape when held on such process, it seems to be settled in England that civil actions against ministerial officers for neglect of duty cannot be maintained, unless damage thereby accrues to the plaintiff, although the neglect affords a presumption of damage which must be disproved to entitle the defendant to a verdict. This has been held in actions against sheriffs for the omission to seize goods to which the plaintiff has no present right of possession, or to execute a *capias*, or to levy under a *fi. fa.*, or for his making a false return. Tancred *v.* Allgood, 4 H. and N. 438; 28 L. J. N. S. 362; Hobson *v.* Thelluson, L. R. 2 Q. B. 642; Stimson *v.* Farnham, L. R. Q. B. 175; Randall *v.* Wheble, 10 A. and E. 719; see also, Williams *v.* Mostyn, 4 M. & W. 144; Wylie *v.* Birch, 3 Gal. and Dav. 629; 4 Q. B., 566, cited in the author's note (*supra*). The distinction thus established in England, by which no liability attends the neglect of official duty unless the neglect results in positive loss to the person aggrieved, is founded on the assumption that the right of a suitor (or other person in a corresponding relation) to the officer's services, is in fact a right only to such pecuniary benefit as can be derived from them, and that if no such benefit can be obtained, no right exists. We think this reasoning fallacious and illogical, as it is a *reductio ad absurdum* to make the right depend on the consequences of violating it. The exception has, however, apparently been recognized in New York in other cases than actions against sheriffs, and which seem to proceed upon such a distinction, though it was not in terms adverted to. Commercial Bank *v.* Ten Eyck, 48 N. Y. 308; *ante*, head p. 45, note 2; Bridge *v.* Mason, 45 Barb. 37; *ante*, head p. 404, note 1. But although, owing to the abolition of imprisonment for a simple debt, the question loses its importance in reference to actions for the sheriff's neglect of duty, in those cases in which the defendant could formerly have been arrested as of course, we think the exception is to be regretted, both as anomalous, and as tending to laxity in the discharge of official duty. Under circumstances giving an officer no discretion, his failure to fulfil a positive duty for the benefit or protection of others should always be, in a legal sense, a wrong to the person in whose behalf the duty should have been discharged; and where there is a legal wrong there should always be a legal remedy. A right of action should accrue when the breach of duty is committed; and once existing, should not be destroyed by the circumstance that it afterwards proves to inflict no pecuniary damage. See *ante*, head p. 404, n. 1.

[2] Former page, 511.

brought against an officer who had attached the plaintiff's goods, it has been said, "That no case can be found where damages have been given for trespass to *personal property*, where no unlawful intent nor disturbance of a right or possession is shown, and where not only all *probable* but all *possible* damage is expressly disproved."* And this certainly ought to be the rule.[1]

THE VALUE OF THE CUSTODY AT THE TIME OF THE ESCAPE AFFORDS THE RULE IN ENGLAND.—In a case in England, the Court of Common Pleas said, that they had not been able to find any decision in which the rule as to the measure of damages was clearly defined. The principal case was one in which it was endeavored to reduce the liability of the sheriff by showing, where an escape from final process had taken place, that the plaintiff might, by diligence, have re-arrested or detained the defendant, and recovered his debt. But this was denied; and it was declared that the true measure of damages is the value of the custody of the debtor at the moment of the escape; that if at the time of the escape the debtor had not the means of satisfying the judgment, the plaintiff loses only the security of the debtor's body, and the damage may be small. If, on the other hand, at the time of the escape, the debtor could pay, and has wasted his means since then, it being clear that the loss of the debt is owing to the sheriff's neglect, the jury would be justified in giving the full amount of the execution.†[2]

But it is plain that this still leaves the whole subject at very loose ends. What is meant by the value of the security of the body of a debtor? Are his physical and mental qualifications to be gone into, and the chance of his subsequently acquiring property, to be estimated? Are the chances of his friends being induced or coerced, by reason of his imprisonment, into paying the debt, to be inquired of? Again, what can be more vague than in a matter of this kind, to say that "*the damages may be small.*" Nor, on the other hand, even if the debtor is solvent,

* Paul *v.* Slason, 22 Verm. 231. *Ante*, 51.

† Arden *v.* Goodacre, 11 C. B. R. (2 J. Scott) 371.

[1] But the present rule in Vermont again conforms to the general doctrine if, indeed, that doctrine can be regarded as departed from, in the guarded language which is cited in reference to a trespass. See *ante*, head p. 51, note 1.

[2] So in a late case in the English Common Pleas, it is held that the jury, without proof of the actual resources of the debtor, may, in estimating the value of the custody, consider the surrounding circumstances showing the probability that the creditor might have obtained payment by means of it,—such as the value of the estate of an aged father of whom the debtor was the only son, and the offer of the debtor's solicitor, some time before his arrest, to pay a certain amount in composition of his debts. Macrae *v.* Clarke, L. R. 1 C. P. 403.

is the liability of the sheriff to pay the debt declared as matter of law. It is simply said that the jury would be "*justified in giving the full amount of the execution.*" And the question on whom the burden of proof as to the debtor's pecuniary condition falls, is not alluded to. It is plain that the whole subject in England is in a state of perplexing uncertainty.

We turn now to the American cases.[1]

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[1] The Supreme Court of Ohio says that in this country the following rules seem now to be settled by the preponderating weight of authority.

1. On proving the judgment, arrest, and escape, the plaintiff is *prima facie* entitled to recover the whole amount of his debt.

2. To reduce the amount of the recovery below the amount of the debt due from the escaping prisoner, the *onus probandi* rests upon the defendant.

3. For this purpose the defendant may not show that the amount of the debt is still capable of being collected from the escaped prisoner, but may show his partial or total insolvency or pecuniary worthlessness at the time of the escape.

4. That on proving judgment, arrest, and escape, the plaintiff in all cases is entitled to recover at least nominal damages.

5. Where the jury find the escape to have been not only voluntary on the part of the officer, but that in permitting the same he was actuated by fraud, malice, or corruption, they are not restricted to the amount of injury actually sustained, and may include reasonable exemplary damages, but with this exception; where evidence in mitigation is given, the actual injury sustained is the proper measure of recovery. Hootman *v.* Shriner, 15 Ohio State, 43.

Where, however, a defendant is arrested by the sheriff, and gives bail, and is discharged, but the bail do not justify, the sheriff becomes bail, and is liable to the same extent to which the bail would have been had they justified. In such case, therefore, after the return of the execution unsatisfied, the sheriff is liable for the judgment and interest, and the insolvency of the judgment debtor will not go in mitigation of the damages. Metcalf *v.* Stryker, 31 Barb. 62; affirmed 31 N. Y. 255. The same rule was re-affirmed in New York, in Bensel *v.* Lynch, 44 N. Y. 162.

The summary of the American law on the subject in the above case of Hootman *v.* Shriner, is doubtless as correct as it is clear and succinct. Yet the proof of *partial* insolvency, which the third proposition above declares to be admissible, is open to a discussion akin to that in the text concerning the value of the custody. If the debtor is hopelessly insolvent, it is plain that the injury to his creditor from his escape must be nominal only. Although in theory the old and barbarous notion of the debtor's body serving as a satisfaction of the debt is not entirely discarded in those cases where imprisonment for debt still exists (notwithstanding the "poor debtors' acts" so generally enacted seem fatal to it), the practical object of the imprisonment is to coerce him into payment. If he has nothing, the coercion is of course useless. But in the case of "partial insolvency," as it is called, we are wholly without any practical measure of the damages. It is true, that where the debtor has made a general assignment of his assets, and they are insufficient to pay the debts in full, or where otherwise an arrangement is made by which where the assets do not equal the debts, they can be apportioned *pro rata* to them, a particular debt will, on the liquidation of the assets, have a definite value. It will be that proportion of the debt which the whole net assets bear to the whole amount of the debts. But there can be no *pro rata* apportionment of assets to executions, which are paid in full in the order of their priority. The only case of "partial insolvency" of the debtor, therefore, which can practically affect the measure of damages against the sheriff for failure to collect an execution, is where specific property only belonging to him is known to exist subject to execution, but less in value than the amount of the particular execution under which the sheriff is sought to be charged for the escape; and it is in this definite sense only, we think, that *partial* insolvency will go in mitigation. Where it can neither be shown that the debtor can pay the whole debt, nor that he has specific property of ascertainable value applicable to it, and which might have satisfied it in part, it must be impossible to say that the value of the custody is worth any specified fraction of the debt, since there are no elements or means for such a calculation. But the burden in this country is always on the sheriff, and solvency should be presumed so far as he cannot definitely show that the debt was not collectible.

In the case of Jenkins *v.* Troutman, 7 Jones' Law R. (N. C.) 169, the court while again recognizing the rule of mitigation already acquiesced in, in that State (Murphy *v.* Troutman, 5 Jones' Law R. (N. C.) 379), by allowing the defendant to mitigate the damages by showing

American Cases—Actual Injury—Mitigation.—[514[1]] In an early case in New York,* the facts were these. One Briggs had been master of the schooner Friendship, and had signed bills of lading for goods shipped at New York by Potter, the plaintiff, for account and risk of a West India house, to the amount of £1,655 9*s.* 3*d.* South Carolina currency. He also owed the plaintiff a balance of £129 11*s.* 3*d.* Briggs ran away with the goods, and never delivered them. Potter sued Briggs, and he was arrested on a *capias ad respondendum*, and after being in prison some time, escaped by the assistance of his friends. The sheriff made a special return to the writ, of a rescue: the plaintiff sued the sheriff in case for the escape and false return. It appeared on the trial that Briggs was very poor, and had no means of subsistence; and the defendant offered to prove that the plaintiff's attorney, after the escape, admitted Briggs "to be not worth a cent." This, however, was excluded. The judge charged that the facts did not justify the sheriff's return of a rescue; that the plaintiff had established a right of action, as well for the value of the goods shipped as for the balance of account; but that the jury were to decide the damages under all the circumstances: that the poverty of Briggs might be considered in mitigation, and if the return of the sheriff was fraudulently made, it would be an aggravation, of damages. The jury, taking into consideration both the amount of the invoice and the balance of the account, found for the plaintiff $3,000, which (as appears by the opinion of Livingston, J.) was about half the plaintiff's demand against Briggs. On motion for a new trial, the court held the declarations of the plaintiff's attorney rightly excluded. As to the rule of damages, Tompkins, J., said,—

"It is impossible to determine whether the circumstance of the defendant having made a false return to the writ operated on the minds of the jury to

* Potter *v.* Lansing, 1 J. R. 215. See Balden *v.* Temple (Hobart, 202), for nominal escape, but which decides nothing as to the point we are here considering. See, also, Lewis *v.* Moreland, 2 Barn. & Ald. 56; Brown *v.* Jarvis, 1 Mees. & Wels. 709; and Scott *v.* Henly, 1 M. & Rob. 227, where Littledale, J., said, "that the sheriff was only liable for escape on mesne process, for such damages as the plaintiff can show he has actually sustained."

that the effect of his wrongful act was not so great, because the escaped debtor could not pay the debt, or any part of it, rejected as irrelevant, proof that the defendant was "largely indebted," which was offered with a view to establish the probability that the debtor would, if arrested, have assigned his property to secure the payment of those debts, thereby diminishing the plaintiff's chances of satisfaction. So in the case of Sherrill *v.* Shuford, 10 Iredell (N. C.), 200, the court say, "the true inquiry is, has the defendant, by his negligence, deprived the plaintiff of any legal means of securing the payment of his debt? If he has, and the debtor had property which might by due process have been subjected to it, he shall answer the full amount of the debt."

[1] Former page, 513.

increase the damages. The judge was perfectly correct in stating to them that the return was legally false. But I do not think that, even if the sheriff knew it to be so, it ought to aggravate the damages. The true question is, what has the plaintiff lost in consequence of this escape? The alleged false return by the sheriff, neither adds to nor diminishes the loss; and therefore the solvency of Briggs, or his capacity to pay, must determine the quantum of damages sustained. If the circumstance of a false return be a substantive ground of damages, it would follow that where the person escaping was perfectly solvent, and the sheriff makes a false return, the creditor might recover in damages more than the full amount of his debt." * [515[1]]

But a new trial was granted, on the ground that the plaintiff, the consignor—the goods being shipped for account and risk of the West India house—could not have recovered against Briggs, and in this opinion Kent, C. J., and Spencer, J., concurred. Livingston, J., and Thompson, J., who dissented as to the right of the consignor to bring the action, concurred in the rule of damages laid down as above by Tompkins, J. Thompson, J., said, "If the idea communicated to the jury was that they might give what is commonly called smart money, beyond the actual damage of the plaintiff, it was undoubtedly incorrect." †

In another case in the same State,‡ the plaintiff had on the second Monday of November, 1806, issued a *capias ad respondendum* to the defendant, sheriff of Rensselaer County, against one Abel Turner and others. Turner was arrested by the sheriff, and gave bond on the 5th of November, 1806, for the liberties of the jail, and admitted, when arrested, that he owed the plaintiff about $800; and in November term, 1806, he confessed a judgment for $871 36, docketed on the 30th December, 1806. He soon after escaped, and went to Vermont. The defendant proved that in November, 1809, Abel Turner was again arrested at the suit of the plaintiff, on his way to Vermont, and gave a cognovit for $871 39, on which the plaintiff relinquished to him a tract of land in Vermont, which he had received as security, and which a witness testified was of more value than the debt, and the [516[2]]

* This is strong to show, that although the action be in tort still the verdict must be restricted within the limits of legal compensation.

† In an early case on an action of debt for escape, Spencer, J., said, "If an action on the case had been brought, it might have been inquired, what was lost by the escape; and the jury might have given such damages as they supposed the party had sustained." But in an action of debt, it was held that every inquiry of that kind was improper, the statute having fixed the extent of the sheriff's liability, that is, for the original debt and damages recovered; and the plaintiff was confined to the precise amount of his original judgment and costs. Rawson *v.* Dole, 2 J. R. 454. The remedy given by the action of debt, as we have already seen, no longer exists in New York. See also, Van Slyck *v.* Hogeboom, 6 J. R. 270.

‡ Russell *v.* J. Turner, Sheriff, 7 J. R. 189.

[1] Former page, 514.

[2] Former page, 515.

plaintiff gave him a receipt in full of all demands, except the suit in Rensselaer County. It was agreed that the execution was to be stayed for one year, and the plaintiff said he meant to charge the sheriff of Rensselaer County. The jury were instructed at the trial, that the plaintiff ought not to recover more than the actual damages which he had sustained, of which they were to judge, and in the estimation of which they had a right to take into consideration all the circumstances. A verdict was given for six cents. On motion for a new trial, it was insisted by the plaintiff, that he was entitled to recover the whole sum due him in the original action.

Thompson, J., delivering the opinion said,—

"The question is, Whether it was competent for the sheriff to show that the plaintiff had, after he knew of the escape, relinquished to the prisoner real security for the debt, which he held in the State of Vermont, with a view to recover his demand of the sheriff. The true question in cases of this kind is, what has the plaintiff lost in consequence of the escape. The jury are not confined to the exact damages in the final judgment, as to the amount of the plaintiff's demand, but have a power and discretion to assess such damages as they shall suppose the plaintiff has sustained under all circumstances.

"The value and extent of this security was a proper subject for the consideration of the jury, and could the plaintiff have shown it to be worth little or nothing, it would not have mitigated the damages. As the testimony, however, appeared before the jury, it was sufficient to pay the plaintiff's demand. It was admitted by the plaintiff's counsel, and indeed could not be denied, that the insolvency of the prisoner, or payment of the demand by him, could be given in evidence in mitigation of damages. On what principle could this be done? None other certainly than to show how far the plaintiff had been or was likely to be damnified. If the prisoner had deposited with the plaintiff a sum of money to satisfy his demand when ascertained by judgment, and the plaintiff on discovering that an escape had been made, had surrendered up the money, could it be doubted that the sheriff might avail himself of it in mitigation of damages? Or, suppose the suit upon a bond which was secured by mortgage on real property, and the creditor on discovering the escape should discharge the mortgage, would not this circumstance be admissible in mitigation of damages? All these cases depend on the same principle, and necessarily result from the nature of the action, which is given to the plaintiff by way of indemnity for the actual injury which he sustains by reason of the escape; and the plaintiff ought not to be permitted to avail himself of his own acts or misconduct to enhance the damages."

[517[1]]

Again,* where suit was brought by the plaintiff as assignee

* Kellog v. Brown, 9 J. R. 300.

[1] Former page, 516.

of the sheriff, on a bail bond, given by the defendants, conditioned that one Brown should keep the liberties, etc., the plaintiff proved his judgment and escape. The defendant proved that Brown was insolvent, and only possessed a cow worth sixteen dollars. The judge directed the jury to find a verdict for the plaintiff for sixteen dollars, the value of the cow, which was done. There were cross-motions in arrest of judgment and for a new trial. Both motions were denied; the court saying, "The plaintiff is entitled, *primâ facie*, to recover his whole debt which is presumed to be lost by the escape; and it could only have been reduced down to the sum found by the verdict, upon the evidence given, that if the party had not escaped there was no ground to consider that any greater sum could have been recovered of the original defendant, by the coercion of confinement.

In Vermont the rule seems stringent, though the action on the case is resorted to. It has been well understood and universally recognized in that State for thirty years, that an officer who holds penal process against a debtor upon whom he may serve it, but who omits to do so, or having once had an opportunity to arrest the debtor neglects to do it, and the debtor afterwards absconds,—becomes *fixed with the debt;* and, of course, no evidence as to the debtor's insolvency is admissible.* So in the same State, in an action against the sheriff for the escape of the debtor from the liberties of the jail, he having taken insufficient security, the rule of damages is the amount of the debt.†

In Illinois, in actions upon the official bond of a constable for failure to return an execution, the measure of damages is the amount of the execution, with interest from the date of the judgment on which it was issued, notwithstanding the defendant in the execution was wholly insolvent from the time of its issue to that of its return.‡

So in North Carolina the remedy of debt is given against the sheriff who shall wilfully or negligently suffer a debtor charged in execution to escape; and in this action, as I have said, there is no question as to the measure of damages: the sheriff is fixed with the debt.‖[1] In the same State, in regard to mesne process,

* Goodrich *v.* Starr, 18 Verm. 227.

† Wheeler *v.* Pettes, 21 Verm. 398. See in the same State, Vilas *v.* Barker, 20 Verm. 603, an action against a sheriff for refusing to assign a jail bond to the creditor.

‡ Robertson *v.* County Com'rs, 5 Gilman, 559. This decision is founded on the statute of that State.

‖ Adams *v.* Turrentine, 8 Iredell, 147.

[1] But the rule appears to be modified in that State. In debt on a sheriff's bond for an escape where the sheriff's return was "The defendant arrested; signed the appearance bond; refused to give surety; and made his escape by jumping on his horse and running, there being no one present to assist," the measure of damages was recently held to be, not the

it has been said that the true inquiry is, whether the debtor had any property which might by due process have been subject to execution, and whether the sheriff by his negligence has deprived the plaintiff of his remedy. But it is no answer for the sheriff to say that the debtor, even after being imprisoned, might pay, or secure to be paid by assignment, other *bonâ fide* debts, [518[1]] to the disappointment of the plaintiff.* Nor on such process is the reputation of the defendant as an insolvent any excuse; the officer is bound to ascertain for himself whether there is property to satisfy the writ.†

In Arkansas, also, it has been held, that in actions for escape from mesne process, the presumption is that the plaintiff lost the entire debt by the escape; and the measure of damages against the officer is the amount of the original debt;[2] but the defendant is at liberty to prove in mitigation of damages that the debt could not have been made out of the debtor.‡

In Georgia, in an action of debt upon the sheriff's official bond for an escape on mesne process, it has been held that the insolvency of the original debtor may be given in evidence by the defendant in mitigation of damages;‖ and in that State the opinion of a witness may be given in evidence as to the insolvency of a party, provided it be accompanied by the facts on which the opinion is founded.¶

In Massachusetts it has been said, that in actions of this kind, "It is peculiarly the right of the jury to assess the damages, and in this they are not restricted to any precise sum."** And so again, "that the jury have the subject of damages at their discretion."†† But notwithstanding this general language,

* Sherrill *v.* Shuford, 10 Iredell, 200.

† Parkes *v.* Alexander, 7 Iredell, 412; The State *v.* Edwards, 10 Iredell, 242.

‡ Faulkener *v.* Bartley, 6 Ark. (1 English) 150.

But in the same State it is also held that in declaring against a constable for failing to levy an execution, it is necessary to allege that the defendant in the execution had property on which the levy might have been made. The court say the officer was under no legal obligation to make the levy unless the defendant had property at the time upon which to make it, and it was incumbent on the plaintiff to allege the fact in the declaration; and this correctly, for no such presumption exists on executions against property before levy, as on mesne process after arrest. State, use of Brooks *v.* Kirby, 6 Ark. (1 English) Reports, 453.

‖ Crawford *v.* Andrews, 6 Georgia, 244.

¶ In Indiana, by statute, in case of a false return to a writ of *fieri facias*, the constable and his sureties are liable on the bond for the full amount which the officer might have collected and paid over, with interest and ten per cent. damages. R. S. 1838, 148; Limpus *v.* The State, 7 Blackf. 43.

** Weld *v.* Bartlett, 10 Mass. 470; and Colby *v.* Sampson, 5 Mass. 310.

†† Rich *v.* Bell, 16 Mass. 294. See, also, Burrell *v.* Lithgow, 2 Mass. 526.

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debt and interest, but such actual damages as the plaintiff had sustained. Lusk *v.* Falls, 63 N. C. 188.

[1] Former page, 519.

[2] So in the United States Circuit Court for the District of Columbia, it is held that if the marshal fail to bring in the body of the defendant on the return of the writ, he will be amerced in the full amount of the debt or damages and costs. Winter *v.* Simonton, 2 Cr. C. C. R. 585.

the rule appears settled there in conformity with that in New York, namely, that the amount of the plaintiff's debt is *primâ facie* the measure of damages;* that it is competent for the defendant to show in mitigation of damages any circumstances which go to prove that the plaintiff has in truth [519[1]] not suffered any actual injury from the loss complained of,† [2] and that, on the other hand, it is competent, if the wrong be a wilful one, for the jury to give more than the actual loss.‡ In a recent case in that State, where case was brought against a sheriff for not taking sufficient bail, the principal debtor being sued to judgment and the execution returned unsatisfied, this language was held: "Although the amount of the judgment is *primâ facie* evidence of the measure of damages, yet this may be controlled by evidence showing the entire inability of the debtor to pay, and the actual injury therefrom to be less than the amount of the judgment against him." And although the principal debtors had left the State, and could not be found on the execution, evidence as to their poverty was held admissible, the court saying, "The fact that the principal debtors were out of the commonwealth, and could not be arrested on execution, may be important in its bearing upon the amount of damages sustained by the default of the sheriff, but it does not affect the rule of damages, or the competency of evidence tending to show the entire inability of the debtors to satisfy the demand. In all actions on the case, the question is, what is the amount of damages sustained?" ‖

ACTIONS FOR TAKING INSUFFICIENT SURETIES.—It is a general principle that in an action against a sheriff for taking insufficient sureties, no more can be recovered against him than the party could have recovered against sufficient sureties.¶ [3] And in an

* Young *v.* Hosmer, 11 Mass. 89.

† Brooks *v.* Hoyt, 6 Pick. 468; Shakford *v.* Goodwin, 13 Mass. 187; Nye *v.* Smith, 11 Mass. 188.

‡ Weld *v.* Bartlett, 10 Mass. 470. Though in this case it was intimated that the limit of the discretion of the jury, even in case of wilful wrong, is merely "expenses and costs not taxable." See, also, Selfridge *v.* Lithgow, 2 Mass. 374.

‖ West *v.* Rice, 9 Met. 564.

¶ Yea *v.* Lethbridge, 4 T. R. 433; Evans *v.* Brander, 2 H. Bl. 547. By this, Concanen *v.* Lethbridge, 2 H. Bl. 36, was overruled. See, also, Jeffery *v.* Bastard, 4 A. & Ellis, 823.

[1] Former page, 520.

[2] Where a constable, having received a writ, with directions to arrest the defendant named in it, returned it unexecuted, under a mistaken idea that he was entitled to indemnity, and the defendant remained publicly living in the State for some months, and the plaintiff might have issued another writ and arrested him, it was held in Vermont that these facts should have been submitted to the jury in mitigation of damages. Blodgett *v.* Brattleboro', 30 Vt. (1 Shaw) 579.

[3] Mortland *v.* Smith, 32 Mo. 225. In an action on the case against the sheriff, for taking insufficient bail, it is competent for the defendant to prove in mitigation of damages, the inability of the original debtor to pay the judgment which has been obtained against him in the

action against the sheriff for taking insufficient sureties in replevin, the assignee of the replevin bond cannot recover as special damage, beyond the limits of the bond, the expenses of a fruitless action against the pledgees, unless he gave the sheriff notice of his intention to sue them.*

EXEMPLARY DAMAGES.—In these cases it will be [520[1]] noticed that the relief does not go beyond the amount of loss actually sustained. But it would seem, if actual malice, fraud, or oppression can be shown on the part of the officer, that it would be competent for the jury to go beyond the line of compensation for actual injury, and award vindictive or exemplary damages; and so it has been frequently held, although we have seen a contrary intimation in New York.[2]

In Connecticut, it was originally decided that an officer who had been guilty of neglect in not serving mesne process, should be liable for the whole debt; a rule which has been there characterized "as one of stern policy, rather than of exact justice;" and it is now well settled that the plaintiff can only recover the damages he has sustained. "But these damages it is peculiarly the duty of the jury to assess, and in so doing they are not limited to any precise sum; they may even give more than the plaintiff's original debt. When that debt has been lost by the wilful misconduct or negligence of the officer, they may add to it the costs of a second suit; and as the jury may give more than the debt, so they may give less. If it should be found by

* Baker *v.* Garratt, 3 Bing. 56. See Gibbs *v.* Bull, 20 J. R. 212, a suit for taking insufficient pledges in replevin.

In Connecticut, where the plaintiff, an officer who had, by virtue of an execution, levied on goods belonging to the judgment debtor, and delivered them to the defendants on their receipt or promise to redeliver, which not being done suit was brought; it was objected that, as it was not stated in the declaration that the officer was commanded, in the writ against the original debtor, to attach to any certain amount, the plaintiff could only recover nominal damages; but the Supreme Court held otherwise, and that the omission did not preclude the plaintiff from a recovery to the amount of the execution. Jones *v.* Gilbert, 13 Conn. R. 507.

suit upon which he was arrested. The true measure of damages is the injury actually sustained by the judgment creditor; and therefore evidence tending to show that the debtor was poor or insolvent, so that his arrest on execution would not have enabled the creditor to realize his debt, also tends to prove that the plaintiff suffered no essential injury by the negligence of the officer. Danforth *v.* Pratt, 9 Cush. (Mass.) 318.

Where a judicial officer is acting ministerially, he is liable for the damage directly resulting from his negligence. In such case the rules of liability and mitigation are the same with those applicable to ministerial officers. And a magistrate liable for the damages directly resulting from his negligence in issuing an irregular or invalid execution, may, in an action brought for the recovery of such damage, show that the judgment debtor had no property, and that the debt could not have been collected on a valid execution. Noxon *v.* Hill, 2 Allen, 215.

[1] Former page 518.

[2] In California, an officer is no less liable to exemplary damages for the consequences of a malicious act than a private person. Nightingale *v.* Scannell, 18 Cal. 315.

them that the failure of the officer to return a writ was owing to a mere mistake, in consequence of which the party had suffered nothing, they might give, and indeed it would be their duty to give, only nominal damages."*

ILLEGAL ACTS.—We have hitherto been examining [521] cases where the public officer is charged with neglect in not executing process confided to him. There is another large class of cases, where the complaint is that he has overstepped his powers, and abused the process of the court. In these cases we shall find, that where the acts of public officers are illegal, they are very narrowly watched, and often, by the infliction of vindictive damages, severely punished for the abuse of their trust; so, where trespass was brought for breaking and entering the plaintiff's house, and taking his goods, it appearing that judgment had been obtained in a court of local jurisdiction, and that execution was illegally levied on property of the plaintiff *out* of the jurisdiction, it was held that the plaintiff was entitled to recover the amount paid by him to release the levy. It was insisted that, as the plaintiff clearly owed the debt, this rule could not apply. But Lord Denman, C. J., said, "A person who takes upon himself to extort money by an authority which he does not possess, must repay the money which he receives thereby." And Patterson, J., said, "I am afraid of admitting the principle contended for, that where money has been extorted by means of an illegal authority, the measure of damages is to be merely the amount of injury actually sustained."†

So where the defendant, acting under color of a *ca. sa.*, was found guilty of an assault and battery and false imprisonment, Lord Abinger, on a motion to reduce the damages, said, "I think, if I had tried the cause, I should probably have said that if parties knowing what the law is, wantonly violate it, the jury should not be sparing in the damages. It is the safest way to say that he who knowingly violates the law in one respect must take all the consequences."‡ So in a recent case where the defendants, under color of process, illegally broke into the plaintiff's house to levy an execution, and the plaintiff paid the amount due on the writ, under protest, to induce the defendants to withdraw, the jury gave the amount so paid [522] and £500 besides damages; a motion was made to reduce

* Palmer *v.* Gallup, 16 Conn. 555; Duryee *v.* Webb, cited in notes to this case. See Clark *v.* Smith, 9 Conn. 380, as to previous rule. Gleason *v.* Chester, 1 Day, 152; Hubbard *v.* Shaler, 2 Day, 195.

† Champion *v.* White, 2 Nev. & Perry, 627; s. c. 6 Adol. & E. 407.

‡ Kerby *v.* Denby, 1 M. & W. 336; Tyrwh. & Gr. 688.

the damages; but the court said, "The trespasses were of a very serious nature, having been committed by officers of the law, under color of the law, breaking open the door with great violence. Such conduct is calculated to lead to dangerous conflicts; and the proper amount of damages must depend so much on the general circumstances, that it is very difficult to discover any standard by which to measure the amount; much must be left to the discretion of the jury."*[1]

So in an action of trespass *de bonis asportatis*, for an illegal levy, it was held, "that the jury might give vindictive damages if they should find that the trespass was committed maliciously, and in a wanton and aggravated manner, and with a design to vex and injure the plaintiff."†

Compensation Furnishes the General Rule, although the Action is in Tort.—On the other hand, the following case in Pennsylvania is a strong one, to show with what vigilance the courts adhere to the principle of applying a fixed rule, even in actions for tort.‡ It was trespass against the defendants for a levy upon certain horses claimed by plaintiff under an execution against a third party; and it appeared that the latter had made a conditional purchase of the horses from the plaintiff, whose property they were to remain till fully paid for. Part had been paid. The court told the jury "to find for the plaintiff the value of the property taken, and interest, and such further amount as, under all the circumstances of the case as argued by the counsel before you, you may think him entitled to demand, if any." But, on error, this was held wrong:

"From this instruction," said the Supreme Court, "we entirely dissent. It appears in evidence that the vendee had paid at least part of the price, and, so far as it appears to us, a considerable part of it. The vendor and vendee stand, therefore, in this position at the time of seizure and sale: the vendor had the legal title, the vendee an equity to the amount he had paid. But by the instruction of the court, the vendor recovers not only the value of his own interest, but the interest of the vendee also. Now, this cannot be; for the only just rule of compensation will be to remunerate him for the amount of injury he has sustained, which is commensurate with his interest in the chattel. Beyond that, upon no principle of law or equity is the jury permitted to go, unless in cases of gross oppression or aggravation, when the jury may mulct a party with
[523] vindictive damages. But this is a case for compensatory, and not

* Duke of Brunswick *v.* Slowman, 8 Man. Gr. & Scott, 317.

† Huntley *v.* Bacon, 15 Conn. 271.

‡ Rose *v.* Story, 1 Barr, State R. 191.

[1] See the cases of distress, arising under English statutes, cited *post*, 536, note.

vindictive damages, as clearly appears from the evidence. We also think that the latter part of the instruction is highly objectionable. The court allows the jury to give such further damages as, under all the circumstances of the case as argued by the counsel, they might think them entitled to demand. This is giving them a discretionary power, without stint or limit, highly dangerous to the rights of the defendants; it is leaving them without any rule whatever. The rights of the defendants are made to depend on the arbitrary will of the jury, of the effects of which this verdict presents a warning example. Nothing appears which should swell the damages beyond the value of the interest which the vendee had in the property sold by the constable."[1]

SUITS BETWEEN DIFFERENT OFFICERS.—Questions of the kind we are now considering frequently arise in suits brought by one officer against another, to test the relative priority of different processes; and in such a case it has been said, in Vermont, that damages are never given beyond the actual value of the property.*

MITIGATION IN ACTIONS FOR NEGLIGENT AND WRONGFUL ACTS.—In regard to mitigation of damages in these actions, it has been held in Maine, in a suit against a sheriff for not safely keeping property attached on mesne process, that the plaintiff was entitled to recover the full value of the property seized, and that the damages could not be mitigated by deducting the expenses which would have necessarily attended the keeping, had it been kept safely.† [2] And in Pennsylvania, it has been held in trespass against a sheriff for seizing and selling the plaintiff's goods under a judgment against another person, that that the amount paid out of the proceeds of the sale for rent of the premises, cannot be received in evidence to abate the damages.‡ [3]

* Goodman *v.* Church, 20 Verm. 187.
† Lovejoy *v.* Hutchins, 23 Maine, 272.
‡ Dallam *v.* Fitler, 6 Watts & Serg. 323.

See also, McMichael *v.* Mason, 13 Penn. State R. 214.

[1] In Iowa, in an action of trespass for breaking into the plaintiff's close, and taking certain liquors, which had been adjudged to be forfeited in a judicial proceeding, to which the plaintiff was a party, it was held, that he could not recover the value of the liquors, and if the defendants acted in good faith, he could recover nominal damages only. Plummer *v.* Harbut, 5 Clarke (Iowa), 308.

[2] In the same State, where the officer, by selling the attached property within the period prescribed by law, had become a trespasser *ab initio*, and it did not appear that judgment had been or would be rendered in the original suit, and the proceeds of the sale of the attached property applied on the execution, the defendant was held not entitled to a reduction of damages. Ross *v.* Philbrick, 39 Maine, 29.

[3] But in such an action, the sheriff may show in mitigation, that the goods were bought in for the plaintiff, at an under price. Forsyth *v.* Palmer, 18 Penn. St. 96. A sheriff who has wrongfully levied upon, and sold the goods of the plaintiff, cannot show in mitigation of damages, that he has applied the proceeds of the sale to the payment of a debt of the

RECEIPTORS.—In some of the States of the Union, property when levied on is sometimes delivered by the attaching officer to a third party, called a receiptor, who holds it during the litigation, and promises to redeliver it to the officer on demand. In a case of this kind in Vermont, the plaintiff, whose property had been unduly levied on instead of that of the real debtor, brought his action of trespass, and, *pendente lite*, assigned his claim to the receiptor. Judgment was afterwards obtained and execution issued in the suits in which the attachment had been issued, and the officer demanded the
[524] property of the receiptor; but he refused to deliver it. It was held that the defendants, on the trial of the action of trespass, were not entitled to give in evidence, in mitigation of damages, such refusal on the part of the receiptor, they never having offered to surrender to him his receipt, or discharge him from his liability thereon; * and the same point has been similarly decided in Massachusetts.†

In another case of this kind, it has been decided in Vermont, that where the value of all the property attached and receipted for is expressed in the receipt at one entire sum, and a portion of it has been withdrawn from the custody of the receiptor so as to discharge his liability, the damages in an action on the receipt are to be determined by assuming the whole value of the property receipted for to be the sum specified in their receipt, and by then ascertaining, on the basis of that assumed value, the just

* Ellis *v.* Howard, 17 Verm. 330. † Robinson *v.* Mansfield, 13 Pick. 139.

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plaintiff. McMichael *v.* Mason, 13 Penn. St. 214. See Ohio *v.* Jones, 21 Wend. 594, *post*, 549. But in New Jersey the rule is otherwise. Hopple *v.* Higbee, 3 Zabr. (N. J.) 342.

In a suit upon a forfeited delivery bond, given by the claimants of property seized under execution against another, the defendants cannot be permitted to show in mitigation of damages that the property belonged to them. Waterman *v.* Frank, 21 Mo. 108.

In trespass brought by the assignee of a mortgage of personal property, against an officer for taking the property on an execution against the mortgagor, and holding it till the assignee paid the execution and officer's fees, the measure of damages is the amount paid and interest, besides a reasonable compensation for the taking and detention. Carpenter *v.* Cummings, 40 N. H. 158. See Felton *v.* Fuller, 35 N. H. 226.

Where one sued a sheriff who had taken personal property from him under a void writ, in a replevin suit, his damages were held not to be affected by the amount of the judgment in the replevin suit, to which he was not shown to be privy. Rathbun *v.* Ranney, 14 Mich. 382.

In Alabama, in an action in the nature of trespass against a sheriff for wrongful levy of an execution, the fact that the goods were in the possession of the defendant in the execution at the time of the levy, is to be taken in mitigation of the damages. Sterretts' Ex'r *v.* Kaster (1 Ala. Select Cases, 404). This, it is presumed, is intended only in reference to the question of vindictive damages, since the actual injury to the plaintiff is the same, however excusably the sheriff may have been misled.

In an action against a former sheriff, as for an escape, on the ground of his neglect to assign over at the end of his term to his successor in office, a debtor taken in execution, who is on the jail limits, the plaintiff's omission to cause the prisoner to be retaken, by issuing a new execution, may be considered in mitigation of the damages. French *v.* Willett, 10 Bosw. 566.

proportion which the property retained by the receiptor would bear to the property for which he is not liable.* [1]

FALSE RETURNS.—Where suit is brought against a sheriff for a false return of *nulla bona* to an execution,[2] it seems that an inquisition finding the property out of the original defendant, is a bar to the action; but in a suit against the officer in trespass by the true owner, an inquisition finding the other way is only to be received in mitigation.†

In Massachusetts, where a sheriff returned to the original writ that he had taken bail, and then refused to deliver the bail-bond, the fact being that no bail had been taken, he was not permitted to show in mitigation, that the original defendant was insolvent.‡

CONSEQUENTIAL DAMAGES.—In New York, it has been held that where the sheriff so negligently conducts himself in regard

* Parsons *v.* Strong, 13 Verm. 235; Allen *v.* Carty, 19 Verm. 65.

† Bayley *v.* Bates, 8 J. R. 185; Townsend *v.* Phillips, 10 J. R. 98; Farr *v.* Newman, 4 T. R. 621, 633, 648; Roberts *v.* Thomas, 6 T. R. 88; Wells *v.* Pickman, 7 T. R. 174, 177.

‡ Simmons *v.* Bradford, 15 Mass. 82.

[1] So in New Hampshire, where property attached by the sheriff in two suits, was delivered to a third party, who gave two receipts for it at the same value, which did not, however, state that one was subject to the other, and the receiptor, after judgment and execution, on a demand in the first suit, paid the amount due on the execution, it was held after a subsequent judgment in the second suit against the owner, that the receiptor was liable only for the amount of the value receipted for over that paid in the first suit. Haynes *v.* Tenney, 45 N. H. 183.

Where the receiptor has allowed the attached property to go into the owner's possession, and judgment is recovered against him, in an action by the officer on the receipt, the amount of the judgment and interest, with the fees on execution, not exceeding the value of the property, are the usual measure of damages. But if, while the action is pending, the receiptor refuses to deliver the property to the officer, the latter may recover its full value with interest from the demand. Clement *v.* Little, 42 N. H. 563.

Where, in an action of trover, the goods for the value of which the action was brought had been attached and delivered to the defendant on his receipt, and he had retained them, this was held no reason for reducing the damages below their value. Luckey *v.* Roberts, 25 Conn. 486.

An officer who has attached property and taken a receipt for it cannot show in mitigation of damages, in an action brought for his not delivering the property or the receipt, that the property was worth less than the value alleged in his return. Allen *v.* Doyle, 33 Me. 420.

[2] For such a false return, the measure of damages is the value of the property which the plaintiff would have been enabled to apply in satisfaction of the execution. Thayer *v.* Roberts, 44 Maine, 247. Where there is property enough to satisfy the amount directed to be collected on the execution, that amount with interest is the measure. The sheriff may show in mitigation, that there was not property enough to satisfy the demand, or that it would have been absorbed by prior executions; but not that the amount directed to be levied was not due on the judgment. Bacon *v.* Cropsey, 3 Seld. (7 N. Y.) 195; Forsyth *v.* Dickson, 1 Grant's Cas. (Penn.) 26. Damages against a sheriff for a false return on the writ in an action of replevin cannot be recouped against the damages recovered by the officer on the replevin bond, which under the Massachusetts general statutes (General Statutes, 143, § 15), would be held by the officer in trust after paying his own fees and expenses for the benefit, both of the attaching creditor and of his decision. Wright *v.* Quirk, 105 Mass. 44. In Ireland, for a false return of *non est inventus*, the analogy of escapes was followed, and the value of the custody was said to be the rule. Cahill *v.* Verner, 2 Ir. L. (2d series) 549. As to nominal damages in these actions; *ante*, 512, note, and *ante*, head p. 45, note 2.

to personal property levied on that it is lost, and in consequence the real estate of the defendant is sold, and the security of a mortgage creditor is impaired, no action lies by such mortgage creditor against the sheriff, unless the conduct of the [525] sheriff be explicitly charged to be *fraudulent and with intent* to diminish the security of the mortgage creditors.*[1]

Collectors and other Public Officers.—Questions of an analogous nature to those which we have been considering, are frequently presented in actions against public officers other than sheriffs. Where trespass was brought against the collector of customs for New York,† for illegally seizing the plaintiff's vessel, it appeared that she was seized on the 2d October, 1801, and retained in custody till the 25th August, 1802, when she was restored. Six months before the seizure, the plaintiff had purchased her for $12,474; and the day previous to the trespass, he made a contract to sell her for $9,500. On the 2d September, 1802, eight days after her restoration, she was finally sold at public sale for $4,288; the plaintiff claimed the sum of $9,500 (the contract price), with interest and marshal's fees, deducting the price actually obtained at the sale, $4,288; and this was held right by the Supreme Court of New York. This recognizes the principle that where an actual bargain is interfered with by the defendant's tortious act, he shall be made responsible for the loss sustained. It is not a case of mere contingent damages or speculative profits; it is an actual contract broken up by an unauthorized act.‡[2]

* Bank of Rome *v.* Mott, 17 Wend. 554. See Yates *v.* Joyce, 11 J. R. 136.

† Woodham *v.* Gelston, 1 J. R. 134.

‡ Vide *ante*, 82, 520.

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[1] But although consequential damages are not ordinarily recovered against the sheriff, yet if he fail in his duty he is liable for the consequences of injuries done by third parties which through his neglect they had the opportunity to commit. Thus, where one had purchased certain premises on the foreclosure of a mortgage, executed to him by the occupants, and a writ of assistance to put the purchaser in possession thereupon placed in the sheriff's hands, that officer neglected to execute for two days, and in the intervening time the occupants greatly injured the premises, he was held liable for the damage thus sustained. Called on to discharge a duty which the law enjoined of giving possession of property which could only be obtained through such official action by him, it was considered by the court just and legal that he should be held responsible to the full extent of the injury. Chapman *v.* Thornburgh, 17 Cal. 87.

But in an action of replevin against a sheriff, damages sustained from depositing a sum of money with a third party to induce him to become surety in the replevin bond are altogether too remote and inconsequential to be considered. Wilson *v.* Hillhouse, 14 Iowa, 199.

[2] In an action in New York against a county clerk, who by statute in that State (Laws 1853, ch. 142) is liable for all damages for mistakes in searches made by him in his office, it appeared that in a search made by him at the request of a lawyer who had been employed to examine the title to a house and lot belonging to the plaintiff's intestate, and paid by the plaintiff, a judgment of about twenty-seven dollars, which was a lien on the premises, had been omitted. The examination of the title was made for the purpose of procuring a loan by

In a recent action against a collector of customs, for refusing to sign a bill of entry for landing a cargo of foreign wheat, in consequence of which the plaintiff was obliged to pay duty on it when, in fact, no duty was by law payable, the proper measure of damages has been held by the King's Bench in England, to be, not merely the amount of duties paid, but the amount of loss sustained by the plaintiff in consequence of a subsequent fall in the price of the article.*

In an action by the United States against a collector on his official bond, for not returning paid treasury notes to the proper department at Washington, it has been held that the rule of damages would be the amount of the notes, unless it was shown that they were canceled, and that the United States had suffered, or was likely to suffer, less than their amount; and that the jury were to take into consideration the amount of [526] damage, from the risk of the notes getting into circulation again; from the delay and inconvenience in obtaining vouchers to settle the accounts; and from the want of evidence at the department that the notes had been redeemed.†

PROPERTY SOLD ILLEGALLY. —In New York it has been held, that where the property of a party is sold under illegal process, and the sum demanded is raised by a bid at the sale of the property, made by an agent of such party, who purchases for the benefit of his principal, and pays for the same with the money of the principal, the measure of damages, in an action of trespass against trustees of a school district, in such case, is the amount of the bid and the interest thereof, and not the value of the property sold.‡[1]

SUITS ON BONDS. — The questions examined in this chapter may arise, as in the instances which we have been considering,

* Barrow *v.* Arnaud, Feb. 3, 1846, Jurist, vol. x, p. 319; 8 Q. B. 595.

† U. S. *v.* Morgan, 11 Howard, 154.

‡ Baker *v.* Freeman, 9 Wend. 36. See to same point, Clark *v.* Hallock, 16 Wend. 607.

mortgage on the property. The money was obtained, and applied as far as necessary to the satisfaction of such liens as were returned on the search. It was more than enough to satisfy them and also the omitted judgment. The premises, which were worth $6,000, were afterwards sold on an execution on that judgment, and were bought in by the plaintiff in the execution for $60. By a compromise arrangement, in consideration of $400, he conveyed the premises to the plaintiff as executor and trustee of the deceased owner. In a judgment which was affirmed by the Court of Appeals, the county clerk was held not responsible for the loss sustained, as it was directly caused by the non-payment of the judgment, and not by his omission. Kimball, Executor, *v.* Connolly, 6 Am. Law R. (N. S.) 598; 3 Keyes (N. Y.) 57.

[1] So in Missouri, where a collector of taxes illegally levied on and sold the plaintiff's personal property, and it was bought by the owner at the sale, the measure of damages was held to be the price bid. Alexander *v.* Helber, 35 Mo. 334.

in suits brought by the aggrieved party against the officer directly; or otherwise, on the bond given by him for the faithful discharge of his duty; or, again, they may be brought against the sureties of the officer. In the case of the suit being brought on the bond, much depends on the form of the instrument and the statute under which it is given. So in Ohio, an action of debt being brought on a sheriff's bond for neglect to sell property levied on, the rule of damages was held to be the value of the property, and not the amount of the judgment, and execution was only allowed to issue for the former sum, the language of the statute under which the bond was given being, that "execution might issue for such sum as it might be ascertained would be sufficient to *indemnify* the person so suing.*[1]

SUITS AGAINST SURETIES.—Where the suit is brought against a surety, the measure of damages often presents very nice and complicated questions, growing out of the fact that the inquiry involves an investigation of the violation of duty of the principal, as well as breach of contract of the surety. In these cases it seems to be well settled,† that judgment against the principal is *primâ facie* evidence of negligence in the suit against the surety, at all events where he has had no notice of the suit being brought.[2]

* State of Ohio *v.* Myers *et al.* 14 Ohio, 538. † *Ante*, 308, and cases there cited.

[1] In an action of debt upon a sheriff's bond, at common law the whole penalty would be recoverable; but by statute in many of the States, no greater recovery can be had than the actual damage done. So in Georgia. Taylor *v.* The Governor, &c. 17 Ga. 521. In some of the States, judgment is rendered for the full amount, but execution issues only for the plaintiff's damage proved. Nelson *v.* Gray, 2 Greene (Iowa), 397; see also, Cameron *v.* Boyle, *Ibid.* 154. In a suit upon a bond given under a provision of a statutory enactment in Maine, for a breach of its condition, where a default was submitted to, it was held, that the damages were to be assessed by the court and not by the jury; and the amount was the *actual* damage sustained by such breach. Clifford *v.* Kimball, 39 Me. 413. So in Pennsylvania. Commonwealth *v.* Allen, 30 Penn. 49. And in Maryland, in a suit on a guardian's bond, it was held that the actual loss suffered by the plaintiffs furnished the measure of damages. State, use of Murray *v.* Bishop, 24 Md. 310.

[2] Carpenter *v.* Doody, 1 Hilt. (N. Y.) 465. But in these cases, also, the rule of "actual loss" applies. So in an action against the sheriff's sureties for an escape, the defendants are liable only for the damages (to the extent of the penalty) actually sustained through that officer's breach of duty. The plaintiff is not entitled as of course to the amount of his judgment against the escaped debtor. The State *ex rel.* Fellows *v.* Johnson, 1 Ind. 158. So in a suit against the surety on a bond given in an action of detinue, the condition of which had been broken by the plaintiff in that action submitting to a nonsuit, the fact that he was the owner of the property sued for, though no defence to the action on the bond, goes in mitigation of the damages. Savage *v.* Gunter, 32 Ala. 467. So in an action on a bond given to procure the release of a debtor from arrest on *mesne* process, the sum due on the execution is *primâ facie* the measure of damages; but the defendant may show, that at the time of the breach the debtor was without property. Sargent *v.* Pomeroy, 33 Me. 388.

In a suit upon a poor debtor's bond the damages will be the amount of the judgment and the costs of the action in which it was given, with the interest thereon. Richards *v.* Morse, 36 *Ibid.* 240; see also, Houghton *v.* Lyford, 39 Me. 267. The same is the measure on a prison-bounds' bond, in Virginia. McGuire *v.* Pierce, 9 Gratt. (Va.) 167.

In a case in Massachusetts, brought against the sure- [527]
ties of a constable's bond, where the breach assigned was an illegal levy, and it appeared doubtful whether all the property in question was taken *colore officii*, a verdict being taken for the penalty of the bond, the court said, "If it appears that *any* of the property was taken by color of office, as it no doubt does here, that shows an official misfeasance, which is a breach of the bond, and entitles the plaintiff to judgment as for such breach. But when it comes to the assessment of damages, and it is open to question whether the trespass, for which judgment was recovered in the action of trespass, was done by color of office, it will no doubt be competent to the court or jury who assess the damages to ascertain what part of the property was so taken; for it is that part only which is in question in the suit." It was also held that the fact that the goods levied on had been mortgaged by a previous owner before the levy, and that they had been delivered by the constable to the mortgagee on his demand, was no defence to the action; but that upon a hearing in equity, this evidence would be admissible in reduction of damages.*[1]

* City of Lowell *v.* Parker, 10 Met. 309. As to cases in other States, see State Treasurer *v.* Weeks, 4 Verm. 215; Governor *v.* Matlock, 1 Hawks, 425; Duncan *v.* Klinefelter, 5 Watts, 144; Hazard *v.* Israel, 1 Binn. 240; Shewell *v.* Fell, 3 Yeates, 17; s. c. 4 Yeates, 47; Eaton *v.* Ogier, 2 Greenleaf, 46; Riggs *et al. v.* Thatcher, 1 Greenleaf, 68; Gibson *v.* The Governor, 11 Leigh, 600; Brugh *v.* Shanks, 5 Leigh, 598; Rootes *v.* Stone, 2 Leigh, 650; Smith *v.* Hart, 2 Bay, 395; Patten *v.* Halstead, 1 Coxe, 277; Gerrish *v.* Edson, 1 N. H. R. 82; Webster *v.* Quimby, 8 N. H. R. 382; Bruce *v.* Pettengill, 12 N. H. R. 341; Peverly *v.* Sayles, 10 N. H. R. 356; Sawyer *v.* Whittier, 2 N H. R. 315; Sanborn *v.* Emerson, 12 N. H. R. 58; Richards *v.* Gilmore, 11 N. H. R. 493; Runlet *v.* Bell, 5 N. H. R. 433; Perkins *v.* Thompson, 3 N. H. R. 144; Cady *v.* Huntington, 1 N. H R. 138; Taylor *v.* Commonwealth, 3 Bibb, 356; Ackley *v.* Chester, 5 Day, 221.

[1] The rule of damages in actions by public officers, to obtain redress for encroachments on their rights as such, presents a question, the converse of that discussed in the foregoing chapter.

If a person without legal right collect the fees of an office, he is liable to the proper incumbent for the profits so received (Arris *v.* Stukely, 2 Mod. 260), deducting however, where he acts in apparent right and good faith, his reasonable expenses in earning them. Mayfield *v.* Moore, 53 Ill. 428.

CHAPTER XXII.

THE MEASURE OF DAMAGES IN CASES OF TRESPASS TO PERSON OR TO PROPERTY.

In every Case of Trespass, Damages are recoverable whether the Act was Intentional or Accidental.—But if no Aggravation is shown, the Rule of Damages is generally a Question of Law.—Does not Depend on Form of Action.—Special Property.—Compensation Furnishes Rule.—Case or Trespass for Injuries to Property.—Decisions examined.—Mitigation.—Case or Trespass for Injuries to Person.—Trespass *de Bonis Asportatis*.—Mining.—Libel and Slander.—Slander to Title.—Seduction.—Criminal Conversation.—Breach of Promise.—Enticing Servants.—Malicious Prosecution.—Decisions examined.—Mitigation.—Wrongful Attachment.—Death of Human Being.—False Imprisonment.—Case or Trespass where Fraud is averred.—Fraud in Sale of Lands.—Mitigation and Recoupment.—General Principles.

We proceed now to examine the measure of damages for those remaining wrongs, either to the person or personal property, which are redressed by the actions of case and trespass; proceedings which are so closely allied to each other, and the line which separates them so difficult to define, that for our present purpose it will be more convenient to treat them together.

The Trespasser is Responsible for his Trespass although Unintentional.—We have already had occasion to notice* that in all cases of trespass, although purely unintentional, unless caused by absolutely inevitable accident, the party in default must respond in damages; and that the intent is only material in aggravation or mitigation of damages. We have seen that in cases of contract the motive of the defendant is not inquired into to augment the remuneration to be made by him. On the other hand, in cases of trespass, the absence of evil motive cannot be set up as an excuse so far as to bar the action. "I had learned," says Lord Kenyon, "from Lord Bacon's maxims, that there is a distinction between answering *civiliter* and *criminaliter* for acts injurious to others: in the latter case the maxim applied is *actus non facit reum nisi mens sit rea;* but it is otherwise in civil actions, where the intent is immaterial if the act done be injurious to another."† And so says Mr. Chitty, "Where

* Chapter xviii, p. 453.

† Haycraft *v.* Creasy, 2 East, 92.

the act occasioning an injury is unlawful, the intent of [529] the wrong-doer is immaterial." * [1]

THE MEASURE OF RELIEF FOR WRONGS TO PERSON AND PERSONAL PROPERTY IS INDEPENDENT OF THE FORM OF THE ACTION.—It follows, from what has been said, that in the cases of wrongs such as we now proceed to consider, the measure of relief does not depend on the form of the action; whether case or trespass be employed, if no aggravation be proved, the rule of damages is a question of law;[2] and it is competent in either proceeding to show those circumstances of evil motive which, as we have already seen, go to place the subject of relief largely within the control of the jury. In regard to this class of cases generally, it will be noticed that the object is to limit relief to compensation, as that term is legally understood;[3] and we shall find, therefore, that while the power of the jury over the subject in cases of aggravation is fully recognized, still, even where such facts are presented, if evidence has been admitted or directions given at the trial, which, had the intention of the jury been to give compensatory and not vindictive damages, would have been incorrect, the court, assuming that such was the purpose of the jury, will exercise their control over the subject. "We consider the law," says the Superior Court of New York, "as properly and wisely settled, that the quantum of damages, with

* Chitty on Pleadings, vol. i, p. 147.

[1] In general, the rule for the measure of damages in tort aims at actual compensation for the injury. Whatever ascertains this is proper to be submitted to the jury. There are qualifications, however. Inadvertent or unintentional injuries, or acts unaccompanied with malice draw after them only their direct and immediate consequences, and not those remote and speculative; while grossly negligent or malicious acts may be the subject of larger damages. In the former, the damages are merely compensatory; in the latter, they rest in the sound discretion of a jury uninfluenced by prejudice or passion. Per Agnew, J., Seely *v.* Alden, 61 Penn. St. 302. The determination of the amount in such a case is left to the jury, subject to no other control than is to be found in the power of the court to set aside the verdict where it is the obvious result of passion, prejudice, or corruption, or conflicts with some established rule of law. See Little *v.* Tingle, 26 Ind. 168.

[2] If a party intending to commit a trespass on public lands, through mistake cuts down trees on the land of another person, he is liable to the penalty for such trespass. Otherwise, if he intended to cut timber on his own lands, but by mistake should cut timber on the land of another. In such a case he would not be liable to the penalty, but only for the actual damage done. Perkins *v.* Hackleman, 26 Miss. 41.

[3] But the compensation allowed for such trespasses, although excluding vindictive damages, is not confined to making good the pecuniary loss merely,—the injury to the defendant often consists in whole or in part of the inconvenience and annoyance to which the plaintiff is subjected, the invasion of his privacy, and the interference with his comfort. For wrongs of this class, equally with pecuniary loss, he is entitled to equivalent damages. Ives *v.* Humphreys, 1 E. D. Smith (N. Y.), 196. He is entitled to compensation for any injury done to his person *or occupation*, and all expenses occasioned by the injury. Cushman *v.* Waddell Baldw. 57 (3d Circuit N. J.) So the plaintiff is entitled to be compensated for the breaking up of a business shown to be profitable. But loss of profits expected from an illegal business cannot be included. Kane *v.* Johnston, 9 Bosw. (N. Y.) 154. See *post*, 563, note.

the exception of cases in which exemplary or vindictive damages may properly be given, is strictly a question of law; so that the jury are bound by the rule which the judge directs them to follow."* This will appear by the cases which we now proceed to examine. And a convenient division of the subject appears to be produced by grouping together, first, those actions where case or trespass is brought for injuries to personal property; secondly, those where redress is claimed for injuries to the person; and lastly, where actual fraud is complained of.

THE ACTION FOR INJURIES TO PROPERTY MAY BE MAINTAINED BY SPECIAL OWNERS AND LIENORS[1] AS WELL AS GENERAL OWNERS.—It may not be improper to make some preliminary observations as to the right in which the action is brought, so far as it affects the question of damages. In all cases the absolute or general owner of personal property, whose rights are infringed, can maintain the action. So can the special owner.[2] And in this country the rights of another class of parties interested have been recognized. So where a defendant fraudulently removed buildings of a judgment debtor from certain premises on which the judgment was a lien, with intent to defeat the lien of the plaintiff's judgment, it was held that the plaintiff was entitled to recover. And so a mortgagee can recover against a party for wrongfully removing buildings from the mortgaged premises, or for any fraudulent injury to the value of the premises. But in cases of this description, the plaintiff must show that he *necessarily suffered damage* by the act complained of; in other words, that there was not property enough left to satisfy the execution or the mortgage.†[3]

[530]

* Suydam *v.* Jenkins, 3 Sandford, 628, per Duer, J. See, also, Baker *v.* Wheeler, 8 Wendell, 505.

† Yates *v.* Joyce, 11 J. R. 136; Lane *v.* Hitchcock, 14 J. R. 213; Marsh *v.* White, 3 Barb. S. C. R. 518; Gardner *v.* Heartt, 3 Denio, 232; but not for mere negligent injury. In Barker *v.* Mathews, 1 Denio, 335, it was held that the principle allowing a recovery in cases of this kind must be limited to real property; and that for similar injury to personal property levied on, the suit must be brought in the name of the party making the levy.

[1] Although this word is not yet found in the dictionaries, it is making its way, and we venture to use it, not knowing any exact equivalent.

[2] The special owner in general recovers only the value of his interest. Brierly *v.* Kendall, 10 Eng. L. & E. 319; s. c. 17 Q. B. 937; 16 Jur. 449. Where, on the execution of a writ of inquiry after judgment by default in trespass for taking personal property, the defendant is estopped from showing the plaintiff had not such a title as would authorize a recovery, he may yet show in mitigation of the damage that the plaintiff was not the owner. Sterrett's Ex'r *v.* Kaster, 1 Ala. Select Cases, 404.

[3] Where the action is brought by a mortgagee for a trespass on the mortgaged premises, or when the purchaser of real estate has paid part of the purchase money and been put in possession, and the action is brought by the grantor, who retains a lien for the unpaid balance of

COMPENSATION THE GENERAL RULE.—We proceed now to notice the general rules which govern in trespass for taking personal property, or as it is technically called in the language of the common law, trespass *de bonis asportatis*. And, as we have said, although this is eminently an action where, in case of evil motive, the damages are under the control of the jury, and although for that purpose all the circumstances of the transaction may be given in evidence, still the determination of which I have spoken, to adhere to the rule of compensation, has been frequently made manifest.

THE VALUE OF THE PROPERTY IF DESTROYED, AND THE ACTUAL AND DIRECT INJURY IN OTHER CASES, THE USUAL MEASURE. —It has been often decided, that where trespass is brought for personal property, and no circumstances of aggravation are shown, the action is to be regarded as one of trover, and the value of the property with interest furnishes the measure of damages.[1]

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the purchase money, the measure of damages is the injury to the security, not the value of trees cut down or other property removed by the trespasser. See State *v.* Weston, 17 Wis. 107. Where, under an execution against a mortgagor of chattels rightfully in possession, the chattels are, without notice to the mortgagee, sold to various purchasers so as to injure or sacrifice the interest of the mortgagee, although the latter cannot maintain an action in the nature of trespass or trover for the value of the goods, he may, it seems, in an action in the nature of case, recover damages to the extent of the injury to his reversionary interest. Goulet *v.* Asseler, 22 N. Y. 225. In such an action by a mortgagee against the receiver of the mortgaged property and others for an injury to his reversionary interest, the damages should be confined to the loss he has suffered by the dispersion of the property among the several purchasers. Manning *v.* Monaghan, 28 N. Y. 585. See *ante*, 482, head p. 601, note 2.

In an indenture of sale, a covenant was inserted stipulating that the deed should be void upon payment of a certain sum of money upon a day to be named by the assignees, of which twenty-four hours' notice was to be given. The assignees having entered and sold the property *within* twenty-four hours from the time of serving such notice, it was held that they were liable in trespass, but that the measure of damages should be, not the value of the goods, but the value of the plaintiff's interest in them at the time of the trespass. Brierly *v.* Kendall, 17 Q. B. 937; s. c. 10 Eng. L. & E. 319.

[1] State *v.* Smith, 31 Mo. 566; Josey *v.* Wilmington and Manch. R. R. 11; s. c. Law R. (Rich.) 399; Dorsey *v.* Manlove, 14 Cal. 553; Campbell *v.* Woodworth, 26 Barb. 648; Derby *v.* Gallup, 5 Minn. 119; Gilson *v.* Wood, 20 Ill. 37; Warren *v.* Cole, 15 Mich. 265. See *ante*, 477. Walker *v.* Borland, 21 Mo. 289; Funk *v.* Dillon, *Ibid.* 294; Yarborough *v.* Nettles, 7 La. Ann. 116; Hopple *v.* Higbee, 3 Zabr. (N. J.) 342; Hair *v.* Little, 28 Ala. 236; Outcalt *v.* Durling, 1 Dutcher (N. J.), 443. The market value of the property, not its value to the plaintiff, is the measure. Gardner *v.* Field, 1 Gray (Mass.), 151; Gray *v.* Stevens, 82 Vt. 1. A verdict, therefore, for profits which might have been made on the goods wrongfully taken, in addition to their value, is erroneous. Butler *v.* Collins, 12 Cal. 457. So in such a case is the allowance of the expenses of the litigation as damages. St. Peter's Church *v.* Beach, 26 Conn. 355; Warren *v.* Cole, 15 Mich. 265 (*supra*); unless where exemplary damages are proper. Dibble *v.* Morris, 26 Conn. 416. So is a charge to the jury that the defendant must make the plaintiff good for all the actual injury sustained by him at his hands resulting directly and naturally therefrom. Oviatt *v.* Pond, 29 Conn. 479; or to include in their verdict damages to compensate the plaintiff for the trouble and expense of establishing his right. Stopp *v.* Smith, 71 Penn. St. 285. (See *ante*, 125.) And the rule in the text is the same where the action is brought by an assignee for the benefit of creditors, although the time limited by law for the presentation of claims has expired, and the value of the property taken would be more than enough to pay them. The legal title being in the plaintiff, the rule of damages is not affected by the fact that he holds it as trustee. Garretson *v.* Brown,

In Maine, in an action of trespass *de bonis asportatis*, it was ruled at the trial, that the jury should give the value of the
[531] property at the time it was taken, and *something for the detention*. But on motion for a new trial, the court said,—

"For an injury done to property, such as is this case, the value of the property at the time of the injury is the measure of damages. There may be circumstances enhancing that value to the party injured, which may be properly taken into account. To the value here, interest might be added as a part of the plaintiff's indemnity. But as the term *interest* was not used, and probably not intended as the limit of damages for *detention*, the jury were at liberty to go into an estimate of the probable or speculative loss the plaintiff might have sustained on this ground. In our judgment, the instruction was too vague and loose, and had a tendency to mislead the jury."*[1]

So in Texas, in an action of tortious conversion analogous to that of trover, where, although there was no other evidence of damage than the value of the property, and no proof of fraud, violence, or malice, yet the jury had given double the value, the verdict was set aside.†

In an action of trespass, on the Pennsylvania circuit, the whole subject was very ably discussed by Mr. Justice Baldwin.‡ The plaintiffs lent $60,000 to one E. Thompson, who took bills of lading of a cargo of teas, and assigned them to the plaintiffs. The teas bought were shipped to Philadelphia, where they were taken on a *fieri facias* at the suit of the United States against Thompson. The defendant was the marshal who made the levy. As to the rule of damage, it being settled‖ that the plaintiffs were the legal owners of the teas and not to be regarded as mere mortgagees, Baldwin, J., charged the jury as follows:—

"The rule which ought to govern jurors in assessing damages for injuries

* Brannin *v.* Johnson, 19 Maine, 361.
† Smith *v.* Sherwood, 2 Texas R. 220.
‡ Pacific Insurance Co. *v.* Conard, 1 Baldwin, 138. See Conard *v.* Atlantic Co. 1 Peters, 386; Nicoll *v.* Conard, 4 Peters, 291.
‖ 1 Peters, 386, and 4 Peters, 291.

2 Dutch. (N. J.) 425. But if the property is not removed or destroyed, but is injured, the rule of compensation gives the damage actually sustained as the measure. And where the plaintiff's horse was injured through the negligence of the defendant's servant, the measure of damages was held to be the expense of the veterinary treatment of the horse, the value of his services during the period of his disability, and the amount of the difference, if any, between his value before the injury and after the cure. Street *v.* Laumier, 34 Missouri, 469. See *ante*, head p. 559, n. 2.

Reversal of Judgment.—Where an execution has been levied on chattels, real or personal, and, after a sale, the judgment is reversed, the amount to be recovered is that raised by the sale. Where on the other hand in such case, the goods themselves are delivered to the judgment creditor, they must be restored. 2 Tidd Prac. 1186, 1187; Bac. Ab. Execution, Q.

[1] See Schindel *v.* Schindel, 12 Md. 108.

to personal property, depends much on the circumstances of the case. When a trespass is committed in a wanton, rude, and aggravated manner, indicating malice, or a desire to injure, a jury ought to be liberal in [532] compensating the party injured, in all he has lost in property, in expenses for the assertion of his rights, in feeling or reputation; and even this may be exceeded by setting a public example to prevent a repetition of the act. In such cases, there is no certain fixed standard; for a jury may properly take into view not only what is due to the party complaining, but to the public, by inflicting what are called in law, speculative, exemplary, or vindictive damages. But when an individual, acting in pursuance of what he conceived a just claim to property, proceeds by legal process to enforce it, and causes a levy to be made on what is claimed by another, without abusing or perverting its true object, there is and ought to be a very different rule, if, after a due course of legal investigation, his case is not well founded. This is what must necessarily happen in all judicial proceedings, fairly and properly conducted, which are instituted to try contested rights to property. The value of the property taken, with interest from the time of the taking down to the trial, is generally considered as the extent of the damages sustained; and this is deemed legal compensation, which refers solely to the injury done *to the property taken*, and not to any collateral or consequential damages *resulting to the owner*, by the trespass. These are taken into consideration only in a case more or less aggravated. But where the party taking the property of another by legal process, acts in the fair pursuit of his supposed legal right, the only reparation he is bound to make to the party who turns out ultimately to be injured, is to place him, as to the property, in the same situation in which he was before the trespass was committed. The costs of the action are the only penalty imposed by the law, which limits and regulates the items and amount. In the present case, the defendant acted under the orders of the government, in execution of his duties as a public officer; he made the levy, but committed no act beyond the strictest line of his duty, which placed him in a situation where he had no discretion. The result has been unfortunate for him; he has taken the property of the plaintiffs for the debt of Edward Thompson, and must make them compensation for the injury they have sustained thereby, but no further.

"It has long since been well settled, that a jury ought in no case to find exemplary damages against a public officer, acting in obedience to orders from the government, without any circumstance of aggravation, if he violates the law in making a seizure of property. In the case of Nicoll against the present defendant, Judge Washington instructed the jury that they might give the plaintiff such damages as he had proved himself to be justly entitled to, on account of any actual injury he had proved to their satisfaction he had sustained by the seizure and detention of the property levied on; but that they ought not to give vindictive, imaginary, or speculative damages. The affirmance of his charge makes it the guide for us in this case. Our true inquiry, then, must be, What damages have the plaintiffs so proved themselves to be entitled to?

"There can be no doubt that they have a right to the value of the teas at

the time of the levy, with interest from the expiration of the usual credit on extensive sales. You may ascertain the value from the sales made at New York or this place, in the spring of 1826. If, in your opinion, they afford evidence of their real value, or if you are satisfied from the evidence you have heard,
[533] that the seizure and storing of these teas had the effect of depressing the prices, you may make such additions to the prices at which sales were actually made, as would make them equal to what they would have been, had they come to the possession of the plaintiffs at the time of the levy. . . . .

"It is in the sound discretion of courts of admiralty to allow or refuse counsel fees, according to the nature of the case, either as damages or a part of the costs, as in the case of the *Apollo;* but by a late case they were allowed as costs in a case where it was adjudged by the Supreme Court that no damages could be claimed. They form an item of costs in such courts, but not in courts of common law. It would be legislation by the common-law courts, to order them to be taxed as costs. The expenses of prosecuting claims of the present description do not come within the principles established by the courts in causes of admiralty jurisdiction, but seem to be considered as extra damages, beyond the value and interest, where there is aggravation, but not otherwise.

"I think it is a safe rule in common-law actions of trespass, and can perceive no sound reason for holding a marshal to a harder rule of damage than a naval or revenue officer, or the owner of a privateer. The same principle ought to govern all alike; or if any discrimination prevails, it should be in favor of the defendant, who could use no discretion, but was bound to do the act which has exposed him to this action.

"The case of Woodham *v.* Gelston (1 J. R. 137) seems to me to be based on this rule; and the damages recovered in that case were only such as related to the property. The marshal's fees were for seizing and keeping possession of the vessel. On the restoration to the plaintiff, he paid them; they were a charge on the property, in the nature of storage and bailment. In sanctioning this item, the court seem to put it on the ground of its being a charge on the defendant; and having been paid by the plaintiff, he was entitled to recover it back. But they say, if it had been a mere voluntary payment, a deduction would have been proper. The other items were for wharfage and ship-keeping, which were disallowed, because they were after the restoration. These were all the claims for expenses presented in that case, and they all attached to the property taken; none related to personal expenses in prosecuting the suit.

"In declaring that voluntary payments shall be deducted, the court settled the principle as to the right to charge for the marshal's fees. They held the jury to strict rules; for they struck out an item of compound interest allowed by the verdict.

"On the principle of this case of Woodham *v.* Gelston, the charges of the auction sales are allowable; because such sale had become necessary, and the expenses thereof became a charge on the teas. Also fire insurance, which is a substitute for bailment, and the premiums paid in place of storage.

"It is all important that, in matters of this kind, the principle which governs them should be fixed and uniform. If we once begin to diverge from the old

line, it will be difficult to draw and define a new one with accuracy. It may be thought a hardship that the plaintiffs shall not be allowed their actual disbursements in recovering this property; but the hardship is equally great in a suit for money lent, or to recover possession of land; they are deemed [534] in law losses without injury, for which no legal remedy is afforded.

"I am therefore of opinion that you cannot, in assessing damages in this case, allow any of the items claimed by the plaintiffs for disbursements; they being consequential losses only, and not the actual or direct injury to their property which they have sustained by its seizure and detention, for which alone they are entitled to recover damages in this case, it not being attended with any circumstances of aggravation on the part of the defendant. Had there been any such, a very different rule would have been applied, by reimbursing the plaintiffs to the full extent of all their expenses and consequential losses.

"You will, then, carefully weigh all the evidence in the cause, and ascertain the true value of the teas at the time of the levy, or when they could have come into market by the rules of the custom-house, if there had been no claim asserted to them by the United States other than for the duties with interest; deducting therefrom the net amount of sales after payment of duties and charges of sales, the balance will be the amount to which the plaintiffs will be entitled."*

WHERE THERE IS A RIGHT OF ACTION THE JURY HAVE NO DISCRETION TO GIVE LESS THAN THE VALUE DESTROYED.—In an early case in Pennsylvania, for running down a ship, it was intimated that where the act complained of was purely fortuitous, the jury might give less than the value of the property; but I suppose no such discretion exists. If there be any right of action, the least compensation is certainly the value of property taken or destroyed.†

In a case in Massachusetts, trespass was brought for [535] destroying game-cocks, which had been taken by a public officer acting on an erroneous construction of the statute against gaming. It was held that though cock-fighting is in that State illegal, the sale of game-cocks is lawful; and that the measure of the plaintiff's damages was "what the cocks were worth to him as articles of merchandise or sale, whether the market for them was to be found in that commonwealth or elsewhere.‡

EXCEPTIONS.—In New York, however, it has been held that in an action on the case for the wrongful detention of personal property, the plaintiff might recover damages for the time lost and expenses incurred in pursuit of the property.‖[1]

* See this case cited with approbation in an analogous case in Iowa. Thomas *v.* Isett, 1 Iowa, 470.

† Bussy *v.* Donaldson, 4 Dall. 206.

‡ Coolidge *v.* Choate, 11 Met. 79.

‖ Bennett *v.* Lockwood, 20 Wend. 22 3 Vide *ante*, 525.

[1] So in Massachusetts, in an action for the abduction of the plaintiff's minor child, although

TRUSTEES AND OTHERS RESPONSIBLE FOR GOODS CAN RECOVER FULL VALUE.—As to the plaintiff's title, it has been held at Nisi Prius, where he was a collector and transmitter of small parcels and responsible for their safe delivery, that he could recover the full value against a railway company, in an action of case for negligence, on the ground of his liability to pay their value to the true owner whether he had actually paid it or not.*[1]

TIME OF COMPUTING VALUE.—We have already, in treating of the action of trover, discussed the question as to the time when the value is to be computed, whether at the time of the illegal act, or at any subsequent period if the value has fluctuated; and the same question presents itself in actions of trespass. In the case just cited, it seems to have been assumed that the period fixing the right of the parties was that of the trespass, and it has been so stated by the Supreme Court of New York;† but on neither of these occasions was the question raised; and whenever it shall appear that after the illegal act the price has risen, and the defendant has received the proceeds, or otherwise had the benefit of the property at its advanced value, the tribunals will find great difficulty in escaping from the necessity of taking the highest value up to the time of trial as the rule of compensation.[2]

ENGLISH CASES.—The following English cases serve to illustrate the subject. They exhibit an inclination to treat the wrong-doer, even when not actuated by any malicious motive, with considerable severity. Where the assignees of a bankrupt sold fixtures on leased premises belonging to the plaintiff, for £36, a fair price on such sale, but it was shown that as between incoming and outgoing tenant the value would have been £80, it was held that the plaintiff was entitled to recover the latter sum.‡ Where trespass was brought for taking goods, the plaintiff had, shortly before the alleged trespass, taken possession of the house, fixtures, and furniture in question, under an assign-

* Crouch *v.* London & N. W. Railway Co., 2 Car. & Kir. 789.

† Brizsee *v.* Maybee, 21 Wend. 144.

‡ Thompson *v.* Pettitt, 10 Q. B. R. 101.

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no malice is alleged. Rice *v.* Nickerson, 9 Allen, 478. So where the property of which the plaintiff has been deprived has a productive value to the possessor beyond mere interest, the value of the use during the period of the detention is actual damage recoverable in the action beyond the value of the property. Haviland *v.* Parker, 11 Mich. 103. (See *ante*, 476, head p. 585, note 2.)

[1] In trespass for injury to personal property, owned by the plaintiffs jointly with other co-tenants, damages may be recovered in proportion to the plaintiffs' ownership. Jones *v.* Lowell, 35 Me. 538.

[2] See *ante*, 481, head p. 590, note 1.

ment from one Mason. The plaintiff paid £109 15*s.* 10*d.* for the fixtures and goods; the defendant, a sheriff, entered, and under color of an execution against Mason sold them for £73. The plaintiff had himself previously ordered the goods to be sold. The judge who tried the cause, Gurney, B., told the jury that the least they could give the plaintiff was the sum he had paid for the goods. On a motion for a new trial, it was insisted that, as the plaintiff had directed the goods to be sold, the sheriff's sale could not damnify him, and the jury should therefore have assessed the damages at the amount which the goods produced, less the expense of the sale. But Alderson, B., said, "It was entirely a question for the jury, what damages they would allow. Juries have not much compassion for trespassers; and I do not think they were bound to weigh in golden scales how much injury a party has sustained by a trespass." [1]

In another case of trespass *de bonis asportatis*,* the plaintiff had purchased goods of the defendant, and owed him £67. The plaintiff went off secretly; the defendant fol- [536] lowed him and took off property, to about £50 or £60, which the defendant had previously sold him. The judge who tried the cause, told the jury that in estimating the damages, they might take into consideration all the circumstances of the case, and amongst others the plaintiff's debts to defendant, which would be reduced, *pro tanto*, by the value of the goods taken away. The jury found for the defendant; and on motion for a new trial, the charge was held wrong. "It would lead," said Abinger C. B., "to this consequence, that a party may set off a debt due in one case against damages in another." Alderson, B., said, "It is equivalent to allowing a set-off in trespass;" and the rule for a new trial was made absolute.† [2]

* Gillard *v.* Brittan, 8 Mees. & Wels. 575.

† Where trespass was brought for breaking and entering the plaintiff's dwelling-house, and taking away certain goods, not alleging them to be the plaintiff's (plea not guilty by statute), the judge at the trial having directed the jury to find a verdict for the plaintiff, with nominal damages for the trespass to the house, it was held, on motion to increase the damages, that the plaintiff was not entitled to damages, also for the value of the goods, as they were not alleged to be the property of the plaintiff. Pritchard *v.* Long, 9 Mees. & Wels. 666.

[1] Where the plaintiff, a sheriff, had by the defendant's orders wrongfully attached certain property, the defendant was held liable to the sheriff for the whole amount recovered from him by the person whose goods had been seized, notwithstanding the finding of the jury in the action against the sheriff, included damages for the breaking open of the owner's store with which the defendant had nothing to do, the whole having been an entire transaction. Nelson *v.* Cook, 19 Ill. 440.

[2] But where a bill of sale to secure a debt empowered the defendants to enter the plaintiff's house and seize his goods immediately on demand in writing being made to him, and on his default; and such demand was made, but the entry and seizure were made before reasonable time was given the plaintiff to pay the demand, it was held by the Court of Exchequer Chamber, affirming the judgment of the Queen's Bench, that his action for damages was maintainable, there being no default on his part, but that the measure of the

In another case, where a sheriff had wrongfully seized goods which were afterwards taken from him by another wrong-doer, and the plaintiff was compelled to pay a sum of money to extricate them from the possession of the last taker, it was held that he might recover the sum paid in an action against the sheriff, although in nowise connected with the second conversion of the property.* But it appears very severe, to hold a party not actuated by any malicious motive responsible for the independent acts of a third party over whom he has no control.

ILLEGAL DISTRESS.—In case for an illegal distress without the statutory appraisement required, it was intimated that the measure of damages would be the difference between the fair value of the goods and the amount of rent discharged by the proceeds of the sale; but the point was not decided.† [1]

MINING.—We have already had occasion to call the reader's attention to the class of cases growing out of trespasses to real estate where personal property is removed.[2] And in these cases

* Keene *v.* Dilke, 4 Exch. 388. † Wilson *v.* Nightingale, 8 Q. B. 1034.

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damage would be not the value of the goods, but his interest at the time of the seizure. Toms *v.* Wilson, 32 L. J. (N. S.) Q. B. 382.

[1] This rule was laid down in Knight *v.* Egerton, 7 Exch. 407; s. c. 12 Eng. L. & E. 562.

In an action on the case for an excessive and irregular distress, under the statute of 11 George 2, c. 19, s. 19, which provided, that any irregularity or unlawful act done by a party distraining for rent justly due, should not make the distress itself unlawful, but that the aggrieved party should have satisfaction for the special damage in an action of trespass or on the case, it was held that the measure of damages was the value of the goods, minus the rent. Biggins *v.* Goode, 2 Cr. & Jer. 364. To the same effect was Proudlove *v.* Twemlow, 1 C. & M. 326.

In Harvey *v.* Pocock, 11 M. & W. 740, where the tenant sued for unlawful distress, and the landlord defended under the same statute, it appeared that among the property seized by the landlord, was some that was by law exempt; the tenant having paid the rent and the costs of the distress, which was removed, was held entitled to recover the actual damages sustained by taking the goods which were not distrainable, but no more.

In Keen *v.* Priest, 4 H. & N. 236, the tenant was held by the Court of Exchequer entitled to recover the full value of sheep exempt from distress and illegally seized.

Again, in a recent case where the defendant put in a distress by a broker, who, while the house was locked and the family absent, got in at the back window and broke open the door, so that the defendant was a trespasser *ab initio*, it was very properly held, that the tenant was entitled to recover the value of all the goods taken. Attack *v.* Bramwell, 3 B. & S. 520; s. c. 32 L. J. R. (N. S.) Q. B. 146.

In Illinois, it is held that if books or papers, indispensable to the business of the plaintiff, though of little or no value in the market, are maliciously or wantonly taken, it is proper to consider the fact in aggravation of damages. Sherman *v.* Dutch, 16 Ill. 283. So in Pennsylvania, it is held, that one injured by an unlawful distress is entitled to such damages as will compensate him. In estimating them the jury may rightfully consider the amount of rent paid by the distress. Mickle *v.* Miles, 1 Grant's Cases (Penn.) 320.

[2] In the case of Jones *v.* Gooday, 8 M. & W. 146, already referred to (*ante*, 136), which was an action of trespass for cutting the plaintiff's close, and carrying away his soil, it was held, in a decision which has been repeatedly followed, that the measure of damages was not, as was claimed by the plaintiff, the expense of restoring the premises, but the value

a marked effort has been shown to award remuneration according to the motives which actuated the defendant. [537] In a recent case in the English Exchequer,* the circumstances were as follows: The plaintiff and defendant were adjoining proprietors in a coal district. The defendant had worked his coal mine under the plaintiff's land, to an extent exceeding a rood, unintentionally, as is to be inferred, the contrary not being alleged, and had brought up a considerable quantity of coal. Trespass being brought, the defendant supposed the rule of damages to be the value of the coal in the bed, or its market value, less the price of getting it out, and paid into court the sum of £133. But Parke, B., who tried the cause, said that the plaintiff would have been entitled in an action of *trover* to the value of the coal as a chattel, either at the pit's mouth, or on the canal bank, if the plaintiff had demanded it at either place, and the defendant had converted it, without allowing the defendant anything for having worked and brought it there; that not having made such a demand, and this action being trespass, he was entitled to the value of the coal as a chattel at the time when the defendant began to take it away, that is, as soon as it existed as a chattel, which value would be the sale-price at the pit's mouth, after deducting the expenses of carrying the coals from the place in the mine where they were got to the pit's mouth.[1] And the jury adopting the above principle,

* Martin *v.* Porter, 5 Mees. & Wels. 351.

of the land removed. But this measure was adopted on the ground that it compensated the plaintiff "for the damage actually sustained;" and it was expressly held that he "was entitled to what the land was worth to *him*." The rule asked for might have given him an amount wholly disproportioned to the loss, as in the instance suggested by Baron Alderson, in his opinion in the case, where one should let the sea in on another's land; and extensive engineering operations be necessary to restore the land to its previous condition, although it was worth only £20.

But it is evident from the reasoning of the learned court, that the rule was not intended to apply where the value of the land taken, does not compensate the injury. In many cases, a whole garden spot, or city lot, or other valuable piece of ground, might be made nearly valueless to the owner by taking from it a strip of little intrinsic and independent value. The rule is often doubtless a fair one, but it should be subordinate to the paramount one that the plaintiff is to be made good for his actual injury.

In a late similar case in Missouri, where the value of the land taken was adopted as the rule on the authority of Jones *v.* Gooday, the court sustained a refusal of the judge at Nisi Prius to charge that the plaintiff was only entitled to recover for the actual damage. Mueller *v.* St. Louis and Iron Mountain R. Co. 31 Mo. 262. This refusal would seem to have been erroneous in principle, if the point were practically material. But the result was free from exception, as it appeared that the value of the land was in fact in this case, as in the other, a full compensation for the injury.

[1] In Pennsylvania, as we have seen, the rule in trover for petroleum, is its value at the moment of separation from the soil. Kier *v.* Peterson, 14 Penn. St. 357. So in Massachusetts in an action for the tortious removal of iron ore from the ore bed, the damages were estimated at the value of the ore as it lay in the bed, and not as it was after the defendants had increased its value by removing it; added to which was the damage done the real estate. Stockbridge Iron Co. *v.* Cone Iron Works, 102 Mass. 80. *Ante*, 484, note.

fixed the value of the coal, when got, at £251 9*s.* 6*d.* Leave was given to reduce the verdict (if the court should be of opinion that the proper measure of damages was the value of the coal in the bed, which the jury estimated at £159) to £16, that being the difference between this sum and the amount, £133, paid in by the defendant. But the rule was refused, the court thus affirming the principle laid down at the trial. Lord Abinger said, "It may seem a hardship that the plaintiff should make this extra profit of the coal; but still, the rule of law must prevail." Parke, B., said, "I am not sorry this rule is adopted; it will tend to prevent trespasses of this kind, which are generally wilful."

And the doctrine of this case has been recently recognized.*[1] In a case at Nisi Prius, where a similar trespass was complained of, Parke, B., told the jury that if there was fraud or negligence on the part of the plaintiff, they might give as damages under one of the counts, which was in trover, the value of the [538] coals at the time they first became chattels, on the principle laid down in Martin *v.* Porter. But if they thought

* Morgan *v.* Powell, 3 Q. B. R. 278.

[1] The same rule was stringently applied in Illinois, in the following case. A company in Chicago, organized for improving the real estate of the corporators, including certain clay lands, by cutting therein canals or slips connecting with the Chicago River, leased a portion of such clay lands to a brick-making company. There was no pecuniary consideration for the lease, the latter company undertaking to excavate canals in the demised premises in consideration of the use of the lands and the right to the clay dug out. In the prosecution of their operations, the lessees, with the knowledge and consent of the lessors, entered on other adjoining lands belonging to the latter, and excavated canals also on the last-mentioned premises in a manner beneficial to the owners. In an action by the canal-making company against the brick company for the use and occupation of the latter lands, the plaintiffs were held entitled to recover the whole value of the use, and the defendants were not allowed to recoup for their excavations. The measure of the plaintiff's damages was held to be, not the excess of the value of the clay over the cost of digging it, but its worth *to the brick company*. The Chicago South Branch Dock Company *v.* Dunlap, 32 Ill. 207.

But in the case of Forsyth *v.* Wells. 41 Penn. 291 (already cited somewhat at large on another point, *ante*, 495, head p. 619, note 1), the Supreme Court of Pennsylvania adopted the opposite, and, as we think, the just rule, the one which most nearly conforms to the cardinal principle which in all cases, except those involving wilful wrong or gross neglect, makes compensation the standard by which lesser measures and rules of damages are adjusted.

So in California the damages for wrongfully removing the gold-bearing earth from a claim and extracting it, are the value of the gold less the expense of digging the earth and separating it from the realty so as to make it personal property. Maye *v.* Tappan, 23 Cal. 306; Goller *v.* Fett, 30 Cal. 481. And with great deference to an opinion carrying so much authority as that of Baron Parke, we cannot think that his suggestion of preventing trespasses by the rule he adopts has any material bearing. Where the trespass is in fact wilful, as he says is generally the case, the doctrine of exemplary damages furnishes the means of prevention, so far as it can be done by a verdict of this sort. But his rule as applied to all trespasses, innocent as well as wilful, is, we respectfully submit, at variance with settled principles, tends to inflict undeserved punishment, and unnecessarily gives the injured party more than just compensation. The directions to the jury by the same distinguished judge, in the case of Wood *v.* Morewood (*infra*), are not open to the same objection. The difficulty grows out of forms of action; the measure should be the actual injury sustained, wherever that measure can be applied.

that the defendant was not guilty of fraud or negligence, but acted fairly and honestly in the full belief that he had a right to do what he did, they might give the fair value of the coals, as if the coal fields had been purchased from the plaintiff; which latter estimate was adopted by the jury.* The principle to be extracted from these cases is, that in trespass, if the defendant has in good faith increased the value of the property, the plaintiff shall not have the benefit of his labor; and this appears to be the rule in this country.[1]

OTHER TRESPASSES TO REAL ESTATE WHERE PERSONAL PROPERTY IS TAKEN.—So in Maine, it has been recently held in conformity to these decisions, that in trespass for logs cut by the defendant on the lands of the plaintiff, but in good faith, and under an erroneous confidence in his title, the measure of damages was not the value of the logs at a certain landing-place to which they had been hauled by the defendant, but their value the moment they were severed from the freehold, when, for the first time, they became a chattel so that trespass would lie for them.[2] It was admitted that the rule in trover was different; but there was said to be a strong equity in not allowing exemplary damages to be recovered against one not conscious of doing wrong when he took the goods of another.† [3]

So in trespass for taking corn, it will not be permitted the plaintiff to show that, in consequence of the alleged illegal act,

* Wood *v.* Morewood, 3 Q. B. R. 440, *in notis.*

† Cushing *v.* Longfellow, 26 Me. 306. Exemplary is here, of course, used as synonymous with severe, and not as implying vindictive damages.

[1] Where in an action by the landlord against his tenant for digging clay on the demised premises, one count of the plaintiff's plaint was for injury to the reversion, and the other in trover for the value of the clay, and the jury found that the removal of the clay had diminished the value of the land by £156, and that the value of the clay as dug was £150, and a verdict was entered for the larger sum, — a motion to increase the verdict by adding to it the sum of £150 was denied by the Irish Court of Queen's Bench. Templemore *v.* Moore, 15 Irish Law R. 14. See the principle of Wood *v.* Morewood adopted in equity. Hilton *v.* Woods, L. R. 4 Eq. 432.

[2] In an action for trespass for cutting down timber trees, the rule of damages is the value of the timber when it is first cut down, and becomes a chattel. Bennett *v.* Thompson, 13 Ired. (N. C.) L. 146; Smith *v.* Gonder, 22 Ga. 353. Compare Chipman *v.* Hibberd, 6 Cal. 162. If the action is to recover damages for the destruction of the trees by negligence, and their value can be ascertained without reference to the soil on which they stood, such value furnishes the measure. Whitbeck *v.* N. Y. Cent. R. Co. 36 Barb. (N. Y.) 644. If the action is for injury to the inheritance by cutting the trees, evidence of the comparative value of the premises with and without the timber, furnishes an appropriate criterion of the damage. Van Deusen *v.* Young, 29 Barb. (N. Y.) 9. It is no defence nor matter of mitigation in an action for cutting down the plaintiff's shade trees, that they made the defendant's house damp and unhealthy. Bliss *v.* Ball, 99 Mass. 597. See *ante*, 484, note 1.

[3] The doctrine that the circumstances attending a trespass may be given in evidence, for the purpose of enhancing damages, though not alleged in the declaration, does not apply where the circumstances themselves constitute an independent cause of action. So held where the defendant had unlawfully assaulted the plaintiff in committing the trespass. Plumb *v.* Ives, 39 Conn. 120.

he was obliged to work as a day laborer to obtain the
[539] means to purchase more corn. "Such testimony," says the Supreme Court of Alabama, "would tend to establish a criterion of damages too remote and disconnected with the act done, and would suppose the rule to fluctuate with the poverty of the plaintiff." *

In an an action on the case in Massachusetts, by the inhabitants of Lowell against the Boston and Lowell Railroad Corporation,† it was shown that the defendants cut across one of the streets in the town of Lowell; and, not replacing proper barriers placed there by the town, and removed by the defendants, two persons fell into the deep cut and were injured; that the town was sued on its liability to keep the highways in order, and was obliged to pay a large sum of money, double damages, counsel fees, etc. The defendants insisted that the damages claimed were too remote, because the town, according to the Massachusetts statute, was only liable for negligence (on which subject the evidence seems to have been that one of the town's selectmen confided in the promise of the defendant's agent to keep up the barriers); and that, at all events, the R. R. Corporation were not liable either for double damages or the costs of the prior action against the town; and so the court held, on the ground that the damages were doubled by reason of the neglect of the town, and that the prior suit was not defended at the request of the defendants (the R. R. Co.), or for their benefit.

Personal Wrongs.—We come now to consider wrongs done to the person; and of these a very important class comprises injuries to character.

Libel and Slander.—Special Damage.—The actions for libel and slander are abundantly treated in the works devoted to those particular subjects.‡ But it may not be superfluous to notice some of the questions that most frequently present themselves in these proceedings with regard to the subject of relief.[1] A very important line of demarkation exists in actions of slan-

* Sims *v.* Glazener, 14 Ala. 695.
† 23 Pick. 24.
‡ See *ante*, 92, Ingram *v.* Lawson, 6 Bing. (N. C.) 212, for what was said by the English C. P. as to damages in an action for libel on a vessel.

[1] Mental suffering is an important element in the injury to be compensated in these peculiar actions. Swift *v.* Dickermann, 31 Conn. 285; Miller *v.* Roy, 10 La. Ann. 231; Dufort *v.* Abadie, 23 La. Ann. 280. In them, as in other actions for personal torts, the extent of the remedy is largely within the control of the jury, there being no precise rule by which the injury can be measured. Commonwealth *v.* Sessions of Norfolk, 5 Mass. 437; Coffin *v.* Coffin, 4 Mass. 1; Wadsworth *v.* Treat, 43 Me. 163.

der, between those defamatory words which are actionable *per se*, and from which damage is presumed to result, and those where to sustain a suit special damage must be averred and proved.[1] As, for instance, damage is presumed if a clergyman is charged with intemperance or profligacy,[2] a lawyer with dishonesty, a merchant with bankruptcy, or a physician with ignorance; while, on the other hand, if a charge of want of chastity is made against a female, no action lies unless she can prove special damage.*[3] But in this latter case slight damages have been held sufficient, and the loss of marriage is enough.† Into this distinction it is not proper more fully here to enter; but it is well to remark with reference to the subject of this treatise, that where the plaintiff undertakes to show special damage by the loss of customers in trade, he ought to state in his declaration the names of such customers,‡ and he cannot prove that any persons not named in his declaration left off dealing with him in consequence of the words spoken. ‖[4]

* Bradt *v.* Towsley, 13 Wend. 254. [Overruled on another point. Note 1, *infra*.—ED.]

† Moody *v.* Baker, 5 Cow. 361; Linney *v.* Maton, 13 Texas, 449.

‡ Hartley *v.* Herring, 8 Term, 130.

‖ Hallock *v.* Miller, 2 Barb. 630.

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[1] See Caldwell *v.* Raymond, 2 Abb. (N. Y.) Pr. R. 193. But even where special damages must be shown, a liberal margin is allowed the jury. And in an action of this kind where the damage, as far as proved, consisted in the loss of a situation of £50 a year and the plaintiff's board, a verdict of £60 was held not excessive. Jackson *v.* Hopperton, 17 C. B. 829.

[2] And spoken words, imputing to a man misconduct in his office or trade are actionable, although the court could not take judicial notice of the office or trade. So where a declaration alleged that it was the duty of the plaintiff as warrener or game-keeper, not to kill foxes, and the defendant falsely and maliciously said of the plaintiff, as such warrener or game-keeper, that he killed foxes, it was held good without the allegation of special damage. Foulger *v.* Newcomb, 2 L. R. (Exch.) 327. But in slander for imputing "larceny," the fact that the plaintiff was a clergyman cannot be considered by the jury in enhancement of the damages, where there is no averment on his part in the pleadings to that effect, and no claim or proof of special damages on that ground. Gandy *v.* Humphries, 35 Ala. (N. S.) 617.

[3] See Lynch *v.* Knight, 5 L. T. (N. S.) 291 (H. of L.), cited *ante*. 83, note. Such special damage must be of a pecuniary nature (Beach *v.* Ranney, 2 Hill, 309), or the loss of some material temporal advantage. Exclusion from a private religious society does not constitute it. Roberts *v.* Roberts, 33 L. J. N. S. (Q. B.) 249. Nor loss of the society of friends and neighbors, and illness resulting from the slander, and consequent medical expenses. Allsop *v.* Allsop, 2 L. T. (N. S.) Exch. 290. And in general, to support an action for defamatory words not actionable in themselves, the special damage must result from such an injury to the plaintiff's reputation as affects the conduct of others toward him. His mental distress, physical illness, and inability to labor, although brought about by the slander, are not such a natural and legal consequence of it as to give an action. Terwilliger *v.* Wands, 17 N. Y. 54, overruling Bradt *v.* Towsley, 13 Wend. 253, *supra*; Fuller *v.* Fenner, 16 Barb. 333. The same principle applies where the action is brought by a husband for a slander on his wife, who has become ill in consequence of it. Wilson *v.* Goit, 17 N. Y. 442.

But the common-law rule in the text as to the defamation of a female is relaxed by judicial decision in some of the States: as Massachusetts (Miller *v.* Parish, 8 Pick. 384); Connecticut (Frisbie *v.* Fowler 2 Conn. 707); Ohio (Wilson *v.* Robbins, Wright, 40); Pennsylvania (Andres *v.* Koppenheafer, 3 S. & R. 255); Iowa (Truman *v.* Taylor, 4 Iowa, 424; Smith *v.* Silence, 4 Iowa, 321). In some others by statute: Kentucky (Morris *v.* Barkley, 1 Little, 64; Williams *v.* Greenwade, 3 Dana, 432); Indiana (Alcorn *v.* Hooker, 7 Blackf. 58); Alabama (Williams *v.* Bryant, 4 Ala. (N. S.) 44).

[4] In an action for slander for words spoken of the plaintiff in his trade or business, with a

In England, in case for words not actionable *per se* and averring special damage, "not guilty" puts in issue not only the speaking of the words but also the special damage alleged.*

[540] EVIDENCE IN MITIGATION OR AGGRAVATION.—But the most important questions in these actions relate to the admission or exclusion of evidence with reference to the mitigation or aggravation of damages.[1] Originally in slander, under the plea of the general issue, the defendant might avail himself of any defence. But it was decided in England at an early day,† that if the defendant intended to justify, he should plead his justification, in order that the plaintiff might know what defence he was to meet. In New York it is well settled, that if the defendant justify he admits the malice, and cannot resort to any defence based upon the absence of malice. So, mitigating circumstances which have a tendency to prove the truth of the charge, cannot be given in evidence under the general issue in diminution of damages; but any circumstances which disprove malice but do not tend to prove the truth of the charge are admissible. ‡[2]

So where it appears that the defendant was drunk when he

* Wilby *v.* Elston, 8 Man. Gr. & S. 142.
† Underwood *v.* Parks, Strange, 1200.
‡ Gilman *v.* Lowell, 8 Wend. 573; Am. Lead. Cases, 190, and cases there collected.

general allegation of loss of business, it is competent for the plaintiff to prove, and the jury to assess, damages for a general loss or decrease of trade, although the declaration alleges loss of particular customers as special damage, which is not proved. Evans *v.* Harries, 38 Eng. L. & E. 347. See also on the rule of damages for defamation, Powell on the Practice of Evidence, 227.

[1] "While the jury may consider the degree of malice with which the words were spoken in assessing the damages, as shown by the subsequent acts and declarations of the defendant, they cannot give damages for such acts or declarations, however infamous or criminal they might be." Stilzell *v.* Reynolds, 67 Penn. St. 54.

[2] This rule, that facts tending to prove the truth of the charge cannot be shown in mitigation of damages, is abrogated in New York by the Code of Procedure. Code, § 165. Since that act, the defendant may give in evidence any circumstances tending to disprove malice, although they also tend to prove the charge. Bush *v.* Prosser, 11 N. Y. 347 (reversing s. c. 21 Barb. 221), and Bisbey *v.* Shaw, 12 N. Y. 67.

A similar relaxation of the rule obtains also in some other States. See West *v.* Walker, 2 Swan (Tenn.), 32; Wagner *v.* Holbruner, 6 Gill (Md.), 296; Cooke *v.* O'Brien, 2 Cr. C. C. R. 17. Thus in Ohio, in an action for words impugning the chastity of a female, the defendant may prove under the general issue and in mitigation of damages, that she and an unmarried man had formerly lived alone together in the same house; that fact having been known to the defendant at the time of speaking the words. Reynolds *v.* Tucker, 6 Ohio St. 516.

So in Iowa, in an action of slander for words imputing unchastity, the defendant, it seems, may in mitigation of damages show that the plaintiff's reputation was bad. Fletcher *v.* Burroughs, 10 Iowa, 557. In Maryland, under the general issue, evidence of general reputation is admissible in mitigation. Shilling *v.* Carson, 27 Md. 175.

But in many States, the rule laid down in the text—that nothing which tends to prove the truth of the charge can be received in mitigation—is still adhered to: Duncan *v.* Brown, 15 B. Monr. (Ky.) 186; Darling *v.* Banks, 14 Ill. 46; Abshire *v.* Cline, 3 Ind. 115; Smith *v.* Smith, 39 Penn. St. 441; Stees *v.* Kemble, 27 Penn. St. 112. And see Galloway *v.* Courtney, 10 Rich. (S. C.) L. 414; Updegrove *v.* Zimmerman, 13 Penn. St. 619; Beasley *v.* Meigs, 16 Ill. 139.

uttered the words, this may go in mitigation of damages as tending to rebut malice.[1] But where it is proved that he repeated the charge both when drunk and sober, on public and private occasions, his being drunk at the particular time alleged is no reason for abating the damages.* Nor can the defendant prove in mitigation of damages, irritating language addressed to him by the *father* of the plaintiff immediately previous to the uttering of the slanderous words to another person.†

REPETITION OF THE SLANDER OR LIBEL.—JUSTIFICATION.—In actions of slander and libel, it has been much discussed how far the fact of the slander or libel complained of being a mere repetition or republication can be set up either in justification or mitigation.‡ But the general scope of this work allows me here only to refer to the subject. It is well settled that if a strict justification is attempted, it must be as broad as the accusation. So, it is necessary to justify the aggravating portion as well as the substantial charge.‖ And it has been even held that an unsuccessful plea of justification was a good ground for increasing the damages.[2] But I [541]

* Howell *v.* Howell, 10 Iredell (N. C.) 84.

† Underhill *v.* Taylor, 2 Barb. S. C. R. 348.

‡ Bennett *v.* Bennett, 6 Car. & Payne, 589, and cases there cited.

‖ Helsham *v.* Blackwood, 20 Law J. Rep. (N. S.) C. P. 187; a notice to offer certain facts in evidence which are really of a justificatory character, will not be vitiated by the fact that the notice uses the phrase, in mitigation of damages, instead of justification, as it should. Baker *v.* Wilkins, 3 Barb. S. C. R. 220.

[1] The allegation of malice in speaking the words, is a material one in a declaration for slander. And when the plaintiff has *primâ facie* established that allegation upon the trial, the defendant has a right, under the general issue, to give in evidence to mitigate the damages, matters disproving or tending to disprove malice, such as insanity, or that the words were spoken in a sudden heat of passion, or upon a justifiable occasion, or that there was a general belief on the part of the public in the truth of the matters charged, etc., which evidence the plaintiff may rebut. Brown *v.* Brooks, 3 Ind. 518. See Mousler *v.* Harding, 33 Ind 176. And where in an action for slander the defendant under the general denial offered to prove that at the time of speaking the words his mind was so besotted by a long course of dissipation, and his character so depraved, that no one who knew him would pay any attention to what he might utter, or give any credence whatever to any slanderous charge he might make; it was held, that the evidence was admissible. Mental incompetency intentionally and knowingly to perform an act, though produced by a course of intemperance, exempts from legal responsibility for such act. This rule applies in cases of slander. Slander must be malicious. An idiot or lunatic, no matter from what cause he became so, cannot be guilty of malice. Gates *v.* Meredith, 7 Ind. 440.

Also in an action for a printed libel, it is proper to admit evidence of what was said by the defendant in directing the printing, in order to disprove actual malice in the publication, and to influence the question of damages. The terms and conditions on which the defendant requested the printing and publication to be done, and on which the witness agreed to do it, are admissible in evidence as a part of the *res gestæ* given in evidence by the other side. Such evidence is pertinent and material in respect to the *motives* of the defendant in procuring the publication complained of. Taylor *v.* Church, 4 Seld. (8 N. Y.) 452.

[2] The question whether an unsuccessful plea of justification should enhance the damages continues to be differently decided in the various States of the Union. In Pennsylvania (Gorman *v.* Sutton, 32 Penn. St. 247), Indiana (Shank *v.* Case, 1 Ind. 170; Murphy *v.* Stout, 1 Ind. 372; Shoulty *v.* Miller, 1 Ind. 544; Swails *v.* Butcher, 2 Ind. 84), Georgia (Richardson

think the inclination of the latter cases is against this idea; which in truth leads to an effort to punish what may be a perfectly innocent act. So, in Indiana, in slander for perjury, if the defendant plead the truth of the words in justification, and fail to prove the plea, the filing of that plea is not an aggravation; and on the contrary, if from the evidence it appear that the defendant, though he cannot strictly justify, had reason to believe from the plaintiff's conduct that the charge was true, such fact may go to the jury in mitigation of damages.* [1]

* Byrket *v.* Monohon, 7 Blackf. 83.

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v. Roberts, 23 Geo. 215), and Alabama (Pool *v.* Devers, 30 Ala. 672; Robinson *v.* Drummond, 24 Ala. 174), it is held that such a plea is evidence of actual malice, and a high aggravation of the offence. So in Vermont, it is competent for the jury on the question of damages to take into consideration, the fact that the defendant in his pleadings has repeated and attempted to justify his statements. Cavanaugh *v.* Austin, 42 Vt. 576. On the other hand, in Illinois (Thomas *v.* Dunaway, 30 Ill. 373; Cummerford *v.* McAvoy, 15 Ill. 311; Spencer *v.* McMasters, 16 Ill. 405; Sloan *v.* Petrie, 15 Ill. 425), New Hampshire (Pallett *v.* Sargent, 36 N. H. 496), and Ohio (Rayner *v.* Kinney, 14 Ohio St. 283), such a plea, interposed in good faith, is no ground for increasing the damages. We think the last rule is the true one, and that the plea should not as matter of law carry with it any effect of aggravation. The necessity of such a consequence may prevent an honest defence. As is said in the case last cited, the motive with which the justification is pleaded, should be "for the consideration of the jury. If they find that it was done with the intention to injure the plaintiff, they may rightfully consider it an aggravation of the damages; but where no wrongful intention is found, there is no just ground for the punishment of the defendant."

In New York, the severer rule formerly obtained (Fero *v.* Ruscoe, 4 N. Y. 162); although before the Code of Procedure, it had perhaps been modified by a limitation of the increase of the damages to the extent of the injury sustained by the repetition. Fulkerson *v.* George, 3 Ab. (N. Y.) Pr. R. 75. But it would seem to have been wholly superseded by that important act, which, in consonance with the comprehensive system of pleading it establishes, permits the defendant in his answer to allege both the truth of the matter charged as defamatory, and any mitigating circumstances, and whether he prove the justification or not, to give in evidence the mitigating circumstances. N. Y. Code of Procedure, § 165; Bush *v.* Prosser, 1 Kern. (11 N. Y.) 347. And it is now held by the New York Court of Appeals, that where the defendant in an action of libel or slander, pleads under this section, facts both in justification and mitigation of the charge, the allegations in justification though unproved are no longer evidence of malice to be considered by the jury, or taken as enhancing the plaintiff's damages. Klinck *v.* Colby, 46 N. Y. 427. The remarks therefore of Mr. Justice E. D. Smith, to the contrary, in delivering the opinion of the Supreme Court of New York, in a recent case cannot be regarded as authority. Bennett *v.* Matthews, 64 Barb. (N. Y.) 410. See *ante*, 540, note.

[1] In Indiana, the same evidence is required to establish a plea of justification of slander consisting in charging the plaintiff with a criminal offence, as would be necessary to convict him of the offence in a criminal prosecution. Swails *v.* Butcher, 2 Ind. 84; Shoulty *v.* Miller, *Ibid.* 544; Landis *v.* Shanklin, *Ibid.* 92. But evidence insufficient to establish the plea may be considered in mitigation of damages. Shoulty *v.* Miller, 1 Ind. 544; Landis *v.* Shanklin, *Ibid.* 92.

Mere rumors and general reports are not admissible, even in mitigation. Dame *v.* Kenney, 5 Fost. (N. H.) 318. But evidence of the general bad reputation of plaintiff at the time of the alleged slander is admissible in mitigation of damages, not merely with a view to disprove malice, but upon the broader ground that a person of already disparaged reputation is not entitled to the same measure of damages as one with an unblemished fame. The evidence is admitted to show the value of what is alleged to be injured; and is therefore not to be restricted to the particular traits of character involved in the slanderous words. Sayre *v.* Sayre, 1 Dutch. (N. J.) 235. See also, Leonard *v.* Allen, 11 Cush. (Mass.) 241. So also in Armstrong *v.* Pierson, 8 Iowa, 29; Stone *v.* Varney, 7 Met. 86; Wolcott *v.* Hall, 6 Mass. 514.

In an action of slander, a *recantation* of the slanderous charge may be admissible in

So, in Tennessee, an invalid and insufficient plea of justification in an action of slander upon which no judgment could have been entered, is entitled to no weight in aggravation of damages under the plea of not guilty.* No damages can be given in slander for any repetition of the defamatory words subsequent to the commencement of the suit.[1] Such repetition may be in some cases shown in order to prove the character of the original transaction, and the motives of the defendant, but not with a view to enhancing the damages by obtaining any relief for the new injury.†

RULE IN LOUISIANA.—It has been distinctly declared in Louisiana, that no proof of damage is necessary to entitle the plaintiff to recover in actions of libel, and that the pecuniary damage is never the sole rule of assessment.‡[2]

SLANDER TO TITLE.—It is also necessary to notice the action of slander to title of real estate. We have already had occasion to speak of an action for slander of a vessel. A false statement made maliciously with reference to the title to real estate, is a good cause of action; but the malice cannot be inferred from the falsehood: in order to recover substantial damages they must be proved to have resulted from the false statement; ‖[3]

* Braden *v.* Walker, 8 Humphreys, 34.

† Pearson *v.* Lemaitre, 5 Man. & Gr. 700; Schoonover *v.* Rowe, 7 Blackf. 202.

‡ Daly *v.* Van Benthuysen, 3 La. Ann. R. 69.

‖ Malachy *v.* Soper, 3 Bing. (N. C.) 371; Brook *v.* Rawl, 4 Exch. 521; Pitt *v.* Donovan, 5 M. & Sel. 639.

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evidence, in mitigation of damages; but such retraction must be in public, or in a mode to qualify the slander, in order to be of any avail. Kent *v.* Bonzey, 38 Me. 435; Darling *v.* Banks, 14 Ill. 46.

And the plaintiff cannot prove the speaking similar words to those charged, on other occasions, in aggravation of damages; such words not having been laid in the declaration. Vincent *v.* Dixon, 5 Ind. 270.

[1] And where in an action by a surgeon for a slander imputing that a female servant had had a bastard child by him, in consequence of which one who had engaged him as accoucheur would not employ him, and the plaintiff was otherwise injured in his business, it was held that although his damages should not be confined to the fee lost in the special instance, he could not recover for a general loss of business caused by repetitions of the slander, but which could not have arisen directly from the speaking of the words by the defendant. Dixon *v.* Smith, 5 H. & N. 450. And see Olmsted *v.* Brown, 12 Barb. (N. Y.) 657.

[2] The jury in estimating the damages may consider the defendant's pecuniary circumstances, and his position and influence in society. The defendant's wealth is an element in his social rank and influence, and therefore tends to show the extent of the injury from his slanderous speech. Hosley *v.* Brooks, 20 Ill. 115; Peltier *v.* Mict, 50 Ill. 511; Humphries *v.* Parker, 52 Me. 502; Lewis *v.* Chapman, 19 Barb. (N. Y.) 252.

[3] To maintain an action for slander of title to lands, the words spoken must not only be false, but they must be uttered maliciously, and be followed, as a natural and legal consequence, by a pecuniary damage to the plaintiff, which must be specially alleged and proved. And where the plaintiff, before the speaking of the words, had entered into a written contract with a third person, for the sale to him of the lands in relation to which the words were spoken; and the purchaser afterwards, in consequence of these words, having become dissatisfied with the purchase, the contract was at his request canceled by the plaintiff, and part of the pur-

and in this action, as in others of a like nature, exemplary damages may be recovered.*

[542] We turn now to other injuries to the person.

SEDUCTION.—The common-law action of case, by the father or master, for seducing a daughter or female servant, is one of a peculiar character. It is eminently a legal fiction: the demand is based upon the mere loss of service; but the damages are very much at large, and in the discretion of the jury. And, as a general rule, exemplary damages may always be given.†[1] It is very curious to see how the practice of giving damages beyond the mere value of the service, has grown up. As late as the latter part of the last century, in a case tried before Mr. Justice Chambre, the action being brought by the father for the seduction of his natural daughter, the judge charged the jury that they must consider the female merely in the character of a servant, and award the plaintiff compensation for the loss of service only.‡ In the year 1800, Lord Eldon, then chief justice of the Common Pleas, in an action tried before him, told the jury that they were to look, not merely to the loss of service, but to the *wounded feelings* of the party. ‖ In 1805, Lord Ellenborough, in a case before him, told the jury that "damages

* Kendall *v.* Stone, 2 Sandf. S. C. 269. This case was reversed on appeal, 1 Seld. 14.

† Ingersoll *v.* Jones, 5 Barb. S. C. R. 661; Irwin *v.* Dearman, 11 East, 23; see Edmondson *v.* Machell, 2 T. R. 4.

‡ Selwyn's Nisi Prius, 5th ed. 1075.

‖ See note to Andrews *v.* Askey, 8 Car. & P. 7; Eng. C. L. R. 270.

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chase money which had been paid returned to him (the loss of a sale to that person being the only special damage alleged); it was held that the action could not be maintained; that the damages (if any) sustained by the plaintiff, were the consequence of his own voluntary act, and not of the words spoken by the defendant. Kendall *v.* Stone, 1 Seld. (N. Y.) 14. The Supreme Court of California in deciding that in an action of this kind the good faith of the defendant is of no consequence, appears to have overlooked the bearing of malice on the question of exemplary damages. Levitzky *v.* Canning, 33 Cal. 299.

[1] Ball *v.* Bruce. 21 Ill. 161; Bartley *v.* Richtmyer, 4 Comst. 38, 44. Nor where the relation of master and servant exists by convention only, as where the plaintiff's daughter is of age, will the recovery be restricted to compensatory damages. Lipe *v.* Eisenlerd, 32 N. Y. 229; Badgley *v.* Decker, 44 Barb. 577. Nor although the statute authorizes the daughter to sue in her own name will they be thus restricted in an action brought by the father. Stevenson *v.* Belknap, 6 Iowa, 97.

The plaintiff may not only recover the damages he has sustained by the actual loss of service, and the payment of necessary expenses, but the jury may award him compensation for the destruction of his domestic peace, as well (it is said) as the disgrace cast upon his family. Kendrick *v.* M'Crary, 11 Ga. 603. As to the *family* disgrace, however, see *post*, head p. 683, n. 2. On the other hand, proof of careless indifference on the plaintiff's part, in affording opportunities of criminal intercourse between his daughter and the defendant, may be admitted in mitigation of damages (Zerfing *v.* Mourer, 2 Greene (Iowa), 520); but not of a seeming insensibility on the part of the father to his daughter's disgrace (Bolton *v.* Miller, 6 Ind. 262); nor is it competent for the defendant to show that the daughter consented willingly to the seduction, nor even that she in fact seduced the defendant, her consent not depriving the plaintiff of his right of action. M'Aulay *v.* Birkhead, 13 Iredell's (N. C.) L. 28. Evidence of an abortion produced by the defendant is not inadmissible on the ground that the damages it tends to prove are too remote. Klopfer *v.* Bromme, 26 Wisc. 372.

might be given for the loss which the father sustained by being deprived of the *society* and *comfort* of his child, and by the *dishonor* which he receives."* And finally, the same learned judge used this language in the King's Bench, on a motion to set aside an inquisition in a case of seduction, on the ground of excessive damages. He said, "This proceeding was one *sui generis*, where in estimating the damages, the parental feelings and the feelings of those who stood in *loco parentis*, had always been taken into consideration; and although it was difficult to conceive on what legal principles the damages could be extended ultra the injury arising from the loss of service, yet the practice was now inveterate, and could not be shaken."† [1] "The action for seduction," says the Supreme Court of New York, "is peculiar, and would seem to form an exception to the rule that actual damages only can be recovered when the action is for loss of service consequential on a direct injury; but there the party directly injured cannot sustain an action, [543] and the rule of damages has always been considered as founded on special reasons only applicable to it."‡ In a case brought by the mother, in 1837, Tindal, Chief Justice of the English Common Pleas, directed the jury that they might give damages for the *distress* and *anxiety* of the plaintiff. ‖ [2] As to the right of recovery, however, the English cases adhere to the original idea on which the action is founded. So, if there is no proof of loss of service whatever, there can be no relief.¶ So, although the defendant be guilty of the seduction, but the jury are of opinion that the child is not his, the plaintiff cannot recover.** In other words, without some damage to the plaintiff or master, occasioned by the illness of the female, and resulting from the illicit intercourse, the plaintiff is without relief.

In this country, however, there seems to be an inclination to push the redress further. Thus, in North Carolina, it has been held that an action on the case for seduction might be maintained before the delivery, and it was said that the law would be the same had there been no pregnancy.†† So, the English rule requiring proof of actual service has been relaxed; it is only necessary to show that the parent has the legal right to com-

* See same note.
† Irwin *v.* Dearman, 11 East, 23.
‡ Whitney *v.* Hitchcock, 4 Den. 461.
‖ Andrews *v.* Askey, 8 Car. & P. 7.
¶ Grinnell *v.* Wells, 7 Man. & Gr. 1033.
** Eager *v.* Grimwood, 1 Exch. 61.
†† Briggs *v.* Evans, 5 Iredell, 16. See, also, Hewitt *v.* Prime, 21 Wend. 79.

[1] See Powell on the Practice of Evidence, 228.

[2] The injury to plaintiff's feelings need not be laid in the declaration as special damages. Phillips *v.* Hoyle, 4 Gray (Mass.), 568.

mand the services of the child,*[1] and very slight evidence of loss of service will suffice.† But the action cannot be maintained by one standing merely *in loco parentis* without proof of actual service.‡[2] It is also proper to bear in mind in relation to this action, that criminal connection may take place without seduction, and that if seduction be not proved, damages for it should not be given.‖[3]

THE DAMAGES ARE GOVERNED BY LEGAL RULES AS FAR AS COMPENSATION IS INTENDED.—Where the jury were directed, or supposed they were directed, that damages might be given for bringing up the child, the fruit of the illicit connection, [544] the Supreme Court of New York granted a new trial, on the ground that the plaintiff, the master, was under "no legal obligation to support and educate the child; that he could not be compelled to appropriate the proceeds of the verdict to that purpose; and that the verdict would not afford the defendant any exemption from his liability to provide for the child when called on in the regular course of the law."[4] This in effect, declares that the damages are to be measured by strict

* Bartley *v.* Richtmayer, 4 Comstock, 38, where the cases are collected.

† Villepigue *v.* Shaler, 3 Strobhart, 462.

‡ Roberts *v.* Connelly, 14 Ala. 235; South *v.* Denniston, 2 Watts, 474. In both of these cases, the case of Sargent *v.* ———, 5 Cow. 106, has been denied to be law so far as it admitted the right of the plaintiff to recover. See, also, in Indiana, Boyd *v.* Byrd, 8 Blackford, 113.

‖ Hill *v.* Wilson, 8 Blackford, 123.

[1] White *v.* Nellis, 31 N. Y. 405; Ingerson *v.* Miller, 47 Barb. (N. Y.) 47; Mulvehall *v.* Millward, 1 Kern. (N. Y.) 343. But so hard and so technical is the absurd theory on which this action still rests, that where the female seduced was the apprentice of the defendant, and bound to live with him until she was eighteen, and the seduction occurred while she was thus in fact and in law the defendant's servant, and the plaintiff, her father, had no legal right to her services, it was held, that there being no pretence that the defendant procured the daughter to enter his service with a view to her seduction, the action could not be maintained. Dain *v.* Wycoff, 3 Seld. (N. Y.) 191; Terry *v.* Hutchinson, L. R. 3 Q. B. 599; 9 B. & S. 487. Otherwise, where in such case the father had the right to reclaim the daughter's services from the defendant (Bolton *v.* Miller, 6 Ind. 262), or the implied relation of master and servant between the father and daughter is revived. See, also, Hedges *v.* Tagg, L. R. 7 Exch. 283; Manley *v.* Field, 7 C. B. (N. S.) 96; Thompson *v.* Ross, 5 H. & N. 16; Davies *v.* Williams, 10 Q. B. 725; Blaymire *v.* Haley, 6 M. & W. 55; Dean *v.* Peel, 5 East, 45. So an action cannot be maintained by a *mother* where the daughter was, at the time of the seduction, over twenty-one, and residing with her brother, nor by the personal representatives of a deceased father or master. George *v.* Van Horn 9 Barb. (N. Y.) 523.

[2] But the action may be maintained wherever the female seduced is *de facto* a servant of the plaintiff, although there is neither contract of service nor tie of blood between them. Irwin *v.* Dearman, 11 East, 23; Bennett *v.* Allcott, 2 T. R. 166; Harper *v.* Luffkin, 7 Barn. & C. 387; Manvell *v.* Thomson, 2 Car. & P. 303; Moran *v.* Dawes, 4 Cow. 412. So where the action is for an assault. Edmondson *v.* Machell, 2 Term, 4.

[3] In case for seduction, evidence of the intercourse of the plaintiff's daughter with other men may be given in evidence under a plea of not guilty. Verry *v.* Watkins, 7 C. & P. 308.

[4] To a like effect is Haynes *v.* Sinclair, 23 Vt. 108. But in England the expenses of maintaining the child (as well as the doctor's fees) are now allowed to be included in the damages. Terry *v.* Hutchinson, *supra*.

legal rules, or at least asserts the principle I have above stated, that even in cases of aggravation, where it appears that the jury did not intend to give vindictive, but only compensatory damages, and on that point were wrongly instructed, such course will be taken as to restrict the compensation within legal limits.*[1]

So, also, it is well settled that in this action no evidence can be given as to any promise of marriage, either with reference to the right of action or measure of damages; the remedy for the breach of that contract belonging to the female in her own name. Thus, in the King's Bench, Lord Ellenborough said, "The daughter may be asked whether the defendant paid his addresses in an honorable way; further than that you can on no account go."†

So, in New York, in such a case, it has been held incorrect to admit this description of evidence, whether the judge instructs the jury that they may give damages for the seduction, and also for the breach of the promise, or whether he admits it only to prove the seduction, but not to enhance the damages.‡ Nor can an offer to marry the female be given in evidence to mitigate the damages.‖

CRIMINAL CONVERSATION.[2]—In actions for criminal conversation, it has been held that the amount of reparation is in no sense to be measured by the defendant's property; and evidence that the defendant is a man of large fortune is therefore inadmissible.[3] But this is not so in actions for breach of promise of

* Sargent *v.* ———, 5 Cow. 106. See, also, Edmondson *v.* Machell, 2 T. R. 4.

† Dodd *v.* Norris, 3 Camp. 519. See, also, Tullidge *v.* Wade, 3 Wils. 18.

‡ Foster *v.* Scoffield, 1 J. R. 297; Clark *v.* Fitch, 2 Wend. 464; Gillett *v.* Mead, 7 Wend. 193. See, also, Brownell *v.* M'Ewan, 5 Denio, 367, and Wells *v.* Padgett, 8 Barb. S. C. R. 323.

‖ Ingersoll *v.* Jones, 5 Barb. S. C. R. 661.

[1] It is occasionally said that in this action the jury may give compensation for the dishonor of the plaintiff's *family* and *their* injured feelings. Felkner *v.* Scarlet, 29 Md. 154; Wilhoit *v.* Hancock, 5 Bush (Ky.) 587. But we do not think this proposition will bear analysis.

[2] Contrary to the general tenor of the decisions elsewhere, punitory damages in this class of actions are not allowed in Ireland. Wilson *v.* Leonard, 5 Ir. Jur. O. S. (Exch.) 96, 101.

[3] In the assessment of damages against a co-respondent in this action, the measure of damages is the value of the wife of whom the husband has been deprived. If the co-respondent's fortune was used by him as a means of the seduction, it is said in England that it may be taken into account, but not otherwise. Cowing *v.* Cowing and Wollen, 38 L. J. (N. S. Probate) 149. See as to the theory of this action, *post*, 547, and note. But in slander, as we have seen (*supra*, 541, note), evidence of the defendant's wealth may be given to aid in determining the amount of damages, and such seems to be the case in actions for malicious torts generally. Richards *v.* Booth, 4 Wis. 67; Rowe *v.* Moses, 9 Rich. (S. C.) L. 423; Bell *v.* Morrison, 27 Miss. 68; although "the evidence should be confined to general reputation as to the circumstances of the defendant." Kniffen *v.* McConnell, 30 N. Y. 285. So in an action on the case for the seduction of the plaintiff's daughter, it is competent for the plaintiff to give in evidence, on the question of damages, the pecuniary circumstances of the defendant. McAulay *v.* Birk-

marriage, where the amount of the defendant's property is material, as going to show what should have been the station
[545] of the plaintiff in society if the promise had not been broken.*

ENTICING SERVANTS.—In the action for enticing a servant from his employment, the same effort to limit the relief to compensatory damages has been exhibited. In an early case it was said that the general rule of damages is the value of the servant's time during the period he was in the defendant's employment; but that in cases of aggravation, the jury may give the whole value of the servant.† This, however, refers rather to slaves than servants. In a case of this kind in Illinois, for enticing a registered servant, it was held that the plaintiff was entitled to recover the value of the services lost up to the time of the commencement of the suit, the reasonable expenses necessarily incurred in getting the servant back again, and damages for the loss of time, trouble, and injury sustained until the commencement of the suit; and that if the plaintiff lost the entire service in consequence of the defendant's act, then he was entitled to the value of the term of service.‡

In an action on the case for enticing the plaintiff's servants, who were not hired by the plaintiff for a limited or constant period, but worked by the piece, by inviting them to dinner, and inducing them to sign an agreement not to work for him; it being proved that the plaintiff, a piano-forte maker, realized about £800 per annum by the sale of his instruments, the jury found a verdict for £1,600. The plaintiff was nearly, if not absolutely ruined. On a motion for a new trial, it was insisted that, as the men worked by the piece, each of them was justified in leaving the plaintiff when he had completed the work in hand; and that in point of fact, the plaintiff could only be entitled to recover damages for the half-day for which his workmen accepted the defendant's invitation. The court refused to interfere on the ground that the damages were excessive; and Richardson, J., said, "The measure of damages he is entitled to receive from the defendant is not necessarily to be confined to

* James *v.* Biddington, 6 C. & P. 589.
† Dubois *v.* Allen, Anthon's N. P. 128.
‡ Hays *v.* Borders, 1 Gilman, 46.

head, 12 Iredell's (N. C.) L. 28. But in Alabama such evidence has been held inadmissible in slander. Ware *v.* Cartledge, 24 Ala. 622. In Iowa, in assault and battery. Guengerech *v.* Smith, 34 Iowa, 348. And see Dain *v.* Wycoff, 3 Seld. (N. Y.) 191 (opinion of Gardiner, J.). *E converso*, in an action for assault and battery, the plaintiff, to increase the damages, was allowed to show he was a laboring man and had a wife and children to support. Gaither *v.* Blowers, 11 Md. 536.

the servants he might have in his employ at the time they were so enticed, or for that part of the day on which they absented themselves from his service, but he is entitled to recover damages for the loss he sustained by their leaving him at [546] that critical period." *[1]

TRESPASS FOR ILLEGAL SEIZURE.—CONSEQUENTIAL DAMAGES.—So, again, in trespass for taking the plaintiff's goods in execution under a warrant of attorney and judgment, which were afterwards set aside as illegal, it has been recently held in the English Queen's Bench that the plaintiff cannot claim as part of the damage, his costs incurred in vacating the warrant of attorney and judgment; Lord Denman saying, "The plaintiff might have recovered these costs in a proper form of proceeding; but he cannot sue the defendant for a trespass *per quod* he was put to expense in removing the cause of the trespass." †[2]

PARENT'S ACTION FOR INJURY TO A CHILD.—There is a class of cases nearly connected with these, in which I do not find that any rule has been declared distinctly; it is where the parent sues for personal injury to the child, without actual malice or other aggravating circumstances; as, for instance, an action against a railroad or steamboat, for collision or explosion. Here it may, perhaps, be said, on one hand, that injury to the person resulting from negligence is a good ground to infer malice; but, on the other, the action is based on the loss of service alone, and the question is, what has the plaintiff lost in the services of the servant? And the analogy of the action for seduction does not appear to hold good; because there is no pretence of intention to injure, and no interest of public morals to vindicate. The question is embarrassing, and I cannot but believe that the embarrassment results from placing the claim on a false basis, *i. e.*, the loss of service.[3]

* Gunter *v.* Astor, 4 Moore, 12. † Holloway *v.* Turner, 6 Q. B. R. 928.

[1] In these cases, remote or speculative damages, such as damages from poor crops, occasioned by the circumstance that the plaintiff had to furnish the servants, employed in the place of those who were enticed away, with provisions, while the others had provisions of their own, cannot be recovered. Salter *v.* Howard, 43 Geo. 601.

[2] In in action for the illegal seizure of goods, if there be no circumstances of aggravation, the measure of damages is the value of the goods, with interest from the time of the taking to that of the trial. Wanamaker *v.* Bowes, 36 Md. 42. The owner of cattle which are wrongfully turned out of an inclosure, cannot, if he knows of the consequent necessity of taking care of them, recover from the trespasser damages for their subsequent death by starvation. Story *v.* Robinson, 32 Cal. 205.

[3] In such an action the rule of damages is now well established to be compensation for the loss of the minor's future services, and the expenses sustained by the injury, such as those for

MITIGATION.—We have had occasion, in regard to actions on contract, to discuss the subject of recoupment and set-off. The doctrine of mitigation, to which we have already incidentally referred, is of an analogous character in regard to actions of tort.[1] The general rule is that anything which is a complete answer to the action must be pleaded either in bar or in justification; but it is also well settled in many cases that matters which go to the quantum of damages merely, to palliate the character of the offence, or to *mitigate* the amount which the jury may award, may be given in evidence under the general issue.[2]

AS TO PERSONAL WRONGS.—One of the simplest forms of mitigatory evidence comes under the head of provocation.
[547] "In actions for personal wrongs and injuries," says Lord Abinger,* at Nisi Prius, "a defendant who does not deny that the verdict must pass against him, may give evidence to show that the plaintiff in some degree brought the thing upon himself."

So in an action for libel, the defendant may give in evidence other libels recently published before, by the plaintiff of

* Fraser *v.* Berkeley, 7 Car. & Payne, 621.

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surgical and medical attendance. Oakland R. Co. *v.* Fielding, 48 Penn. 320; Gilligan *v.* The New York and Harlem R. Co. 1 E. D. S. (N. Y.) 453. The prospective loss must be declared for specially. *Ibid.* The parent may recover for the loss of the child's services to the age of twenty-one. If his disability continue beyond that age, the child, having come to man's estate, may recover for the further loss. Travers *v.* 8th Ave. R. R. Co. 3 Keyes (N. Y.), 497.

[1] See Street *v.* Blay, 2 B. & Ad. 456; *ante*, 448; Verry *v.* Watkins, 7 C. & P. 308; *ante*, 543; and see *ante*, chap. 17. The extent of damages to which the attaching officer who sues the real owner of the attached property for trespass for unlawfully removing it from the attachment is entitled, is the amount due on the execution which the property was held to pay. Houston v. Howard, 39 Vt. 54.

In an action to recover damages for killing a dog, proof of the animal's worthlessness is admissible in mitigation, though that defence was not pleaded. Dunlap *v.* Snyder, 17 Barb. (N. Y.) 561.

[2] The distinction as to the effect of mitigating circumstances on actual and on exemplary damages is, that where the excusing or palliating circumstances involve no fault of the plaintiff, they may prevent exemplary damages and limit the recovery to actual compensation. If, making due allowance for the infirmities of human temper, the defendant has a reasonable excuse for the violation of the public order, then there is no foundation for exemplary damages. So where there is a reasonable excuse for the defendant, arising from the provocation or fault of the plaintiff, but not sufficient entirely to justify the act done, there can be no exemplary damages, and the circumstances of mitigation must be applied to the actual damages. If it were not so, the plaintiff would get full compensation for damages occasioned by himself. The rule ought to be, and is practically mutual. Malice and provocation in the defendant are punished by inflicting damages exceeding the measure of compensation, and in the plaintiff by giving him less than that measure. Robison *v.* Rupert, 23 Penn. St. 524; Evans *v.* Matson, 56 Penn. 54. In an action for an unlawful arrest, the declarations of a plaintiff prior to the arrest and tending to provoke it, cannot be admitted to reduce his compensation for the actual injury, but are admissible to mitigate the damages for the indignity and the punitive damages. Prentiss *v.* Shaw, 56 Maine, 427.

the defendant.* [1] So in an action for assault and battery, a libel published by the plaintiff on the defendant, may be given in evidence in mitigation of damages, even though it be at the time the subject of a cross-action; but that being so, the defendant ought not to derive much advantage from it in mitigating the damages.† [2]

So in an action of *criminal conversation*, which is founded on the loss of the comfort, fellowship, and assistance of the wife,[3] it is competent to show, in mitigation of damages, that the plaintiff's wife was an actress; that he concealed his marriage from his wife's mother, and very seldom saw his wife, but suffered his wife to remain living with her mother as if she were a single woman, and allowed her to continue her theatrical performances in her maiden name.‡ [4]

It has been held in Pennsylvania, that in trespass against a constable for arresting and imprisoning the plaintiff on suspicion of a felony, the bad character of the plaintiff cannot be given in evidence in mitigation of damages.‖ [5]

In an action of assault and battery,[6] the defendant cannot

* Watts *v.* Fraser, 7 Car. & Payne, 369.
† Fraser *v.* Berkeley, 7 Car. & Payne, 621.
‡ Calcraft *v.* Earl of Harborough, 4 Car. & Payne, 499.
‖ Russell *v.* Shusler, 8 Watts. & Serg. 308.

[1] See Pugh *v.* McCarty, 40 Geo. 444. In an action of slander or libel, it is competent for the defendant to show, in mitigation of damages, the manner of language held towards him by the plaintiff, prior to the time of the libel for which he is sued. Botelar *v.* Bell, 1 Md. 173. And he may prove in mitigation of damages, a declaration of the plaintiff that he was not injured by the words complained of. But evidence that the witnesses who heard the words uttered did not believe them, is not admissible. Richardson *v.* Barker, 7 Ind. 567. See also on this subject, Turner *v.* Foxall, 2 Cr. C. C. R. 324.

[2] But see *post*, next page, and note (2).

[3] So far is this theory of the action carried, that in a case at Nisi Prius, where the husband was unaware of his wife's dishonor till she made the disclosure to him on her dying bed, and he continued to treat her with great kindness till her death, which occurred in the same month, Mr. Justice Coleridge, while instructing the jury against the allowance of vindictive damages, told them to give damages for the shock to the husband's feelings and *the loss of his wife's society* down to the time of her death. Wilton *v.* Webster, 7 C. & P. 198.

[4] Proof of the ill treatment of the wife by the husband before the criminal intercourse, may be received in mitigation. Palmer *v.* Crook, 7 Gray (Mass.), 418. As to the evidence admissible in mitigation in an action for enticing away the plaintiff's wife, see Bennett *v.* Smith, 21 Barb. 439.

[5] In an action to recover damages of the defendant for having illegally procured the plaintiff's arrest and imprisonment for discouraging enlistments, which was done by a federal officer on the defendant's affidavit, the defendant was allowed to prove in mitigation that the plaintiff had in fact discouraged enlistments. Roth *v.* Smith, 54 Ill. 431.

[6] The rules for measuring damages in assault and battery, as far as any rules obtain, are the same in substance with those elsewhere considered in respect of aggressive torts in general (*ante*, chap. 18, *post* 552, note); although from their nature they are especially subject to the application of the principle of punitive damages. In an action for an aggravated assault and battery, whereby the plaintiff lost his leg, the elements of damages were said to be,—1. Loss of time and labor from the date of the assault until plaintiff's restoration to health. 2. Expenses of medical and surgical attendance during illness. 3. Diminished capacity to work at his trade, consequent on the loss of his leg. 4. His bodily pain and suffer-

give in evidence the general bad character of the plaintiff; but he may show the conduct, and even character of the plaintiff, when they form the provocation and inducement to the particular trespass.* [1] The defendant cannot give in evidence, in mitigation of damages, the acts or declarations of the plaintiff at a different time, or any antecedent facts which are not fairly to be considered as part of one and the same transaction, though they may have been ever so irritating or provoking.† [2]

The provocation, to entitle it to be given in evidence in mitigation of damages, must be so recent and immediate as to induce a presumption that the violence done was committed under the immediate influence of the feelings and passions excited by it.[3]

* Rhodes *v.* Bunch, 3 M'Cord, 66; M'Kenzie *v.* Allen, 3 Strobhart, 546.

† Lee *v.* Woolsey, 19 J. R. 319.

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ing. Donnell *v.* Sanford, 11 La. Ann. 645. As to what damages will be allowed in admiralty for the excessive punishment of a seaman by a master, see Whitney *v.* Eager, Crabbe's C. C. R. 442. In trespass for assault and battery, evidence of the pecuniary condition of the plaintiff may be given. Cochran *v.* Ammon, 16 Ill. 316. And the jury may consider the plaintiff's loss of peace of mind and happiness. Cox *v.* Vanderkleed, 21 Ind. 164. In Cushman *v.* Waddell, 1 Bald. 59, which was an action by a schoolmaster against a parent for a severe beating, the court held that no provocation could excuse the defendant from making full compensation for all the injury the plaintiff had suffered by the unlawful attack on his person. But if the jury were satisfied that, without any previous malice towards the plaintiff or any deliberate design to injure him in person or the estimation of the public, he acted in the heat of passion, caused by the appearance and account of his son, it was a circumstance which ought to operate powerfully to reduce the damages to such as were compensatory The plaintiff may recover as part of his damages the amount of a surgeon's bill which he incurred for treating his injuries, although before the trial the bill had been voluntarily paid by the trustees of the township, to whom he was under no legal liability to refund the amount. Klein *v.* Thompson, 19 Ohio St. 569. See *ante*, p. 39.

[1] This right extends to the reduction of compensatory as well as of exemplary damages in such cases. Mosely *v.* Dunbar, 24 Wisc. 183.

[2] Gaither *v.* Blowers, 11 Md. 536. Mere words do not amount to an assault; and no words will justify an assault and battery, though they may be proved in mitigation of damages. Keyes *v.* Devlin, 3 E. D. Smith's (N. Y.) C. P. R. 518. But words uttered by the plaintiff against the defendant on a former occasion, and repeated to the defendant, are not admissible in mitigation. Jarvis *v.* Manlove, 5 Harring. (Del.) 452. In an action for an assault and battery, where the altercation grew out of a question of veracity between the parties, the defendant was allowed to show that the *truth* of the matter in dispute was with him, in mitigation of damages. Marker *v.* Miller, 9 Md. 338.

[3] Ireland *v.* Elliott, 5 Iowa, 478; Johnson *v.* Crawford, Phillips' L. R. (N. C.) 342. See Willis *v.* Forrest, 2 Duer (N. Y.), 310 (affirmed in the Court of Appeals), where it is held on a review of the cases, that in an action of assault and battery, causes of provocation cannot be admitted in evidence in mitigation of damages unless they happened at the time of the assault, or immediately preceding it, so as to form part of one transaction. To a like effect is Collins *v.* Todd, 17 Mo. 537. See also Tyson *v.* Booth, 100 Mass. 258. And the previous throwing on several occasions of missiles, such as inkstands, pieces of iron, &c., at defendant's house, besides pelting his premises at the time with snowballs, does not justify a murderous assault by firing a musket loaded with shot. *Ib.* And see Corning *v.* Corning, 2 Seld. (N. Y.) 97. And it would seem that no provocation will reduce the damages in an action for assault and battery below compensatory or actual damages, unless it amounts to a justification. Birchard *v.* Booth, 4 Wis. 67. The plaintiff's bad character and association with persons of ill repute does not palliate the assault, and cannot mitigate the damages. Bruce *v.* Priest, 5 Allen (Mass.), 100. Nor can a person guilty of wilful assault and battery show, that from the intemperate habits of the other party, the injury was more aggravated than it would have been upon a person of temperate habits. Littlehale *v.* Dix, 11 Cush. (Mass.) 364.

Nor can the defendant in a civil action for an assault and battery be permitted to prove in

An admission by the counsel for the plaintiff at the trial of an action of trespass, that the defendant acted without malice, precludes the plaintiff from claiming vindictive damages; and therefore evidence on the part of the defendant, in the nature of a justification, is inadmissible by way of mitigation.* It is proper here to notice the rule, that one of several joint trespassers who is compelled to pay damages cannot compel his co-trespassers to contribute.†

As to Trespass to Property.—As to mitigation in trespass, it has been held in the State of Pennsylvania, that in an action for pulling down a building, evidence that the building was peaceably taken down, and its materials preserved, in conformity with the directions of the commissioners of the township, during a period of great public excitement and disorder, with a view of saving the neighborhood from threatened violence, is admissible in mitigation of damages. But in such action, evidence that the commissioners had by law the power to abate and remove nuisances, and that a grand jury, after instructions by a competent court, presented the building as a public nuisance and recommended its abatement, is not admissible in mitigation of damages.‡[1]

Return of Property Wrongfully Taken.—The general rule in regard to personal property is that its return is no bar to an action, but is admissible in mitigation of [548]

* Hoyt *v.* Gelston, 13 J. R. 141; s. c. in Error, *Ibid.* 561.

† Acheson *v.* Miller, 18 Ohio, 1.

‡ Reed *v.* Bias, 8 Watts & Serg. 189.

mitigation of damages that he had been indicted, convicted, and fined for the same offence. An indictment is intended as a vindication of public justice; an action is brought for compensation for private injury. The object of the two proceedings is entirely distinct, and the one should not interfere with the course of the other. Wheatley *v.* Thorn, 23 Miss. 62; Wolff *v.* Cohen, 8 Rich. (N. C.) 144. (See on this subject, however, as regards exemplary damages, *ante*, 466, note, head p. 569.) In an action by a husband and wife for an assault and battery on the wife, previous misconduct of the husband cannot be received in mitigation. Jacobs *v.* Hoover, 9 Minn. 204. Nor, it seems, where the misconduct consisted in fraudulently obtaining possession of premises, and the assault and battery were perpetrated in forcibly turning out the fraudulent occupant, could such fraud be shown in mitigation of any real damages sustained by him. It could be received in mitigation of exemplary damages only, and then only where the fraud or its discovery was very recent and the defendant acted under the consequent excitement of the moment. *Ibid.* The wife's loss of time is no part of the injury for which compensation can be given. Her time and service belong to the husband, and for a loss of them he must sue alone. Barnes *v.* Martin, 15 Wis. 240. See also Kavanaugh *v.* The City of Janesville, 24 Wis. 618.

[1] In Illinois, in trespass, evidence tending to repel the presumption of malice is admissible in mitigation of exemplary damages. Gray *v.* Waterman, 40 Ill. 522; Reeder *v.* Purdy, 41 *Ibid.* 279. So also in trespass *vi et armis*. Roth *v.* Smith, 41 *Ibid.* 314. And false imprisonment. Donnelly *v.* Harris, 41 *Ibid.* 126.

damages.*[1] And such we have already seen to be the law in regard to the action of trover.†[2] For the same reason as in that action, therefore, if the property has been returned without injury to the plaintiff before action brought, he can only recover nominal damages; and if special damage intermediate the trespass and the return is demanded, it would seem that it should be specially alleged.‡ So in Massachusetts, where the plaintiff, before suit, demanded the goods, and the defendant promised to return them, but they were attached on a writ against the plaintiff while the defendant was preparing to return them, the measure of damages has been held to be the same that it would have been if the defendant had returned the goods.‖ So, on the same principle, it has been held in the same State, that the defendant may prove in mitigation that the goods did not belong to the plaintiff, and that they have gone to the use of the true owner.¶[3]

I think that the principle of these decisions has been carried quite far enough. It is of importance to draw the line between good and bad faith; where the party acts with pure motives, and endeavors as soon as possible to repair his mistake, it may be very proper to construe his conduct favorably; but it will not do to permit acts of wilful or wanton trespass to be excused by the defence of outstanding titles in third persons. It would lead directly to that reckless interference with the property of others which the law always sedulously seeks to prevent. This distinction is well laid down in a case in New York, where it was held that where property tortiously taken by one person from the possession of another, is subsequently levied upon whilst in the hands of the tort feasor, by a third person, under a warrant of distress for rent due by the owner, such last taking may be shown in mitigation of damages in an action by the

* Bac. Abr. 628; Vosborgh *v.* Welch, 11 J. R. 175; Gibbs *v.* Chase, 10 Mass. 125; Hanmer *v.* Wiley, 17 Wend. 91.

† *Ante*, 492, and cases there cited.

‡ Moon *v.* Raphael, 2 Bing. (N. C.) 310.

‖ Kaley *v.* Shed, 10 Met. 317.

¶ Squire *v.* Hollenbeck, 9 Pick. 551; City of Lowell *v.* Parker, 10 Met. 309.

[1] Hibbard *v.* Stewart, 1 Hilt. 207. See Pratt *v.* Battels, 28 Vt. 685, 688.

[2] The rules of mitigation in trespass and trover generally are and always should be the same where either action is brought for the same offence. See *ante*, 492, head p. 614, note 2. And the fact that property taken by a trespasser has been appropriated to the owner's use by his consent, expressed or implied, goes in mitigation; and it is said in Illinois that such consent is always implied where the property has been legally seized and sold under process in favor of a stranger, or of the trespasser against the owner. Bates *v.* Courtwright, 36 Ill. 518.

[3] Criner *v.* Pike, 2 Head (Tenn.), 398. So in the case of an executor *de son tort*, who is liable for the value of goods appropriated by him (see Baysand *v.* Lovering, 1 Cr. C. C. R. 206), it was long ago held by Lord Holt, that although "he cannot plead payment of debts, etc., to the value, etc., or that he hath given the goods, etc., in satisfaction of the debts. . . . nevertheless, upon the general issue pleaded, such payments shall be recouped in damages." Whitehall *v.* Squire, Carthew, 103.

owner against the tort feasor, *if the latter took the property under an honest belief that he had a title to it, and not for the purpose of subjecting it to a landlord's warrant.** [1] [549]

PAYMENT OF PLAINTIFF'S DEBTS BY TRESPASSER.—And so in Pennsylvania, it has been held that a sheriff who has wrongfully levied on and sold the goods of the plaintiff, will not be permitted to give in evidence, in mitigation of damages, that he has voluntarily applied part of the proceeds of the sale to the payment of a debt of the plaintiff, the court saying, "It is the naked case of a voluntary payment out of the proceeds of a debtor's property wrongfully converted, but not at the debtor's special instance and request. Every one has a right to adjust his own liabilities, and no one has a right to make another his debtor by interference with his affairs."† [2]

PLAINTIFF'S ACTS OF OWNERSHIP.—Where the goods taken are inclosed in boxes, the mere opening of the boxes subsequently by the owner, to enable a witness to appraise the value of the goods, is not such a resumption of the property as will justify a mitigation of damages.‡

ILLEGAL AND NOXIOUS PROPERTY.—The character of the property may be such that the law will not give it any protection at all, or at best a partial one. In an action for trespass for cutting and destroying a picture, it appeared that it was a valuable painting, but it also appeared that it was a gross libel on the defendant's sister; and Lord Ellenborough told the jury that they must only award the value of the canvas and paint which formed its component parts. ‖

So, where trespass was brought against officers of the cus-

* Higgins *v.* Whitney, 24 Wend. 379; Otis *v.* Jones, 21 Wend. 394.

† McMichael *v.* Mason, 13 Penn. State R. 114, and Dallam *v.* Fitler, 6 W. & S. 323.

‡ Connah *v.* Hale, 23 Wend. 462.

‖ Du Bost *v.* Beresford, 2 Camp. 511. See also, Davis *v.* Nest, 6 Car. & P. 167.

[1] See Sherry *v.* Schuyler, 2 Hilt. 204. And see *ante*, 536, note; Toms *v.* Wilson, 32 L. J. (N. S.) Q. B. 382.

[2] So in the same State where property wrongfully seized is sold pending the suit for the trespass, and bought in by the owner at less than its real value, his right to recover the full value from the trespasser is unaffected by the purchase. Eby *v.* Schumacher, 29 Penn. St. 40. And, as we have seen in trover, where the plaintiff has regained the property, he is entitled to the damages sustained by his temporary deprivation of it and the expense of getting it back. See M'Inroy *v.* Dyer, 47 Penn. St. 118; *ante*, 492 (head p. 614), note. But where a sale of goods was made by a debtor in violation of the State insolvent laws, and the goods while in the purchaser's hands were attached by a creditor who held them till the institution of proceedings in insolvency and the choice of an assignee, and then delivered them to the assignee, these facts were allowed in mitigation in an action of tort brought by the purchaser against the attaching creditor. Leggett *v.* Baker, 13 Allen, 470.

toms for taking a portfolio and drawings, it has been held by the King's Bench, that the defendant may justify by showing that the portfolio contained drawings liable to seizure for non-payment of duty, which the plaintiff was in the act of carrying ashore out of a foreign packet. The jury found one farthing damages. On this the plaintiffs were nonsuited, and the court refused liberty to enter a verdict for the amount found.*

MALICIOUS PROSECUTION.[1]—We have already partially discussed the action for malicious prosecution.† [2] Where partners sue for torts committed on them as a firm, as in cases of [550] libel or malicious prosecution, it is well settled that no damages can be given for any injury to the private feelings of the plaintiffs. The act complained of must affect the joint business or trade of the copartnership.‡

And it has been held in New York that the jury in this action cannot, upon the question of malice and in determining the amount of damages, take into consideration facts which establish against some of the defendants a case of false imprisonment, as such facts constitute a distinct cause of action, for which those defendants may be rendered liable in another suit.‖ [3]

WRONGFUL ATTACHMENT.—In Alabama, it has been decided that in an action for wrongfully and vexatiously suing out an attachment auxiliary to the main suit, to enable the plaintiff to

* De Gondouin *v.* Lewis, 10 Adol. & Ellis, 117.

† *Ante*, 96.

‡ Haythorn *v.* Lawson, 3 Car. & P. 196. See an elaborate and able exposition of this subject by the Supreme Court of Alabama, in Donnell *v.* Jones, 13 Ala. (N. S.) 490, 509. See this last case again, 17 Ala. 688.

‖ Carpenter *v.* Sheldon, 5 Sand. S. C. R. 77.

[1] Three sorts of damage will support an action for a malicious indictment, (1.) To a man's fame; (2.) To his person, as where he is put in danger to lose his life, or limb, or liberty; (3.) To his property, as where he is forced to expend money to acquit himself of the crime charged. Savile v. Roberts, 1 Ld. Raym. 374, *infra*, 558.

[2] It is well settled that in this action, evidence of the plaintiff's bad character is admissible in mitigation of damages. Fitzgibbon *v.* Brown, 44 Me. 169. Where the plaintiff has incurred the moral guilt of the crime of which the defendant sought to have him convicted, and escaped conviction on technical grounds, if he is entitled to recover anything in this action, it can be nothing more than the actual damages sustained by his arrest. Sears *v.* Hathaway, 12 Cal. 277. In an action against several defendants for malicious prosecution, the jury cannot, upon the question of malice, and in determining the amount of damages, take into consideration facts establishing against some of the defendants a case of false imprisonment. That constitutes a distinct cause of action for which those defendants may be rendered liable in another suit. Carpenter *v.* Sheldon, 5 Sandf. (N. Y.) 77. In an action for the malicious prosecution, without probable cause of a civil suit, the plaintiff can recover the damages sustained by him in defending the original suit in excess of his taxable costs. Closson *v.* Staples, 42 Vt. 209. See also, as to the evidence admissible in this action, Bacon *v.* Towne, 4 Cush. (Mass.) 217.

[3] It is said by Cockburn, C. J., that in estimating damages in an action for false imprisonment and malicious prosecution the jury must consider not only the sufferings and loss of the plaintiff, but also the necessity which exists for the occasional prosecution of innocent persons in order to prevent the escape of criminals from justice. Tully *v.* Corrie, 16 L. T. N. S. 796. If this observation of the very eminent judge be sound, it introduces into the rules of damages a quasi-political principle neither based on the notion of compensation nor on those of example and punishment, and one which we think has never before been distinctly recognized.

obtain a lien on property for the satisfaction of whatever judgment he might recover, the costs incurred in defending the original suit constitute no part of the plaintiff's damages;* but the counsel fees in the suit may be proven and considered by the jury.† And in this action, evidence of the plaintiff's profits, alleged to be lost by injury to his credit, has been admitted, not as a measure of damages, but as an ingredient in the cause, or to guide the discretion of the jury.‡

In the same State, on the issuing of an attachment, the plaintiff gives bond to pay the defendant "such damages as he may sustain by the wrongful or vexatious suing out of the attachment."[1] On these bonds it has been held that if the attachment be *wrongfully* sued out, the actual damage only can be recovered; but if both wrongfully and maliciously, then the party may have vindictive damages.‖[2]

* White *v.* Wyley, 17 Ala. 167.
† Marshall *v.* Betner, 17 Ala. 833.
‡ Donnell *v.* Jones, 17 Ala. 689.
‖ Sharpe *v.* Hunter, 16 Ala. 765.

[1] The measure of damages for a wrongful attachment is chiefly discussed in actions on the bonds required by law as a condition of the attachment, and is considered in that relation, *ante*, 397, head p. 488, note 2.

[2] Aside from the question of malice, the cardinal rule of indemnity is maintained in these actions. Thus, where wheat wrongfully attached advanced considerably in value pending the proceeding, but at the time of its redelivery to the defendant in the attachment, had declined to about the price it bore when the process was levied, it was held that he could not recover the difference between its highest market value pending the attachment, and its value at the time of the redelivery, without proof that he could or would have sold it at the advanced rate. Meshke *v.* Van Doren, 16 Wis. 319. Where, however, bonds and notes belonging to a bank were wrongfully attached, and declined in value pending the attachment, the defendants were held liable for the actual loss resulting from the sale at a price lower than would have been realized but for the attachment. Horn *v.* Bayard, 11 Rob. (La.) 259. So in a late case in Mississippi, the depreciation in the value of wheat pending an attachment was held to be the measure of damages for the wrongful suing out of the attachment. Fleming *v.* Bailey, 44 Miss. 132. See *ante*, 397, note.

The rules as to nominal damages (*ante*, ch. ii) apply here. Where, in Louisiana, an attachment against a vessel was released on the execution of a mortgage on her by her master, which mortgage was void by the laws of the State, and pending the suit in which the attachment was issued, the vessel passed into the hands of *bonâ fide* purchasers, but was not registered in the custom-house, and there was no other record evidence of the change of ownership, and after final judgment decreeing her to be liable, she was again seized by her attaching creditors, but released in four days without being delayed in the prosecution of her next voyage, it was held in an action by the owners for the wrongful seizure, that they were entitled to nominal damages only. The court said that they had no cause to complain that they were called to make proof of ownership in a thing apparently bound for the claim of the seizing creditor. Hunter *v.* Bennet, 15 La. Ann. 715. See also Groat *v.* Gillespie, 25 Wend. 383.

The general conclusion as to the damage to an owner of property from its detention or from his deprivation of its use by a wrongful application of a remedial process, is as follows. The inquiry should be limited to the actual value of the use, as for example the rent of real estate, the hire of chattels, or the value of the use of any other species of property in itself unproductive; and where the property is not productive, the injury from the deprivation of the use should be restricted to interest on its value. Beyond this, the damages would be conjectural, indefinite, and uncertain, and the plaintiff cannot recover them. If, however, the property is damaged, or if when returned it is of less value than when seized, in consequence of a depreciation in price, or from any other cause, for such difference the plaintiff is entitled to recover. It is said that the rule as to the fall in price would not be applicable to every species of property. But it would clearly apply to the case of goods kept for sale, not for mere use. See Reidhar *v.* Berger, 8 B. Monr. 160. Under a claim for the loss of the use of property, a verdict for its value cannot be sustained. Cox *v.* Robinson, 2 Rob. (La.) 313.

UNAUTHORIZED SUITS.— Akin to malicious prosecutions, though not identical with them, are unauthorized suits brought in the name of a party without his direction or consent. The action is in this case a groundless proceeding, irrespective of any merits it might have had if legitimately brought. The person so acting without authority, is liable to make good the damage sustained;[1] and it has been said that though the person in whose name it is brought would have had a right to maintain it, this circumstance will afford no reason for reducing the damages.*

DEATH OF HUMAN BEING.—We turn now to other trespasses. It appears that at common law, and independently of statutory provision, the death of a human being is not the ground of an action for damages. In a case where a plaintiff brought an [551] action against the proprietors of a stage-coach for negligent driving, by which his wife was killed, Lord Ellenborough said that, "in a civil court, the death of a human being cannot be complained of as an injury."† And so it has been held in Massachusetts, in a case where a widow sued a railroad company for negligence, by which her husband had been killed.‡

In New York, in an action on the case‖ for negligently running over and killing the plaintiff's son, a lad of ten years of age, the judge charged that the plaintiff was entitled to recover such sum by way of damages as they should be of opinion the services of the child would have been worth until he became twenty-one years of age. The case was carried up, but no question seems to have been distinctly made as to the correctness of this direction.[2] And in a subsequent case in the same State, where the plaintiff's infant child died within an hour and a half after the injury, Bronson, J., delivering the opinion of the Court of Appeals, said, "I have a strong impression that the father could recover nothing on account of the injury to

* Foster *v.* Dow, 29 Maine, 442.
† Baker *v.* Bolton, 1 Camp. 493.
‡ Carey and wife *v.* Berkshire R. R. Co., 1 Cushing, 475.
‖ Ford *v.* Monroe, 20 Wend. 210.

[1] The gist of the action is not malice, but the want of authority. But evidence of express malice on the part of the defendant towards the plaintiff, although not necessary, is still competent. If the plaintiff in such action disclaims any special damages for injury to his character, the defendant cannot attack it, either to rebut the evidence of malice or in mitigation of damages. Smith *v.* Hyndman, 10 Cush. (Mass.) 554.

[2] See also Drew *v.* The Sixth Avenue R. Co., 26 N. Y. 49. It is held in Michigan that a husband may maintain an action for the loss of his wife's services caused by an injury done her by the defendant's malpractice, notwithstanding the injury resulted in her death; but that the recovery should be only for the loss of her services between the injury and the death, and without including damages for her mental suffering. Hyatt *v.* Adams, 16 Mich. 180.

the child beyond the physician's bill and funeral expenses;" but the point was not decided.*

STATUTES.—The remissness of the common law in this respect has been cured by various statutes. In England, the 9 and 10 Vict. c. 93, provides that whenever the death of a person shall be caused by a wrongful act, and which would, if death had not ensued, have entitled the party injured to maintain an action, the party offending shall be liable notwithstanding the death. So, in Massachusetts,† if the life of any passenger is lost by the negligence, etc., of the proprietors of a railroad, etc., or of their servants, the proprietors shall be liable to a fine not exceeding five thousand dollars nor less than five hundred dollars, to be recovered by indictment, for the benefit of the widow and heirs.[1]

And in New York a statute‡ [2] provides that whenever the death of any person shall be caused by any wrongful act or neglect, the party who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the party injured, and although the act be felonious.[3] This statute is taken from the English [552] statute‖ above cited, commonly known as Lord Campbell's act; and the second section provides that the action is to be brought by the personal representatives of the deceased, and that, "in every such action the jury may give such damages as they deem a fair and just compensation, not exceeding five thousand dollars, with reference to the injuries resulting from such death, to the person." [4] I suppose that under this act

* Pack *v.* Mayor of N. Y. 3 Comstock, 489.

† Stat. of 1840, c. 80.

‡ Passed 13th of Dec. 1847. Laws of 1847 c. 450.

‖ 9 and 10 Vict. c. 93.

[1] See as to other kindred legislation in Massachusetts, *post*, 552, notes, and *ante*, 466 (head p. 568), note.

[2] Laws of 1847, ch. 450; Amended, Laws 1849, ch. 256.

[3] Where a passenger on a street railway car was killed in an unprovoked attack made on him by another passenger, who, although drunk and disorderly, had been permitted to remain in the car by the conductor, the widow of the deceased having recovered against the railway company a verdict to the full amount allowed by the statute, the judgment on the verdict,—which was affirmed by the Superior Court in *banc*,—was reversed by the Court of Appeals, on the ground that the circumstances did not show such neglect on the part of the defendant as to make it responsible. Putnam *v.* Seventh Ave. R. R. Co. New York Superior Court at Nisi Prius, November 22, 1872; and Court of Appeals, November 25, 1873, not yet reported.

[4] Money received by a widow on a policy of life insurance on the deceased, is not to be taken into account by the jury in assessing such damages under the New York statute. Althorf *v.* Wolfe, 22 N. Y. 355. But in England, at Nisi Prius, Lord Campbell held otherwise, and instructed the jury to deduct from the amount of the pecuniary loss sustained by the family the insurance they would be entitled to receive on a policy on the life of the deceased against accidents by railway. Hicks *v.* The Newport, Abergavenny & Hereford R. R. Co. 4 B. & S. 403, note. On principle, it should seem that the New York rule is the

the jury are not intended to give vindictive[1] or exemplary damages.* [2]

* See Smith, Adm'r, *v.* London & N. W. R. Co. 1 Code Reporter, 32.

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proper one. It has been lately approved by the Supreme Court of Vermont. Harding *v.* Town, 43 Vt. 536. And see the analogous rule in cases of loss by collision, *ante*, 469, note.

[1] Under these statutes exemplary damages are not generally recoverable. Penn. R. Co. *v.* Henderson, 51 Penn. St. 315; Cleveland & Pittsburgh R. Co. *v.* Rowan, 66 Penn. St. 393. In California, however, such damages are expressly allowed by statute. Stat. April 26, 1862, § 3; Hittell's Gen. Laws, 2327; Myers *v.* San Francisco, 42 Cal. 215.

[2] Under the English statute there must be some evidence of actual or prospective pecuniary loss. Where such is given, though indistinct as to amount, the jury have the right to determine the amount. Duckworth, Adm'r, *v.* Johnson, 4 H. & N. 653.

So, also, under the same act, the action was held maintainable, though all the decedent's income survived him as a whole, his estate of £4,000 a year passing to his eldest son, subject to a jointure of £1,000 a year to his wife and £800 a year to the eight younger children. The jury were to look separately to the interests of the respective members of the family, and if the death occasioned to any one of them the loss of the reasonable expectation of future pecuniary benefit, they were bound to consider such loss, and give damages accordingly. Pym, Adm'x, *v.* The Great Northern R. Co. 32 L. J. (N. S.) 377 (Exchequer Chamber); affirming s. c. in Q. B. 31 L. J. (N. S.) 249. Also, 4 B. & S. 396, affirming 2 B. & S. 759.

Statutes varying in details, but similar in purpose, to the English act have been passed in many of the States. Under most of them the recovery is limited to a fixed sum as $5,000 or $3,000. Pennsylvania, act April 26, 1855 (Laws 1855, p. 309); Brightly's Purdon's Dig. 1862, p. 754; Iowa, R. S. 1860, p. 705, § 4111 (2500); Code, 1873, p. 431, §§ 2526, 2527; Missouri, Gen. Stat. 1865, ch. 147, p. 601; Illinois, act Feb. 12, 1853, 3 Ill. Stat. ed. 1869, p. 60; Indiana, 2 Ind. Rev. Stat. 1862, 330, § 784; California, 1 Gen. Laws Cal. (1865), 2325; Kansas, Gen. Laws (1862), p. 80, (1868) p. 709; Code, § 422; Ohio, 2 R. S. Ohio (1860), p. 1139; Connecticut, Gen. Stat. tit. 1, §§ 97, 98; Rhode Island, Gen. Stat. 1872, ch. 193, § 21; Wisconsin, R. S. 1858, ch. 135, § 12; Maryland, Code, art. 65, §§ 1, 2; Vermont, Verm. Gen. Stat. 1863, ch. 52, § 15 (p. 391); New Jersey, Nix. Dig. 1868, p. 234, act March 3, 1848; North Carolina, N. C. Rev. Code, 1855, p. 65, ch. 1, § 9; South Carolina, R. S. 1873, p. 507, ch. 109, § 2; Oregon, Code, 1862, Gen. Laws, 1866, p. 241, § 367; Minnesota, Min. Rev. Stat. 1866, p. 546, ch. 77, § 2; Alabama, Ala. Rev. Code, 1867, §§ 2297, 2298; Mississippi, Miss. Rev. Code, 1871, p. 141, § 676; Nebraska, Gen. Stat. 1873, p. 272, ch. 15. In one or two of the States, as in Michigan, the statutory liability is confined to railroad companies. 1 Mich. Comp. L. 1871, ch. 75, pp. 771, 814, 815.

In most of the American acts, as in their English model, compensation for the pecuniary loss only is contemplated, and where such is the case, nothing is to be allowed for the suffering of the decedent, or the grief of his surviving relatives. Illinois Central R. Co. *v.* Baches, 55 Ill. 379; Illinois Central R. Co. *v.* Weldon, 52 Ill. 290; Penn. R. R. Co. *v.* Butler, 57 Penn. St. 335; Chicago & N. W. R. Co. *v.* Swett, 45 Ill. 197; Chicago & Alton R. Co. *v.* Shannon, 43 Ill. 338; Braunberger *v.* Cleis (Penn.), 4 Am. Law Reg. (N. S.) 587; Pennsylvania R. Co. *v.* Zebe, 33 Penn. 318; Pennsylvania R. Co. *v.* Kelly, 31 Penn. 372; Oakland Railway Co. *v.* Fielding, 48 Penn. 320; Pennsylvania R. Co. *v.* Vandever, 36 Penn. 298; North Penn. R. Co. *v.* Robinson, 44 Penn. 175; Ohio & Mississippi R. Co. *v.* Tindal, 13 Ind. 366; McIntyre *v.* The New York Cent. R. Co. 47 Barb. (N. Y.) 515; Donaldson *v.* The Mississippi & Missouri R. Co. 18 Iowa, 280; City of Chicago *v.* Major, 18 Ill. 349; Telfer *v.* Northern R. Co. 1 Vroom (N. J.), 188; State of Maryland, to the use of Mary Coughlan *v.* Baltimore & Ohio R. Co. 5 Am. Law Reg. (N. S.) 397; Quin *v.* Moore, 15 N. Y. 432; Lehman *v.* Brooklyn, 29 Barb. 234. Nor can anything be allowed for the bereavement or for *solatium*. Conant *v.* Griffin, 48 Ill. 410. Blake *v.* The Midland R. Co. 18 Q. B. 93. If the injuries are pecuniary, they may be compensated from whatever source they proceed. The jury are held to no precise rule. Tilley *v.* The Hudson R. Co. 29 N. Y. 252. Compensation may be given for the loss of a parent's care and training to the surviving children. *Ibid.* The sound sense of the jury, it is said, must ascertain the pecuniary value of the life, from the evidence, as best they may. Penn. R. Co. *v.* Keller, 67 Penn. St. 300. And it is not necessary to the maintenance of the action that the person to be indemnified should have had a *legal* right to some pecuniary benefit which would have resulted from the continuance of the decedent's life. Oldfield *v.* N. Y. & Harlem R. Co. 14 N. Y. 310; Pennsylvania R. Co. *v.* McCloskey's Adm'r, 23 Penn. St. 526; Pennsylvania R. Co. *v.* Bantom, 54 Penn. St. 495. If the services of the deceased *might have been* of some value to the next of kin, a nonsuit should not be directed. McIntyre *v.* New York Cent. R. Co. 43 Barb. 532.

In England it has been held, that the rule of the common

So it was lately held by the New York Court of Appeals, that the jury would not be restricted to nominal damages, although there were no direct proof of pecuniary loss. Dickens *v.* New York Central R. Co. 1 Abb. Ct. App. Decisions, 504.

So again, specific proof of the wages paid at the time of the death is not necessary to entitle the plaintiff to substantial damages. Balt. & Ohio R. R. Co. *v.* State, use of Kelly, 24 Md. 271. Nor are the damages limited to the actual pecuniary loss proved. Ihl *v.* Forty-second street and Grand street R. R. Co. 47 N. Y. 317. And in Pennsylvania, in an action by a husband for his wife's death by the defendant's negligence, a charge instructing the jury that they should measure the plaintiff's damages by a just estimate of the services and *companionship* of his wife in a pecuniary sense, was held,—although "perhaps not the best selection of words,"—not erroneous. Penn. R. Co. *v.* Goodman, 62 Penn. St. 329. And the damages should be calculated with reference to a reasonable expectation of pecuniary benefit, as of right *or otherwise* from the continuance of the life. In an action by a father for injury resulting from the death of his son, it appeared that the father was old and infirm, and that the son, who was young and earning good wages, assisted his father in some work, for which the father was paid 3*s.* 6*d.* a week. The jury having found that the father had a reasonable expectation of pecuniary benefit from the continuance of his son's life, the court held that the action was maintainable. Franklin, Adm'r, *v.* The South Eastern R. Co. 3 H. & N. 211. See, to the same purpose, Dalton *v.* The Same, 4 C. B. (N.S.) 296; 27 L. J. R. C. P. 227.

In estimating the damages, the jury should consider the exact situation, annual earnings, health, habits, family, and estate of the deceased. The Chicago and Rock Island R. R. Co. *v.* Morris *et al.* Adm'rs, 26 Ill. 400; Balt. & Ohio R. R. Co. *v.* State, use of Kelly, 24 Md. 271; Kesler *v.* Smith, 66 North Car. 154. Some proof should be given of the profits of the labor of the deceased, and what he might have in all probability earned for his wife and children's support. Ill. Cent. R. Co. *v.* Weldon, 52 Ill. 290 (*supra*). The injury to the widow from the loss of her husband's care, protection, support and assistance, may be considered by the jury. City of Atchison *v.* Twine, 9 Kansas, 350. These statutes are usually for the exclusive benefit of the widow and next of kin, and where, as in New York, such is the case, the husband suing as administrator of his wife cannot recover the value of her services to him. Dickins *v.* The New York Central R. Co. 23 N. Y. 158. And it is held in Ohio, where the provision of law is the same, that pecuniary damage will not be presumed except where it is for the benefit of the widow and *children*. Adm'x of Michael Durhene, deceased, *v.* The Ohio Life and Trust Co. Disney, 257. See Lucas *v.* The N. Y. Cent. R. Co. 21 Barb. 245; Green *v.* Hudson R. R. Co. 32 Barb. 25.

The damages are not to be estimated by the value of the decedent's life, according to the annuity tables, but the jury are to give what they think a reasonable compensation. Armsworth *v.* South Eastern Railw. 11 Jur. 758. But in Georgia it is said that the jury, after ascertaining what would be a reasonable support to the wife, according to her husband's circumstances in life, and taking into view his character, habits, occupation, and prospects, should give as damages the worth of his life as ascertained by mortuary tables of well established reputation. Macon & Western R. Co. *v.* Johnson, 38 Geo. 410. And in an action under Lord Campbell's act, where the deceased had been *under a covenant to pay his mother an annuity* of £200 during their joint lives, it was lately held material to know what, according to the experience of insurance companies, the value of an annuity of that amount would be secured on an average life of his age; and the permission to a witness to refer for this purpose to the "Carlisle Tables," which were in use among life insurance companies, was held proper. Rowley *v.* London & North Western R. Co. L. R. 8 Ex. 221; L. J. R. N. S. 42, Exch. 153. And in Iowa these "Tables" are held admissible to show the expectation of life of the deceased at the time of the accident. Donaldson *v.* Mississippi and Missouri R. Co. 18 Iowa, 280.

The funeral and mourning expenses of a child are not allowed the parent. Boulter *v.* Webster, 13 Weekly R. 289. But in Pennsylvania, funeral expenses, as well as nursing and medical expenses, if any were incurred before death, are included. Cleveland & Pittsburgh R. Co. *v.* Rowan (*supra*); Railroad Co. *v.* Bantom, 4 P. F. Smith, 495.

Under the American as well as English statutes, prospective loss may be compensated. Oldfield *v.* N. Y. & Harlem R. Co. 14 N. Y. 310; Tilley *v.* The Hudson R. R. Co. 29 N. Y. 252. So in Ireland, in an action by a widow for the death of her son, aged 14, who had never earned any money, but whose capabilities were valued at sixpence a day, the probability that he would have earned more, or would have devoted part of his earnings to her support, may be considered by the jury on the question of damages. Condon *v.* The Great Southern and Western R. Co. 16 Ir. Law R. (N. S.) 415. Prospective damages for the loss occasioned by the death of a child are usually limited by what would have been the period of minority. State of Maryland to use of Coughlan *v.* Baltimore and Ohio R. cited above. And such damages must be specially alleged. Gilligan *v.* New York and Harlem R. Co. 1 E. D. S. (N. Y.) 453. But in an action by the father as administrator of his wife, there is no sufficient legal reason for limiting the damages sustained by the chil-

law is applicable to this statute; that the action is to be treated

dren for the loss of her care to their minority, if the jury are legally persuaded they would continue afterwards. Tilley *v.* The Hudson River R. Co. 29 N. Y. 252. See, as to the practice and pleading in these actions, Baker *v.* Bailey, 16 Barb. (N. Y.) 54; Safford *v.* Drew, 3 Duer, 627, 640; Lynch *v.* Davis, 12 How. Pr. R. 323.

As the damages should be confined to compensation for the pecuniary loss, it is erroneous to leave the question of the amount to the uncontrolled discretion of the jury. The Pennsylvania R. Co. *v.* Vanderver, 36 Penn. 298. But in such a case, it is not error for the court, after laying down the rule of law, to tell the jury that much is left to their sound discretion. Penn. R. Co. *v.* Ogier, 35 Penn. 60. And a refusal to charge that "if the deceased was largely indebted at the time of his death, the plaintiff would have no pecuniary interest in his life till his debts were paid," is proper. *Ibid.* But in Massachusetts it has been held in a widow's action for her husband's death, the fact that she has children dependent upon her, does not go to enhance the recovery. Shaw *v.* Boston and Worcester R. Co. 8 Gray, 45. Evidence of the defendant's wealth is inadmissible. Conant *v.* Griffin, 48 Ill. 410, *supra.*

To recover, the plaintiff must show that the deceased came to his death without fault on his part. Curran *v.* Warren Chemical and Manf'g Co. 36 N. Y. 153. But to defeat the right of action, the negligence must have been that of the deceased. That of his fellow-servants does not affect it. Paulmier *v.* Erie R. Co. 34 N. J. (5 Vroom.) 151.

These statutes, it is held in New York, do not apply where the injury is committed in a foreign State. Whitford *v.* Panama R. R. Co. 23 N. Y. 465; Mahler, Adm'x, *v.* Norwich & New York Transportation Co. 45 Barb. 226.

Under the Massachusetts statute, which simply provides that actions of tort for damage to the person shall survive (Laws, 1842, c. 89, § 1; Gen. Stat. 1860, ch. 127, p. 648, § 1), the Supreme Court of that State, influenced perhaps by the rule at common law in analogous cases (see Osborn *v.* Gillett, L. R. 8 Exch. 88), have held that no action lies where the death ensued instantaneously on the injury. This is on the ground that no right of action ever *accrued* to the deceased, and none consequently could survive. Kearney *v.* The Boston and Worcester R. Co. 9 Cush. 108. And under a similar statute in Tennessee (Tenn. Code, art. 15, § 2291), a corresponding decision has been made. Louisville and Nashville R. Co. *v.* Burke Adm'x, 6 Coldwell (Tenn.), 45. With great deference, however, it may be observed, that as the death must always be really later in point of time than the injury which produced it, however inappreciable to our perceptions may be the interval, the mere difference in duration of this interval ought not to affect a right of action which *would otherwise* exist. And where the decedent survived a few hours, although perhaps unconscious, it was held that the action could be maintained. Hollenbeck *v.* Berkshire R. Co. 9 Cush. 478. And in Connecticut, the decision in Kearney *v.* The Boston and Worcester R. Co. (*supra*), has been pronounced "nice and technical," and under the statute of that State (Conn. R. S. 1866, p. 22, § 98), which is similar, although more specific, as providing in terms that the action shall survive, notwithstanding that the death result from the same injury which is the ground of the action, it is held that the suit may be maintained, although the death was instantaneous. Murphy *v.* New York and New Haven R. Co. 30 Conn. 184.

An authoritative construction has been given to these acts by the Supreme Court of the United States, and a broad and untechnical view taken of their remedial purpose, in a case arising under the law of Illinois, the provisions of which are the same with those of New York already cited. The defendant in error, executor of William T. Barron, deceased, brought his action against the plaintiff in error for damages occasioned by the death of his testator, caused by the negligence of the defendant below.

The testator was a bachelor, about thirty-five years of age, and owned an estate worth from $30,000 to $40,000. The plaintiff was his father, and he left brothers and sisters, one of whom had formerly received some assistance from him for her support. A verdict of $4,000 having been found for the plaintiff and judgment entered thereon, the company took out a writ of error to this court, on the argument on which, it was insisted, that in order to recover more than nominal damages, it was necessary to show that there were next of kin in existence, entitled to claim the indemnity given by law, and that they had sustained a pecuniary loss justifying the claim. It was urged, that as the intention of the act under which the action was brought, was simply to compensate the widow and next of kin of the person killed for the pecuniary injury they sustained by his death, if the death caused them no pecuniary injury, the act gave them no damages. His next of kin could not properly be said to sustain any pecuniary loss by his death. Indeed, instead of a pecuniary loss to them, his death gave them an estate of great value, which otherwise they might never have received.

But the court, after remarking on the absence of a fixed measure of compensation, and the large discretion allowed the jury in these actions, as in others for personal injuries, overruled these suggestions. "A suit is given" by the act, said Mr. Justice Nelson, in delivering its opinion, "against the wrong-doer in every case by the representative for the benefit of the

as if the injured party had brought it; and that if his negligence contributed to the disaster, the plaintiff cannot recover.* Such, too, is the doctrine in this country. So in New York, where a lunatic in charge of his father was killed by being run over by a railway car; but it appeared that his death was owing not to the negligence of the railway company or its agents, but to the carelessness of the father of the lunatic,—it was held that no recovery could be had. †

EXCEPT IN AGGRAVATED CASES, THE RELIEF IN TRESPASS SHOULD BE RESTRICTED TO COMPENSATION.—In regard to personal trespasses generally, they are so frequently accompanied by circumstances of aggravation that the question of strict compensation is rarely raised.[1] But even in this class of cases, we find the same effort to restrict the relief within legal limits.[2]

* Tucker *v.* Chaplin, 2 Kar. & Kir. 730.

† Willetts *v.* Buffalo and Rochester R. R. Co. 14 Barb. S. C. R. 585.

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widow and next of kin, where if death had not ensued, the injured party could have maintained the suit. The only relation mentioned by the statute to the deceased essential to the maintenance of the suit, is that of widow or next of kin; to say they must have a legal claim on him for support, would be an interpolation in the statute, changing the fair import of its terms." The Illinois Central Railroad Co. *v.* Barron, 5 Wallace, 90.

[1] In actions of tort for a personal injury, the amount of damages is entirely in the discretion of the jury, subject to supervision by superior court of law, if unreasonably large or unreasonably inadequate. Per Bell, J., in Rowley *v.* London and North Western Railway Co. L. R. 8 Ex. 221; Huelsenkamp *v.* Citizens' Railway Co. 34 Mo. 45; see Ihl *v.* 42d St. R. R. Co. 47 N. Y. 417. See *ante*, head p. 566, n. 1.

[2] The general rule is that a man is answerable for the consequences of a fault which are natural and probable, and not beyond this. McGrew *v.* Stone, 53 Penn. St. 436; Sharp *v.* Powell L. R. 7 C. P. 258; Putnam *v.* 7th Ave. R. Co. N. Y. Ct. Appeals, Nov. 25, 1873.

The damages for a personal injury in cases of simple trespass free from malice, or of simple negligence (where the rule seems to be the same), should, as far as a money standard is applicable, be such as to compensate the injured party for such loss of time, medical and other expenses, physical pain, and, as it seems, also mental distress, as are fairly and reasonably the plain consequences to him of the injury. Peoria Bridge Association *v.* Loomis, 20 Ill. 235; Hunt *v.* Hoyt, 20 Ill. 544; Maine *v.* The Inhabitants of Ellsworth, 32 Me. 271; Morse *v.* The Auburn and Syracuse R. Co. 10 Barb. (N. Y.) 621; Ransom *v.* N. Y. and Erie R. Co. 15 N. Y. 415; Keyes *v.* Devlin, 3 E. D. S. (N. Y.) C. P. R. 518; West *v.* Forrest, 22 Mo. 344; Bannon *v.* Balt. & Ohio R. R. Co. 24 Md. 108. The latter element of compensation is very clearly justified by the decisions in the State of Connecticut, which hold that the plaintiff is entitled to a pecuniary equivalent for the apprehensions and anguish of mind naturally excited by the risk and danger at the time of the injury. Seger *v.* Barkhamsted 22 Conn. 390; Masters *v.* Town of Warren, 27 Conn. 293; Lawrence *v.* Housatonic R. Co. 29 Conn. 390. So, also, in California, Fairchild *v.* Cal. Stage Co. 13 Cal. 599.

Since the foregoing observations appeared in the fourth edition of this work, it has been denied by the Supreme Court of Nevada that in estimating the damages for an injury from negligence, the jury may consider "pain of mind" as distinct from "bodily suffering." Johnson *v.* Wells, Fargo & Co. 6 Nevada, 224. But although such suffering cannot be made an independent ground of action, the doctrine is generally recognized as we have stated it. "Mental pain or anxiety," observes Lord Wensleydale, "the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone; though where a material damage occurs, and is connected with it, it is impossible that a jury in estimating it should altogether overlook the feelings of the party interested." Lynch *v.* Knight, 9 H. of L. Cases, 577, 598. So in Pennsylvania, Massachusetts, New Hampshire, Maryland, New York, Georgia, and Indiana, it is held that in actions for a personal injury, mental as well as bodily pain enters into the damages to be compensated. Pennsylvania and Ohio Canal Co. *v.* Graham, 63 Penn. St. 290; Smith *v.* Holcomb, 99 Mass. 552; Holyoke *v.*

FALSE IMPRISONMENT.—So in New York, it has been held that evidence of the value of the services of an attorney, in getting rid of an illegal arrest, is not admissible in an action of false imprisonment brought for such arrest, where such expenses are not

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Grand Trunk Railway, 48 N. H. 541 (*supra*); Stockton *v.* Frey, 4 Gill (Md.), 406; Matheson *v.* N. Y. Cent. R. Co. 62 Barb. 364; Smith *v.* Overby, 30 Geo. 241; Cox *v.* Vanderkleed, 21 Ind. 164; *ante*, 547, note. See also, Gould *v.* Christianson, B. & H. 507.

So in an action for false imprisonment, "injury to the feelings" and "anxiety of mind" were held by the Circuit Court of the United States for the District of California, subjects of damage to be compensated for. McCall *v.* McDowell, Deady, 233. So, as we have seen in the action for seduction, it is quite settled that damages may be given for injured feelings (*ante*, 543), and although this action is an exceptional one, the allowance of this item of compensation rests on the same grounds on which it is permitted in other cases of personal injury. So in an action for an indecent assault on a female person, her sufferings of mind are held a fair subject for consideration by the jury. Ford *v.* Jones, 62 Barb. (N. Y.) 484. So again in actions of slander, injuries to the feelings are recognized as a legitimate subject of compensation. *Ante*, 539, n. So also it is held they may be considered in the case of wilful trespasses to real estate. Meagher *v.* Driscoll, 99 Mass. 281, *post*, 554, n. It is sometimes said that damages for mental suffering cannot be included in the recovery unless the injury be wilful. Ill. Cent. R. R. Co. *v.* Sutton, 53 Ill. 397; 2 Greenl. Ev. § 269. But this is not the uniform, nor perhaps the general rule, as will be seen by reference to the actions against carriers and some of the other cases above referred to.

The character of the plaintiff cannot be considered in estimating his damages. Johnson *v.* Wells, Fargo & Co. 6 Nev. 224 (*supra*). Nor can he augment them by proving he has a wife and several small children. Stockton *v.* Frey, 4 Gill (Md.), 406. Nor are they affected by his wealth or poverty. Shea *v.* Railroad, 44 Cal. 414.

No deduction is to be made from the verdict because of any charitable aid the plaintiff may have received. Norristown *v.* Moyer, 67 Penn. St. 355; see *ante*, 39 (head p. 36).

If the injury be permanent, compensation should be given for the future as well as present disability. Tiler *v.* New York Cent. R. R. Co. 49 N. Y. 42; Toledo, Wabash and Western R. Co. *v.* Baddeley, 54 Ill. 19; Frink *v.* Schroyer, 18 Ill. 416; Slater *v.* Rink, 18 Ill. 527; Passenger Railway Co. *v.* Donohue, 70 Penn. St. 119; Kansas Pacific R. Co. *v.* Pointer, 9 Kansas, 620; City of Chicago *v.* Langlass, 52 Ill. 256; Fair *v.* London and Northwestern Railway Co. 21 L. T. (N. S.) 326; 18 W. R. (Q. B.) 66; Holyoke *v.* Railway, 48 N. H. 541. Loss of health is to be compensated. *Ibid.* Weisenberg *v.* The City of Appleton, 26 Wisc. 56.

So in an action for the loss of an arm of an infant, eighteen months old, the court refused to set aside a verdict of $8,000 as excessive. Schmidt *v.* The Milwaukee and St. Paul R. Co. 23 Wisc. 186. Damages for permanent deformity, resulting from an injury, may be allowed (Karr *v.* Parks, 44 Cal. 46), but not the expenses of surgical operations undertaken after the wound is healed, for the purpose of removing the blemish. *Ib.*

Evidence of the plaintiff's habitual drunkenness incapacitating him for labor, is proper in reference to the amount of the compensatory damages he should receive for a permanent disability. Cleveland and Pittsburgh R. Co. *v.* Sutherland, 19 Ohio St. 151.

And in ascertaining the proper amount in case of permanent disability, it is proper for the jury to inquire into the nature of the plaintiff's previous occupations (City of Ripon *v.* Bittel, 30 Wisc. 614; Nebraska City *v.* Campbell, 2 Blackf. 590), and the kind and amount of the physical and mental labor to which he has been accustomed. Ballou *v.* Farnum, 11 Allen, 73; Caldwell *v.* Murphy, 1 Duer, 233; affirmed, 1 Kern. 416. In determining this item of compensation, the profits of a future business of which he has been deprived, are in general too remote as an element in the estimate of the damages (*Ibid.*), although it has been said that he is entitled to recover for the diminution of the receipts of his business resulting from such inability to attend to it as the injury caused him. Kinney *v.* Crocker, 18 Wis. 74. This latter point is distinctly held in Hanover R. R. Co. *v.* Coyle, 55 Penn. 396. The plaintiff in that case was a peddler, and on the trial below offered to prove the nature and character of his business, the extent of his loss of time, also of the percentage on the goods sold by him in his usual course of business, the loss of interest of money received for the same, in consequence of the injuries received, and the annual amount of sales made by him. The evidence was admitted against the objection of the defendant, who excepted. On error it was held by the Supreme Court that the evidence had been correctly admitted as bearing directly upon the question of damages in affording a means of computing the plaintiff's loss for the time he was confined by his injuries and prevented from carrying on his business.

Where successive actions may be brought for a continuous wrong, as in the case of a continued trespass upon land, the damages in each suit are very properly limited to those sustained by the plaintiff at its commencement; but for an injury to the person resulting from

specifically laid in the declaration; expenses thus incurred [1] not being the legal and natural consequences of the act complained of.* [2]

* Strang *v.* Whitehead, 12 Wend. 64.

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a single act, a single action only can be brought, and it would therefore be manifestly unjust not to take into consideration upon the trial the nature and extent of the injury in all its consequences; since by not so doing, the plaintiff in many cases would be deprived of the larger portion of the compensation he might justly claim, and the damages given be wholly disproportioned to the injury sustained. Caldwell *v.* Murphy, *supra.*

Such *future* bodily *pain* also as is reasonably certain to result should be compensated. Aaron *v.* Second Ave. R. Co. 2 Daly (N. Y.), p. 127.

The expenses of living cannot be included in the damages in addition to the value of the plaintiff's time. Graeber *v.* Derwin, 43 Cal. 495.

Much latitude is necessarily given the jury in these cases, and the Supreme Court of California in enlarging upon the sound and familiar rule that courts will not disturb the verdict in cases of personal tort unless it is obviously not the result of cool and dispassionate deliberation, broadly declares that in such actions "the law does not attempt to fix any precise rule for the admeasurement of damages, but from the necessity of the case leaves the assessment to the good sense and unbiassed judgment of the jury." Aldrich *v.* Palmer, 24 Cal. 513. To the same purpose is Wheaton *v.* North Beach & Mission R. Co., 36 Cal. 590. So, the Supreme Court of the United States say that in these actions "there can be no fixed measure of compensation for the pain and anguish of body and mind, nor for the loss of time and care in business, or the permanent injury to health and body." Illinois Central R. Co. *v.* Barron, 5 Wallace, 90, *supra.* The considerations, however, already stated, should be pointed out by the court whenever applicable, and the jury should not disregard or overstep them. But the court can never confine a jury to either nominal or special damages if there has been a real personal injury, and every deprivation of liberty is so regarded. It is for the jury themselves to determine whether the circumstances should reduce the recovery to a minimum. Therefore, where the plaintiff, in an action for false imprisonment, had not been locked in a cell, but allowed free range within the limits of the jail yard, and had his meals at the jailer's table, it was held erroneous to instruct the jury that he was entitled only to recover damages for the loss of his time. Page *v.* Mitchell, 13 Mich. 63. And see Josselyn *v.* M'Allister, 22 Mich. 300. So where one is illegally arrested for dishonestly purchasing goods without intending to pay for them, he is entitled not merely to nominal damages, but such as he actually suffered. Tefft *v.* Windsor, 17 Mich. 486.

[1] In an action for injuries to the plaintiff and his horse and carriage driven by him, caused by a defect in the highway, both items of damage were held properly included in one action, and in estimating the latter the jury were permitted to consider the length of time that elapsed before the horse recovered from his injury so far as to be fit for use, the length of time necessary for the repair of the carriage, and in connection with this, the necessary expense of having another for use meanwhile, if that was the most prudent and economical course to adopt. Johnson *v.* Holyoke, 105 Mass. 80. In Maine, however, the allowance of damages from the loss of *use* of a stage coach, during the period required for repairs, caused by an injury from a defect in the highway *was disallowed.* McLaughlin *v.* City of Bangor, 58 Me. 398; see *ante,* head p. 559, n. 2; and *post,* 569, head p. 722.

[2] Costs actually paid in the former action and properly alleged are recoverable. Pritchet *v.* Boevey, 1 Cro. & M. 775. And in Wisconsin it is held that under a proper averment, counsel fees in procuring the plaintiff's discharge may be recovered if the plaintiff was liable for them, although they had not been actually paid. Bonesteel *v.* Bonesteel, 30 Wis. 511. "Where a party," said Erle, C. J., in the case of Bradlaugh *v.* Edwards, 11 C. B. 377, "has been illegally imprisoned, and has been put to expense in procuring his discharge, he may very well urge that fact before the jury as an aggravation, but he has no right to demand to be reimbursed *ex debito justitiæ.*" And the court refused to grant a new trial on the ground that the plaintiff had incurred an expense of £7 14*s.* in procuring his discharge from custody at a police station where he had been detained on a charge of assault which proved unfounded.

It has been held, however, in New York, that in an action for false imprisonment, the plaintiff may recover damages for the time spent, and expenses incurred, in procuring his discharge upon habeas corpus, where the application for the discharge was not palpably unnecessary. It does not appear, from the opinion, that these damages were specially alleged. Blythe *v.* Tompkins, 2 Abbott's Pr. R. 468. So where the plaintiff, who had been committed to jail for manslaughter, by a coroner's warrant, was afterwards admitted to bail, and subsequently got the inquisition under which he had been committed quashed, it was held, in an

JUSTIFICATION IN THIS ACTION.—An action of trespass being brought for false imprisonment, and a plea that the defendant had committed a felony being put in, it was held not to be a misdirection, that the judge told the jury that the putting of such a plea on the record was a persisting in the charge comtained in it, and was to be taken into account by them in estimating the damages.* [1]

In an action of false imprisonment, the defendant had given the plaintiff into custody on a charge of felony. The magistrate heard the charge, and remanded the prisoner. It subse-
[553] quently appearing that the charge had been made under a mistake, the plaintiff was released. The declaration charged the first arrest and the remand as distinct acts of trespass, and damages were given for both, although the latter was the act of the magistrate, on the ground that the wrong-doer was responsible for it as the consequence of his wrongful act; but it was held erroneous, and a new trial was granted, on the ground that the defendant was not responsible for the act of the magistrate.†

ACTION FOR NEGLIGENCE—LOSS OF PERMANENT SITUATION.—Where the butler of a London club brought his action against an architect, employed to do repairs on the club-house, and his agents, and averred that they put in gas so negligently that it exploded, and crippled the plaintiff for life, and he was discharged for incapacity to do the duties of his place, it was insisted for the plaintiff that the measure of damages was the amount of money which would be required to purchase an annuity for the plaintiff adequate to the sum which he was receiving from the club; but Lord Abinger ruled otherwise; and after commenting on the fact that neither party was in actual fault,

* Warwick *v.* Foulkes, 12 Mees. & Wels. 507. † Lock *v.* Ashton, 12 Q. B. R. 871.

action against the coroner for false imprisonment, in which was alleged as special damage that he had been obliged to pay money in procuring his discharge from custody, that he was entitled to recover the costs of quashing the inquisition. Foxhall *v.* Barnett, 22 Eng. L. & Eq. 179.

So in Virginia, the plaintiff in this action may recover for the loss of time, the interruption to his business, his bodily and mental suffering, besides his costs and reasonable counsel fees in obtaining his release. Parsons *v.* Harper, 16 Grat. (Va.) 64.

[1] The fact that the defendant was advised to make the arrest by an ignorant and inexperienced attorney may be considered in mitigation. Mortimer *v.* Thomas, 23 La. Ann. 165. During the late civil war in the United States, the plaintiff having publicly and indecently exulted at the assassination of President Lincoln, was arrested pursuant to a general order of the defendant, who commanded a military department. The order was illegal, but was issued without malice, and was intended as a means of preserving the public peace. The plaintiff was held not entitled to exemplary damages. But having, during part of his imprisonment, been manacled and compelled to labor in common with other prisoners, his damages were enhanced on account of this treatment. On the other hand, the provocation of his disgraceful language was allowed in mitigation. McCall *v.* McDowell, Deady, 233.

said; "If it be asked that the jury are to give damages equal to an annuity, it may be demanded, what right has the plaintiff to calculate that he would have continued in office to the end of his life? I think it would be absurd to make the value of the annuity the measure of damages." *

We have already discussed the question, whether even in actions on the case for negligence, counsel fees can be estimated in the damages.†

LOSS OF SERVICE—FORMS OF ACTION.—In trespass for assault on the child or servant of plaintiff, the ground of action being the loss of service, the measure of damages is the actual loss which the plaintiff has sustained, and if illness follows, the expenses attending such illness;[1] but exemplary damages cannot be recovered. These last are only given to the injured child or servant, if he brings his action in his own name.‡ This has been so held in New York, in regard to an assault, and on technical reasoning appears just; but if this doctrine [554] be applied to cases of seduction, the remedy for that outrage, already but too imperfect, will be deprived of the only efficiency it possesses.[2] Nor is it improper in this connection to call attention again to the great incongruity and injustice resulting from the adoption of technical forms of action, and which in fact make legal rights depend on mere legal technicalities. The Supreme Court of New York appear to have been pressed by this difficulty in the case in question; for they say, in language already cited, "The action for seduction is peculiar, and would seem to form an exception to the rule that actual damages only can be recovered when the action is for loss of service consequential upon a direct injury; but there the party directly injured cannot sustain an action, and the rule of damages has always been considered as founded on special reasons only applicable to that case."

INJURIES TO FEELINGS.—It has been intimated that neither in actions of this description, nor for frauds, can damages be allowed

* Rapson *v.* Cubitt, 1 Car. & Marsh, 64 (9 Mees, & W. 710). I find an analagous case to this in the Scotch books. In Leven *v.* Young, action for defamation, in consequence of which the plaintiff was removed from his office, which was one dependent on the will of his superiors, it was held that the jury must take into consideration both the nature and tenure of the office, and not give the value of an annuity certain. 1 Murray, 350, 384.

† Lincoln *v.* Saratoga & Sch'y R. R. 23 Wend. 425; *ante*, 95, *et seq.*

‡ Whitney *v.* Hitchcock, 4 Denio, 461.

[1] So in other actions for injuries to a child. Pennsylvania R. R. Co. *v.* Kelly, 31 Penn. State R. 372; Pennsylvania R. R. Co. *v.* Zebe, 33 Penn. 318.

[2] It is now well settled, that exemplary damages may be had in these actions. *Ante*, 466, note 1, head p. 567; 542, and note.

for injury to feelings or reputation.*[1] In an action brought by a father for an assault on a son, *per quod servitium amisit*, the judge who tried the cause having charged that the jury in making up their verdict, might take into account the feelings of the parent, a new trial was ordered, on the ground that the suit, being for loss of service, and the child also having a right of action against the defendant, the direction was wrong. But in cases proper for exemplary damages, I suppose no such line as this can practically be drawn.

In Massachusetts, it has been held that under the provisions of their statute,† by which towns are made liable for injuries sustained by not keeping roads or bridges in repair, no damage can be given for fright or mental suffering resulting from *mere* risk or peril; but where an actual injury has been sustained, however small, attended by mental suffering, the jury can take that mental suffering into their estimate.‡[2] It is evident that the inquiry here becomes of a very metaphysical character.

Suits for Freedom.—During the existence of slavery in Virginia, the action in use for the recovery of the freedom of persons alleged to be slaves, was trespass *vi et armis*, for assault and battery, and false imprisonment. But the object was [555] simply to remove the claimant from the *status* of slavery to that of freedom. The form was fictitious, and the damages nominal; nor could the persons so held recover the profits of their labor for the time that they were illegally held in slavery, even though it was done with a full knowledge of their right to be free, and although the suit was protracted on frivolous pretexts.‖ In Louisiana, one held in slavery by a person who purchased him in good faith, believing him to be a slave, might recover against the latter wages for the time of his confinement in jail during the suit for freedom, with a fair allowance in addition as damages for the imprisonment; but no damages or wages were allowed for any period anterior to the institution of the suit.¶

* Richards *v.* Farnham, 13 Pick. 451.
† Rev. Stat. c. 25, § 22.
‡ Canning *v.* Inhabitants of Williamstown, 1 Cushing, 451.
‖ Peter *v.* Hargrave, 5 Grattan, 12.
¶ Coby *v.* Kock, 3 La. Ann. R. 439.

[1] Such damages, however, we think are now generally allowed. See *ante*, 552, head p. 699, n.

[2] In the case of wilful trespasses to real estate, the natural injury to the plaintiff's feelings may be taken into consideration as well as in other actions of tort. And in an action of trespass *q. c. f.* for the removal of a deceased child's remains from a lot in a cemetery, such injury was held a proper subject for compensation. Meagher *v.* Driscoll, 99 Mass. 281 (*ante*, 552 n.)

CONTROL EXERCISED BY THE COURT.—The power of the [556] court over the measure of relief is constantly exercised,[1] even in cases of fraud. This is invariably so as to remote and consequential damages. The rules in this respect we have already considered, and they are uniformly applied in cases of fraud as well as all others. So, in a case in England, where the defendant was sued for false representations in regard to the credit of his son, where it appeared that the plaintiffs had trusted the son for a length of time, and to an amount which might be considered ill-judged and excessive, even if the representations had been true,—Tindall, C. J., charged the jury, "As to the damages, the verdict must be for such damage as is justly and immediately referrible to the falsehood of the statement. The goods first purchased have been paid for, but six hundred pounds' worth since have not, and the son was made a bankrupt by the plaintiff in the month of October. You must say how much of this is justly and immediately referrible to the false statement. That is a problem which you must solve for yourselves. I will only make an observation, and that is, if they give the son an indiscreet and ill-judging credit, they cannot in fairness call on the father to be answerable for the loss occasioned by it." * The language of the eminent judge is particularly deserving of notice; for if, in cases of this kind, the principles that exclude remote damages are not adhered to, the whole subject of remuneration would be in the hands of the jury.[2]

FALSE REPRESENTATIONS.—So, where † case was brought for fraud and deceit in the sale of a vessel, which was represented to be British, whereas in fact she was Spanish, Story, J., before whom the cause was tried, held the rule of damages to be the difference between the value of the vessel if she had been what she was represented to be, and her actual value, together with such part of the costs of repairs laid out on her, on [557] faith of the false representations, as the jury should see fit to allow. He said:

* Corbett *v.* Brown, 5 C. & P. 363. † Sherwood *v.* Sutton, 5 Mason, 1.

[1] But the court must not in any degree usurp the province of the jury in deciding the facts. And where in an action for work and labor, and for goods sold and delivered, including a chandelier, the referee reported that the defendant's damage from a defect in the construction of the chandelier was *from* $12 *to* $15, but made no allowance for the defect, supposing he had no power to do so under the pleadings; and the general term of the Superior Court on appeal deducted $12 from the amount reported, the Court of Appeals of New York reversed the judgment on the ground that the Superior Court had no power to determine the amount of unsettled damages where this amount was necessarily indefinite, and ordered a new trial. Moffet *v.* Sackett, 18 N. Y. 522.

[2] See Collins *v.* Cave, 6 H. & N. 131, affirming 4 H. & N. 225 (Exch.).

"The true rule of damages in cases of this nature is, to allow the difference between the value of the vessel, if her real character had been known, and the price at which she was bought, under the faith of her being a vessel entitled *bonâ fide* to the privileges and benefits of such a *British* character. To this extent, at least, he has sustained a loss.[1] Now, it is in proof that, as a *Spanish* vessel, at the time of the purchase, she was not worth more than $500, that is, than the value of her materials, if she were broken up. As a British vessel, she was worth $1,500, and on the faith of the representations made of her possessing such character, the plaintiff gave that sum for her. The difference between the sums is a loss actually sustained by the plaintiff; for he had paid $1,000 more for the vessel than she was worth, and that upon a false representation of the defendant. But it further appears that, upon the faith of this representation, the plaintiff went on and expended about $1,900 in repairs; and I am of opinion that of this sum the jury are at liberty to allow the plaintiff such portion as they deem reasonable, to remunerate any loss for which the plaintiff has not received any indemnity or compensation by the subsequent earnings of the ship or otherwise; for the loss was a direct consequence of the fraudulent representation."

And it has been held in Massachusetts, in an action on the case, where the defendant, being part owner of a vessel, by fraudulent representations persuaded the attorney of the plaintiff, during his absence, to sell him the vessel at a less price than its value, and afterward himself sold it for a greater price, that if the latter sale was an actual sale, the sum realized at it would be the proper measure of damages; "because it would be unjust to permit the fraudulent party to retain the fruits of his fraud," and because the plaintiff, if not deceived, might have obtained the larger sum. But the court allowed the defendants to show that the price which they paid was the true and full value of the plaintiff's share, both in order to disprove the fraud, and as proper for the consideration of the jury on the question of damages.*

So in Connecticut, in an action against the vendor of a horse for false representations, the plaintiff cannot recover the expenses of keeping, previous to an offer to return the horse.†[2]

* Matthews *v.* Bliss, 22 Pick. 48. This decision would appear to assume that the object of the jury was merely to give compensatory damages; because, as we have already said, fraud is frequently a case for vindictive or exemplary damages, unless, perhaps, in Massachusetts.

† West *v.* Anderson, 9 Conn. 107.

[1] See Morse *v.* Hutchins, 102 Mass. 439.

[2] Where the plaintiff, a livery-stable keeper, had taken the defendant's horse to keep in his stable, relying on the defendant's representation that the horse was well, which was untrue, and the horse having the distemper, communicated it to two stallions of the plaintiff, who were thereby incapacitated for service during the season, it was held that evidence of what would have been their probable earnings during the season but for the distemper, was proper for the consideration of the jury in estimating the damages. Fultz *v.* Wycoff, 25 Ind. 321. See *ante*, 295, note 2, also (as to fraud and falsehood to warranty of title to a colt), Brown *v.* Woods, 3 Coldwell (Tenn.), 182.

CONSPIRACY.—At common law, there was a writ of conspiracy, which, strictly, only lay where the conspiracy was [558] to indict the party either of treason or felony, by which his life was in danger. There is also a well-known action on the case, of similar character but wider scope. In this, as also in the action for fraud, the damage is the gist of the action; fraud and damage must concur to give an action; and by damage is meant legal damage. And so, where a conspiracy had been formed to induce a testator, by fraudulent representations, to revoke his will devising certain property to the plaintiff, it was held that no *right* of the intended devisee having been interfered with, he could not maintain an action.*

On the same principle it has been decided in England that case will not lie against two persons for conspiring together maliciously and vexatiously, and without reasonable or probable cause to commence an action against the plaintiff in the name of a third person but for their own benefit, without an allegation of legal damage resulting therefrom.†

OTHER FRAUDS.—In Kentucky, where suit was brought for fraud in assigning a note for which the plaintiff had given certain property, the court held that the value of the property, and not the amount of the note, was the proper measure of damages; though they considered "the precise amount to be recovered by the plaintiff a matter for the consideration and decision of the jury."‡

In the same State, in an action on the case, for fraud in regard to the title of a slave sold, the Court of Appeals said,—

"This is an action on the case for fraud, and the criterion of damages is in such cases in a great measure left to the judgment of the jury. The law no doubt requires that the compensation in damages should equal the injury occasioned by the fraud, and that injury was equal to the value of the slave lost, and the price agreed to be given was no doubt strong evidence of that value. But to decide that interest should be given on that value as a matter of law, was fixing a criterion which tramelled the discretion of the jury, who might give or withhold it, as to them should seem equitable. If the plaintiff in this instance had elected to bring assumpsit for the money paid, or to treat the sale as a nullity, he would not, according to the best authorities, have been entitled to the interest thereon as a matter of law." ‖

* Hutchins *v.* Hutchins, 7 Hill, 104. See, also, Savile *v.* Roberts, 1 Lord Raym. 374; s. c. 12 Mod. 208; 1 Salk. 13; Skinner *v.* Gunton, 1 Saund. 228; Jones *v.* Baker, 7 Cowen, 445.

† Cotterell *v.* Jones, 11 C. B. 713.

‡ Crews *v.* Dabney, 1 Littell's R. 278.

‖ Jackson, Ex'r, *v.* Holliday, Adm'r, 3 Monroe, 363. See, also in New York, Voorhees *v.* Earl, 2 Hill, 288, as to fraud in sale of chattels. See a case in South Carolina, where the action was for fraud in selling a note, as good, which had been paid. Spikes *v.* English, 4 Strobhart, 34.[1]

[1] See *post*, 562, head p. 711, n. 1.

FRAUD IN SALE OF LANDS.—ACTION FOR DECEIT.—The same general principle also prevails where fraud is involved in the sale of lands. The subject of fraud in the sale of chat-
[559] tels we have already examined.* In a recent case in New York, the Court of Appeals said, "The measure of damages in an action upon a warranty, and for fraud in the sale of personal property are the same. In either case they are determined by the difference in value between the article sold, and what it should be according to the warranty or representation." The same rule, I apprehend, holds upon the sale of real estate where the action is for deceit.†[1]

It is well settled, that where, previous to or at the time of the conveyance, the vendor makes material representations in regard to the character of the property, which are known by him to be false,‡ he is liable in an action on the case for the deceit. And the grantee is not confined to his remedy on the covenants in the conveyance. This applies, however, only to cases of fraud, and not to those where the seller merely warmly recommends the property. These are governed by the maxim of the civil law, *simplex commendatio non obligat.* ‖

So¶ in New York, where the defendant, a public officer, fraudulently misrepresented certain premises as free from incumbrance.[2]

So,** where a false representation was made as to the amount for which the property rented. So,†† where the vendor of a

* *Ante*, 295.

† Whitney *v.* Allaire, 1 Comstock, 305.

‡ In Alabama it is not necessary to prove that the vendor knew the representation to be false when he made it. Monroe *v.* Pritchett, 16 Ala. 785. But in that State, where the vendee has accepted a deed with covenants of warranty, neither fraud nor failure of consideration is a good defence to a note given for the purchase money. Patton *v.* England, 15 Ala. 69. See in that State, also, Capshaw *v.* Fennell, 12 Ala. 780.

‖ Taylor *v.* Fleet, 4 Barb. S. C. R. 95.

¶ Culver *v.* Avery, 7 Wendell, 380.

** Lysney *v.* Selby, 2 L. Raym. 1118.

†† Dobell *v.* Stevens, 3 Barn. & Cres. 623.

[1] Drew *v.* Beal, 4 Chic. Leg. News, 161; Wright *v.* Roach, 57 Maine, 600. And a sum equal to interest from that time may be added as damages. *Ib.* Such difference in value must be estimated at the time of the sale. Gaulden *v.* Shebee, 24 Geo. 438. Where one having agreed to convey a certain tract of land, fraudulently conveys instead one of less value, the measure of the grantee's damages in an action for the fraud, is the difference in value between the two. Hahn *v.* Cummings, 3 Iowa, 583.

[2] So in an action against a municipal corporation for misrepresentation as to the extent of its rights in property leased by it. Sharp *v.* The Mayor, &c. of New York, 40 Barb. (N. Y.) 256. The measure of damages in an action for fraudulently representing real estate as unincumbered, which was in fact subject to a mortgage, is the amount of the mortgage and interest, and, where the mortgage is foreclosed, the costs of the foreclosure. Haight *v.* Hayt, 19 N. Y. 464. In such a case the right of action is the same, though the fraudulent vendor refuse to warrant against the incumbrance, has no personal interest in the property, and the purchaser has notice of the claim at the sale. *Ibid.* And see Ward *v.* Wiman, 17 Wend. 193.

Where the vendor of a mill-site misrepresented its description, but the vendee elected to keep the premises actually conveyed, the measure of damages was held to be what it would cost to obtain by expeditious legal proceedings the land falsely represented to be also covered by the deed. Reynolds *v.* Cox, 11 Ind. 262.

public house during the treaty, made false representations as to the amount of business done. And the principle has been since again affirmed in England.*

It has been doubted for some time whether fraudulent representations as to the title to land, would give an action, but that seems now, in New York at least, put at rest, [560] since the case just cited.†

And so‡ as to false representations regarding either the location or the cost of land conveyed. And in this latter case it was held that to an action of covenant to recover the price of land, such fraud on the part of the vendor's agent, might be set up as a defence.

The question as to the rule of damages in actions of this kind was discussed in New York in an action of debt on bond, given for the purchase money of land.‖ The bond was dated in 1836. The action was tried six years later. The defendant offered to prove that previous to the execution of the bond the plaintiff had made various false representations in regard to the land in question, namely, that he had given, or was to give, $32,000, whereas, in truth, he paid but $16,000; that it was graded, and suitable for building lots, whereas it was altogether uneven, and unfitted for the object in view; and that the plaintiff well knew the condition of the land, but that the defendant was ignorant of it. This evidence, which was offered as well to diminish the amount of recovery, as in bar of the action, was rejected, and the plaintiff had a verdict for the amount claimed. Upon argument, the court held, that after entire performance of a contract of sale, the vendee retaining the property, he could not set up fraudulent representations of the vendor, in bar of the action, and that so far the rejection of the evidence was right. But it was further held, that under such circumstances the vendee could recoup the damages which he had actually sustained by the fraud, and that this could be done in an action upon a sealed,¶ as well as an unsealed instrument, and whether it went to defeat the recovery in whole or in part. The court went on to say,—

"If the jury shall find the fraud, the question is then asked, how shall the defendant's damages be ascertained? As the land, whether the representations were true or false, was in reality worth only a small part of the price which the defendant agreed to pay, there may be some difficulty in answering the question. But it may, I think, be solved. We must not go back [561]

* Early *v.* Garrett & Lankester, 9 Barn. & Cres. 928.

† Whitney *v.* Allaire, *supra.*

‡ Sandford *v.* Handy, 23 Wend. 260.

‖ Van Eps *v.* Harrison, 5 Hill, 63.

¶ 2 Revised Statutes, 406, § 77.

to the date of the contract for the price, and then come down to the present day for the actual value of the land, and charge the plaintiff with the difference. The defendant must bear the consequences of the prevailing delusion about prices and new towns under which the purchase was made. On the other hand, the plaintiff cannot say that his fraud has worked no injury, because everybody has now found out that the land never was worth anything for the purpose of building a town upon it.* The cause must, as far as practicable, be tried just as it would have been tried the day after the contract was made, if the question had arisen at that time. The jury must assume, what the parties then believed, that the land was valuable as the site for a town, and then inquire how much less the land was worth for building purposes, taking the surface as it actually existed, than it would have been worth for those purposes, had the plaintiff's representation concerning the surface been true. One mode of arriving at the correct result, and perhaps the only one, would be to inquire into the probable expense of reducing and conforming the surface of the ground to a condition corresponding to the plaintiff's representation. This would, I think, give the correct rule of damages; but in the present stage of the cause, it is not necessary to settle the question."

In a similar action in New York, it has been said that the fraud would have authorized the defendant to deliver up the possession and rescind the contract; but that if he affirms the contract and goes into possession, he cannot then either recover back the purchase money paid, or defeat a recovery of the purchase money not paid, as on a total failure of consideration; the most he can claim is to rely on his action for damages for the fraud, or recoup them in an action for the purchase money.†

Fraud in Sale:—Analogously to the Rule in Warranties, the Difference between the Real and the Represented Value usually measures the Damage.—We ought here to notice an important principle which has been laid down in cases of fraud, one well calculated to enforce honesty and fair dealing. It has been held in Massachusetts, on the sale of a tannery, that where one is deceived in the purchase, by the false affirmations of a third party, and thus pays more than it is worth, the party by whom he was thus deceived cannot defeat the action by showing that the plaintiff sold the property for the same sum which he paid for it; and it was said that the sum for which the party sold the property is not the rule by which to
[562] measure the damages, otherwise it might make the question of fraud depend upon the rise or fall of the property in the market.‡

* See Smith *v.* Griffith, 3 Hill, 333.

† Lamerson *v.* Marvin, 8 Barb. S. C. R. 9. In Alabama, as has been said, fraud furnishes no defence at law. Patton *v.* England, 15 Ala. 69.

‡ Medbury *v.* Watson, 6 Metcalf, 246; approved in Cornell *v.* Jackson, 3 Cush. 506.

So, again, where fraud has been practiced in a sale, as of a horse, the measure of damages is, as in an action for the breach of warranty, the difference between the value of the article sold and the value of such an article as it was represented to be, even if, at the time of the sale, the property was fairly worth the price paid.*[1]

RES GESTÆ IN TRESPASS.—As we have already seen, it is competent in all actions of this description, to give in evidence the circumstances which accompany and give character to the acts complained of;† but the nature of the testimony that is admissible for such purpose belongs rather to treatises on the subject of evidence. It seems that this rule is confined to such injuries as amount to trespasses, for the obvious reason that to permit a substantive injury requiring a different form of action to be alleged by way of aggravation, would be in effect to confound the forms of action.‡

MATTERS IN AGGRAVATION MUST BE ALLEGED UNLESS THE NATURAL RESULT OF THE INJURY.—And the plaintiff cannot give evidence of any matters in aggravation not stated on the record, although they would not have supported any independent action, which do not naturally and even necessarily result from the injury alleged on the record. Thus, if the declaration merely alleges a false imprisonment, the plaintiff cannot show in aggravation, that he was stinted in his food, or that he caught an infectious disorder.‖

It is manifest that in the cases which we are now considering, it is difficult, if not impossible, to lay down any general rules. But it seems that the following propositions can be maintained.

THE MEASURE OF RELIEF THE SAME THOUGH THE FORM OF ACTION DIFFER.—The measure of damages does not depend on the form of the action; and though the proceeding be in tort, if no circumstances of aggravation be shown, the relief is restricted to the line of legal compensation.

Even if circumstances of aggravation are made to appear, the court will look into the evidence admitted [563]

* Stiles *v.* White, 11 Met. 356.

† Starkie on Evidence, vol. 2, part ii, 1116; Trespass, *ante*, 555, *et seq.*

‡ Starkie, *ubi supra.*

‖ Starkie, *ubi supra*; Lowden *v.* Goodrich, Peake's C. 46; Pettit *v.* Addington, *Ibid.* 62.

[1] This rule is applied to a sale, by fraudulent representations, of worthless stocks. Hubbell *v.* Meigs, 50 N. Y. 480. In an action against the seller of a promissory note which has been paid, for knowingly misrepresenting at the time of the sale that it was still due and unpaid, the measure of damages is the amount of the note, not its market value. Sibley *v.* Hubert, 15 Gray, 509.

and the charge delivered; and if it be shown that testimony has been received or instructions given, which, if the purpose of the jury were to give compensatory damages, would have been wrong, the verdict will not be allowed to stand; in other words, the presumption in ordinary cases is, that the jury intended to award compensation only, and not to inflict punishment; and if compensation be the object, it must be regulated by legal principles.

CASES ALLOWING COMPENSATION BEYOND THE DIRECT INJURY.—There is a class of cases, however, ranging between those where vindictive damages are claimed, and those in which trespass unattended by any evil motive is complained of. In these cases, where there is clear misconduct on the part of the defendant, yet not so gross as to permit exemplary damages, the courts show a disposition to extend the limit of relief, and carry remuneration beyond what they would do in cases of contract, or of trespass without fault. But this branch of our subject is still far from being reduced to clear and definite boundaries.*[1]

* See *ante*, 79, *et seq.*, 88, 112, *et seq.*

[1] The damages for the actual injury sustained in cases of pure tort, are not to be always computed by the rule applicable to contracts, although the case is not one for vindictive damages. These rules should be followed, as far as they are pertinent, where elements of certainty exist by which substantial compensation may be estimated. But where such elements are not to be found, or where the rule applicable to breaches of contract would exclude a material part of the damages sustained, in such case all the facts tending to show damages, or their probable amount, may go to the jury, so that they, under instructions from the court guarding them against merely possible or too remote damages, can make the most intelligible and probable estimate which the case will permit.

Thus, where by the defendant's trespass the plaintiff was deprived for the remainder of his term of the premises leased by him, he was not limited in his recovery to the market value of the remainder of the term, or the difference between the rent he was paying and the fair rental value of the premises, if the premises had a greater and especial value to him as a stand for his business. He was entitled to compensation for the loss to his business on a removal to another place necessitated by the trespass. Allison *v.* Chandler, 11 Mich. 542. And see Gilbert *v.* Lansing, 22 Mich. 117.

But, as we have before stated (*ante*, 115, head p. 130, note 1), we think all *rules*, or rather definite principles of damages in civil actions, must be referred either to compensation or punishment, although cases sometimes occur where the jury *may* consider injurious consequences to the defendant, which, on the principles controlling compensation, would generally be too remote, and, as punishment, would bear no necessary proportion to the degree of the offence. See Adams *v.* Blodgett, 47 N. H. 219.

CHAPTER XXIII.

THE RULE OF DAMAGES UNDER STATUTES.

General Principle upon which Damages are granted by Statute.—Damages for taking Private Property for Public Use; in England; in this Country.—When and how Compensation made.—Damages in Actions against Towns.—Statutes for attendance of Witnesses.—Roads and Bridges.—Damages for Injuries done by Animals.—Statutes imposing Penalties.—Damages for Detention.—Double and Treble Damages.—Interest.—Flowing Lands.—Claims against Officials; Special Cases.—Patent Cases.

MANY interesting questions on the subject of damages arise under particular statutes.* There is a large class of cases where a statute, while directing or prohibiting some particular act, omits to annex any penalty, or to prescribe any measure of damages. In these cases, the party aggrieved by the forbidden act or omission has his remedy at law. "The neglect of a compulsory statute which annexes no penalty to the transgression, will found an action at common law to those who have interest, ordaining the defendant either to do what the statute requires or to pay damages."† The damages in such case are entirely at large. In reference to acts of this kind, the Court of Exchequer in England recently held this language: "Where a statute prohibits the doing of a particular action affecting the public, no person has a right of action against another merely because he has done the prohibited act. It is incumbent on the part of the complainant to allege and prove that the doing of the act prohibited has caused him some special damage, some peculiar injury beyond that which he may be supposed to have sustained in common with the rest of the Queen's subjects by an infringement of the law. But when the act prohibited is obviously prohibited for the protection of a particular party, then it is not necessary to allege special damage."‡

* I may be permitted here, on the subject of statutes, to refer generally to a treatise on Statutory and Constitutional Law, by the author of this work.

† Lord Kairns, Prin. of Eq. book i, part i, ch. v, p. 179.

‡ Chamberlaine *v.* Chester & B. R. Co. 1 Exch. R. 870.

There is another class of cases where the legislature, [565] following out the idea of the Aquilian law,* has endeavored to put a stop to all inquiry into the actual damages by fixing an arbitrary sum as the measure of relief. There are others where, in order to punish some particular act, it gives double and treble damages.[1]

Appropriation of Private Property to the Public Use.— There is perhaps, however, no class of questions belonging to this branch of our subject so important as those which grow out of the statutes under which public works of various kinds are carried on, and by which compensation is provided for injury that may be sustained by private proprietors in the prosecution of the work. The right of the government to take private property for public use is one of vast importance, and the power one of indispensable necessity; but great care is required, so to exercise the power that individuals shall not be sacrificed to the community. Keeping this general principle in view, we proceed to examine some of the cases growing out of the statutes founded on what is called the Right of Eminent Domain.[2]

* *Ante*, 25.

[1] See as to the application and object of this provision in the Patent Law of the United States, *post*, 573, note.

[2] As it is not within the scope of this work to discuss in detail the principles on which damages occasioned by public improvements are assessed, depending as they do chiefly upon special and local statutes, the inquirer is referred to the works on that subject: as the author's treatise on Statutory and Constitutional Law (of which a second edition is in press), Redfield on Railways, and Pierce on American Railway Law. In general, it may be said that the rule by which damages are assessed for land appropriated in the construction of a railroad or other public work, is the market value of the land taken, in addition to which allowance is made for special injury to the remaining estate, by the manner in which it may be cut, or by the use to which the land taken is to be put, unless such injury is compensated by the projected public improvement. But no deduction is to be made from the landowner's damages on account of general advantage from the improvement in which he participates. On the other hand, no damages are allowed for the reason that when the owner, at a future day, comes to improve his land, he must be put to extraordinary expense in adapting his improvements to the public road. Nor is he entitled to damages on the ground that the deprivation of his land prevents his resisting the approaches and encroachments of society. Individual property is exclusive as against individuals only. As regards society, it exists concurrently with public right and the right of eminent domain. Nor, in general, is he entitled to consequential damages to lands not taken, unless such damages are provided for by the legislative authority under which the improvement is made. Where the damages are ascertained by an appraisement, it should include compensation for all the prospective loss or injury to which the owner will be entitled by the proper construction and operation of the road, and in case of a subsequent alteration of a highway, he will not be entitled to additional damages. See Dearborn *v.* The Boston, C. & M. R. R. Co. 4 Fost. (N. H.) 179; Mt. Washington R. Co.'s Petition, 35 N. H. 134; Concord Railroad *v.* Greeley, 23 N. H. 237; Carpenter *v.* Landaff, 42 N. H. 218; Amsden *v.* Dubuque & Sioux City R. R. Co. 28 Iowa, 542; Tingley *v.* City of Providence, 8 R. I. 493; Bangor Railroad Co. *v.* McComb, 60 Me. 290; Fleming *v.* Chicago, D. & M. R. R. Co. 34 Iowa, 353; Deaton *v.* The County of Polk, 9 Iowa, 594; The East Penn. R. R. Co. *v.* Hottenstine, 47 Penn. 28; Searle *v.* The Lackawanna & Bloomsburg R. R. Co. 33 Penn. 57; Patten *v.* The Northern Cent. R. R. Co. 33 Penn. 426; Dorlan *v.* The East Brandywine & Waynesburg R. R. Co. 46 Penn. 520; Town of Lambertville *v.* Clevinger, 1 Vroom (N. J.), 53; Robinson *v.* Robinson, 1 Duval (Ky.), 162; Hatch *v.* Vermont Central Railway, 25 Vt. 49; Winona & St. Peter R. R. Co. *v.* Waldron, 11 Min. 515; Minnesota Cent. R. R. Co. *v.* McNamara, 13 Minn.

ENGLISH STATUTES AND DECISIONS.—An English statute declares that a railway company shall make full compensation for

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508; City of Indianopolis *v.* Huffer, 30 Ind. 235; Swett *v.* City of Troy, 62 Barb. (N. Y.) 630; Calkins *v.* Bloomfield and Rochester Natural Gas-light Co. 1 N. Y. Sup. 541. Mere loss of a convenience which was enjoyed by sufferance only, such as the deprivation of facilities, to which the party had no legal right, for watering his stock, is not to be compensated. Hatch *v.* Cin. & Ind. R. Co. 18 Ohio St. 92. Interest should be added to the amount of the damages from the time the landowner was entitled to compensation. Delaware, Lackawanna & Western R. Co. *v.* Burson, 61 Penn. St. 369 (*supra*).

Where the legislature constitutionally authorizes an act the necessary consequence of which is an injury to property, and prescribes the mode of compensation, giving the injured party the power to avail himself of it, such statutory remedy is exclusive. Fuller *v.* Edings, 11 S. C. L. R. (Rich.) 239; The Little Miami R. R. Co. *v.* Whitacre, 8 Ohio St. 590. But although a corporation claim to have taken private property in pursuance of a statute, yet if in fact the act was not authorized by the statute, it stands in the position of any other wrong-doer, and is liable in the ordinary form of action. Cortes *v.* The City of Davenport, 9 Iowa, 227, where the law is reviewed; Freeland *v.* The City of Muscatine, 9 Iowa, 461; Beyer *v.* Tanner, 29 Ill. 135. And in such a case, where the act complained of is the destruction of a building, the measure of damages is not the cost of putting a new building in the place of an old one, but of replacing the original building in its former condition, making allowance to the plaintiff for the deprivation of the use of his property necessarily and immediately caused by the defendant's act. *Ibid.* Where leased land is taken, the measure of the landlord's damages is the value of the rent and the reversion; that of the tenant's is the value of the term subject to the rent. Dyer *v.* Wightman, 66 Penn. St. 425.

The measure of damages to land by the opening of a highway or railway through it, is the difference between its market value with and without the improvement. Troy & Bost. R. R. Co. *v.* Lee, 13 Barb. 169; Sidener *v.* Essex, 22 Ind. 201; Delaware, Lackawanna & Western R. Co. *v.* Burson, 61 Penn. St. 369; Hornstein *v.* Atlantic & Gt. Western R. R. Co., 51 Penn. St. 87. So in an action for consequential damages for injuries to land from the opening of a railroad, where under the law the action can be maintained, the measure of damages is the difference between what the whole property would have sold for, unaffected by the railroad, and what it would have sold for as affected by it. Watson *v.* The Pittsburgh and Connellsville R. R. Co., 37 Penn. 469; Schuylkill Nav. Co. *v.* Thoburn, 7 S. & R. 411. It is the depreciation in the value of the property resulting from the railroad, and not anticipated injury by fire, which is the subject of compensation. Wilmington & Reading R. Co. *v.* Stauffer, 60 Penn. St. 374; although it is said that the increased exposure to fire, which the railroad occasions, may be considered by the jury in estimating the compensation. Colvill *v.* Railway, 19 Minn. 283. And it is held in Kentucky, that the provision of the constitution which secures to the owner the just value of his property before he can be deprived of it, is not satisfied by giving him its fair market value. He is entitled to its actual value *to him* under the circumstances which exist, and as the owner of adjacent property, if he is such. Robb *v.* Maysville & Mt. S. Turnpike R. Co., 3 Metc. (Ky.) 117. In ascertaining the damages to a house and lot from the construction of a railroad in the vicinity, the actual diminution in the rent of the plaintiff's property may be shown, but it is held in Alabama not that of other property similarly situated. Selma R. Co. *v.* Knapp, 42 Ala. 480.

In the multiplicity of decisions, conflicting rules are sometimes adopted in different jurisdictions. Thus in Missouri, it is held that the use of a town street, not amounting to an exclusive occupation, by a railway under its charter, is not a perversion of a highway from its original purposes, and that the damage to the owners of the real estate on the line of the street, whose access to their lots is not affected, is *damnum absque injuriâ*. Porter *v.* The North Missouri R. R. Co., 33 Missouri, 128. So in Indiana, New Albany & Salem Railway Co. *v.* O'Daily, 12 Ind. 551. In New York, on the contrary, it is held that the construction of the railway imposes an additional burden on the owner, not contemplated in the original dedication of his land to the uses of a highway, and one which requires compensation. Williams *v.* The New York Central R. R. Co., 16 N. Y. 97; Craig *v.* Rochester City & Br. Railway Co., 39 Barb. 494; Wager *v.* Troy Union R. R. Co., 25 N. Y. 526; Carpenter *v.* Oswego & Syracuse R. R. Co., 24 N. Y. 655; Mahon *v.* The N. Y. Cent. R. R. Co., *Ibid.* 658. The rule in New York is otherwise, however, where the fee of a city street has been acquired by the city under a previous exercise of the right of eminent domain, and is held by it in trust for the public use of the people of the State. The People *v.* Kerr, 27 N. Y. 188. But further inquiry into the subordinate and conflicting rules on this subject would carry us beyond the scope of this treatise. The following authorities may be referred to as illustrating the general topic.

MAINE. Mason *v.* Kennebec & Portland R. R. Co. 31 Me. 215; Kimball *v.* Same, 35 *Ibid.* 255.

NEW HAMPSHIRE. Aldrich *v.* The Cheshire R. R. Co. 1 Foster, 359; Shattock *v.* The

all damages sustained by any parties by reason of the exercise of the powers of the company; and it also prescribes the mode

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Wilton Railroad, 3 *Ibid.* 269; Dearborn *v.* The Boston, &c. Railroad, 4 *Ibid.* 179; Cate *v.* Nutler, *Ibid.* 108; The Northern R. R. Co. *v.* The Concord & Claremont R. R. 7 *Ibid.* 183. As to bridges, The State *v.* Canterbury, 8 Fost. 195; Same *v.* Boscawen, *Ibid.* 195. As to highways, etc., Brown *v.* Rundlet, 15 N. H. 360; Baker *v.* Shephard, 4 Fost. 208; Thurston *v.* Alstead, 6 *Ibid.* 259; Farmer *v.* Hooksett, 8 *Ibid.* 244; Clark *v.* Hampstead, 19 N. H. 365.

VERMONT. Haswell *v.* The Vermont Central R. R. Co. 23 Vt. 228; Hatch *v.* The Same, 25 *Ibid.* 49; The State *v.* Vernon, *Ibid.* 244; Sabin *v.* The Vermont Central R. R. Co. *Ibid.* 363; Richardson *v.* The Same, *Ibid.* 465; Courser *v.* The Same, *Ibid.* 476; Stacey *v.* The Same, 1 Williams, 39; Butman *v.* The Same, *Ibid.* 500. As to highways, Dalrymple *v.* Whitingham, 26 Vt. 345.

MASSACHUSETTS. Field *v.* The Vermont & Massachusetts R. R. Co. 4 Cush. 150; Boynton *v.* Peterborough & Shirley R. R. Co. *Ibid.* 467; White *v.* The South Shore R. R. 6 *Ibid.* 412; Chapin *v.* The Boston & Providence R. R. *Ibid.* 422; Gardiner *v.* The Boston & Worcester R. R. Co. 9 *Ibid.* 1. As to canals, Chase *v.* Sutton Manufacturing Co. 4 Cush. 152. As to highways, etc., Crockett *v.* The City of Boston, 5 *Ibid.* 182; Monagle *v.* The Co. Commissioners of Bristol, 8 *Ibid.* 360; Damon *v.* Reading, 2 Gray, 274. As to sidewalks, The City of Lowell *v.* French, 6 Cush. 223. As to allowance for benefit, Meacham *v.* Fitchburg R. R. 4 Cush. 291; Upton *v.* The South Reading Branch R. R. Co. 8 *Ibid.* 600. As to admission of evidence, White *v.* Fitchburg R. R. 4 Cush. 440. For further late decisions in Massachusetts, see *post*, 568, note.

RHODE ISLAND. As to streets and highways, Tingley Brothers *v.* City of Providence, 8 R. I. 493; Rounds *v.* Mumford, 2 R. I. 154.

CONNECTICUT. Nicholson *v.* The New York & New Haven R. R. Co. 22 Conn. 74. As to highways, Clark *v.* The Town of Saybrook, 21 Conn. 313. Assessments of benefits, Nichols *v.* Bridgeport, 23 *Ibid.* 189.

NEW YORK. Polly *v.* The Saratoga & Washington R. R. Co. 9 Barb. 449; Wheeler *v.* The Rochester & Syracuse R. R. Co. 12 *Ibid.* 227; Gould *v.* The Hudson River R. R. Co. *Ibid.* 616; The Troy & Boston R. R. Co. *v.* Lee, 13 *Ibid.* 169; Hentz *v.* The Long Island R. R. Co. *Ibid.* 646; Furniss *v.* The Hudson River R. R. Co. 5 Sandf. 551; Hill *v.* The Mohawk & Hudson R. R. Co. 3 Seld. 152; Albany N. Railroad Co. *v.* Lansing, 16 Barb. 68; Canandaigua & Niagara R. R. Co. *v.* Payne, *Ibid.* 273; Cruger *v.* The Hudson River R. R. Co. 2 Kern. 190. As to canals, Newell *v.* The People, 3 Seld. 9; Barney *v.* The City of Buffalo, 15 Barb. 457; Rexford *v.* Knight, *Ibid.* 627; s. c. 1 Kern. 308; The People *v.* Schoonmaker, 3 *Ibid.* 238; Griffith *v.* Follett, 20 Barb. 620. As to bridges, Hill *v.* Supervisors of Livingston County, 2 Kern. 52. As to highways, etc., Plant *v.* The Long Island R. R. Co. 10 Barb. 26; Chapman *v.* The Albany & Schenectady R. R. Co. *Ibid.* 360; Manice *v.* The Mayor, &c. of New York, 4 Seld. 120. In the matter of widening Wall Street, 17 Barb. 617; Clark *v.* The City of Utica, 18 *Ibid.* 451. As to riparian proprietors, Brown *v.* The Cayuga & Susquehanna R. R. Co. 2 Kern. 486. As to admission of evidence, Troy & Boston R. R. Co. *v.* Northern Turnpike, 16 Barb. 100. As to set-off of benefit, Betts *v.* The City of Williamsburgh, 15 Barb. 255.

NEW JERSEY. Somerville & Easton R. R. Co. *v.* Doughty, 2 Zabr. 495; Coster *v.* New Jersey R. R. Co. 3 Zabr. 227; The Same *v.* The Same, 4 *Ibid.* 780; Starr *v.* The Camden R. R. Co. *Ibid.* 592. As to canals, Ten Eyck *v.* The Delaware & Raritan Canal Co. 3 Harr. 200; Den *v.* The Morris Canal Co. 4 Zabr. 587. As to highways, etc., Perrine *v.* Farr, 2 Zabr. 356; The State *v.* Dean, 3 Zabr. 335; Same *v.* Cooper, *Ibid.* 351; Same *v.* Miller, *Ibid.* 383; Readington *v.* Dilley, 4 *Ibid.* 209. Assessment of benefits, The State *v.* Jersey City, *Ibid.* 662.

PENNSYLVANIA. Ohio & Pennsylvania R. R. Co. *v.* Bradford, 19 Penn. 363; Railroad *v.* Gesner, 20 *Ibid.* 240; Reitenbaugh *v.* The Chester Valley R. R. Co. 21 *Ibid.* 100; Pennsylvania R. R. Co. *v.* Keiffer, 22 *Ibid.* 356; Zack *v.* Penn. R. R. Co. 25 *Ibid.* 394; O'Hara *v.* The Same, *Ibid.* 445; The North Penn. R. R. Co. *v.* Davis, 26 *Ibid.* 238; Snyder *v.* Penn. R. R. Co. 55 Penn. 340; Western Penn. R. R. Co. *v.* Hill, 56 Penn. 460. As to canals, Ligat *v.* The Commonwealth, 19 Penn. St. 456. As to joint owners, Pittsburgh & S. Railroad Co. *v.* Hall, 25 *Ibid.* 336.

MARYLAND. Hamilton *v.* Annapolis & Elk Ridge R. R. Co. 1 Md. Ch. Decis. 107. As to canals, Harness *v.* Chesapeake & Ohio Canal Co. *Ibid.* 248; Douglass *v.* Boonsborough Turnp. R. Co. 22 Md. 219.

SOUTH CAROLINA. Greenville & Columbia R. R. Co. *v.* Nunnamaker, 4 Rich. 107; M'Laughlin *v.* The Charlotte & Co. Car. R. R. Co. 5 *Ibid.* 583; White *v.* The Same, 6 *Ibid.* 47; North Eastern R. Co. *v.* Sineath, 8 *Ibid.* 185. As to allowance for benefit, Greenville & Columbia R. R. Co. *v.* Partlow, 5 Rich. 428.

GEORGIA. As to bridges, Young *v.* Harrison, 17 Geo. 30.

of ascertaining the amount of compensation where any party shall have been injuriously affected by the work, and for which they shall not have received satiafaction.* Under this act it has been held that where the proximity of a railway crossing a private road diminished the value of the property (and Lord Campbell, C. J., intimated that the mere passage of the trains close to the house would have the same legal effect), it was held to give a right to redress; and the court said, "The company have done and do that which would be an actionable injury unless done under the powers conferred by the act; and that is a very fair criterion to see if lands are injuriously affected within the statute." †

English Statutes and Cases.—In England, by the Land Clauses Consolidation Act, 8 Vict. c. 18, compensation is given for any lands, or "any interest therein, which shall have been taken for or injuriously affected by the execution of the work." And under this statute, damage done by dirt and dust, and the obstruction of customers, is a subject of remuneration.‡ Under this statute, also, the damages must be paid before entry. ‖

Where a dock company authorized to take lands were to make "compensation for the damages occasioned to any such land by the execution of the works," it was held that this language would include compensation to a landowner parting

* 8 & 9 Vict. c. 20, § 6.

† Glover *v.* N. Staffordshire Railway Co. 15 Jur. 673.

‡ East and W. I. Docks *v.* Gattke, 15 Jur. 261.

‖ Ramsden *v.* Manchester R. Co. 1 Exch. 723.

Alabama. As to admission of evidence, The Montgomery & West Point R. R. Co. *v.* Varner, 19 Ala. 185.

Tennessee. Nashville & Chattanooga R. R. *v.* Cowardin, 11 Humph. 348; Hord *v.* The Nashville, &c. R. R. Co. 2 Swan, 497.

Kentucky. Wolfe *v.* The Covington & Lexington R. R. Co. 15 B. Monr. 404.

Illinois. A. & S. Railroad Co. *v.* Carpenter, 14 Ill. 190; As to fences and cattle-guards, A. & S. Railroad Co. *v.* Baugh, 14 Ill. 211. As to highways, &c., Canal Trustees *v.* The City of Chicago, 12 *Ibid.* 403; County of Sangamon *v.* Brown, 13 *Ibid.* 207.

Indiana. No deduction for benefit, M'Mahon *v.* The Cincinnati, &c. R. R. Co. 5 Ind. 413; The Newcastle, &c. R. R. Co. *v.* Brumback, *Ibid.* 543.

Ohio. Little Miami R. R. *v.* Naylor, 2 Ohio (N. S.) 235. As to bridges, Fulton Co. *v.* Lucas Co. *Ibid.* 508.

Michigan. Draper *v.* Williams, 2 Mich. 536; The People *v.* The Mich. Southern Railroad, 3 *Ibid.* 496. As to interest, The People *v.* La Grange, 2 *Ibid.* 187. As to highways, The People *v.* Township Board of Scio, 3 *Ibid.* 121.

Minnesota. St. Paul R. Co. *v.* Murphy, 19 Minn. 500.

Wisconsin. The Milwaukee & Mississippi R. R. Co. *v.* Eble, 4 Chand. 72; Hegar *v.* Chicago & Northwestern R. Co. 26 Wisc. 624; Snyder *v.* Western R. Co. 25 Wisc. 60.

District of Columbia. Chesapeake & Ohio Canal Co. *v.* The Union Bank of Georgetown, 4 Cranch C. C. R. 75.

English Decisions. The Marquis of Salisbury *v.* The Great Northern Railway Co. 10 Eng. L. & E. 344; Regina *v.* The Leeds, &c. Railway Co. 11 *Ibid.* 484; The Lancashire and Yorkshire R. R. Co. *v.* Evans, 19 *Ibid.* 295; Regina *v.* The London & Northwestern Railway Co. 25 *Ibid.* 37; Pinchin *v.* The London & Blackwall Railway Co. 31 *Ibid.* 240; Byles *v.* Ipswich Dock Commissioners, 33 *Ibid.* 455. As to bridges, Regina *v.* The Inhabitants of Southampton, 14 Eng. L. & E. 116; Lister *v.* Lobley, 7 Ad. & E. 124.

with his premises, for loss which he would sustain by having to give up his business as a brewer until he could obtain other suitable premises for carrying it on.*

In the case of an arbitration to recover compensation for damage occasioned to the lands, mines, minerals, and works of the plaintiffs, under stat. 29 Geo. III, c. 74, there was no provision in the submission in regard to the measure of damages. The arbitrators made an allowance for the capital and interest invested in working the coal field; and, on motion, the Court of King's Bench held this right.†

[566] AMERICAN CONSTITUTIONS AND DECISIONS.—WHAT IS JUST COMPENSATION.—In this country, our State constitutions generally recognize and declare the right of eminent domain on which these statutes are founded; but they are also drawn so as carefully to protect individual property, and their language usually is, that private property shall not be taken for public use without "*just compensation.*" In construing this phrase, the general principle running throughout the cases seems to be, that a just compensation to the owner for taking his property for public use without his consent, means the actual value of the property in money, without any deduction for estimated profit or advantages accruing to the owner from the public use of his property. Speculative advantages or disadvantages, independent of the intrinsic value of the property, from the improvement are a matter of set-off against each other, and do not affect the dry claim for the intrinsic value of the property taken.‡[1] It has been declared in New York, in relation to railroads running through cities, that the prohibition of the constitution is against *taking* private property, not against *injuries* to property, and that contingent future damages or incidental and consequential injuries of indefinite amount, not capable of estimate, do not fall within the statute.[2] So when it is alleged that private property in the neighborhood of a rail-

* Jubb *v.* Hull Dock Co. 9 Q. B. 443.

† *In re* Wright *et al. v.* Comford Canal Co. 1 Queen's Bench, 98.

‡ Jacob *v.* City of Louisville, 9 Dana Rep. 114; Kent's Commentaries, vol. ii, p. 339, in notes, where many cases are collected.

[1] *Vide supra*, 565, note. But under an act of the legislature of South Carolina, which required an assessment to be made "for the value of the premises taken for the public use, as well as for damages generally to the same," it was held, that the owner of a private wharf taken for the public use was entitled, besides the market value of the land taken, to the expenses necessarily occasioned him by the improvement, such as the cost of additional fencing, and compensation for carting mud across the road, but not the loss of customs and tolls from the destruction of his landing. Eddings *v.* Seabrook, 12 S. C. (Rich.) 504; Fuller *v.* Edings, 11 S. C. (Rich.) 239.

[2] So in Pennsylvania. Pottstown Gas Co. *v.* Murphy, 39 Penn. 257; Buckwalter *v.* Blackrock Bridge Co. 38 Penn. 281.

way will be injured by its vicinity, the claim is inadmissible.* The same doctrine has also been applied to the grading of streets and highways, and it has been held that injury resulting from grading and leveling a street, either by cutting down or filling up so as to make the street either below or above the natural level of the adjacent land, is *damnum absque injuriâ*, for which no compensation can be had.[1] In the principal case it was found thus, though the property had suffered damage, there was no precedent for saying that it had been "taken for public use" within the meaning of the constitution, and it was declared "that the case seemed to fall within the principle that a man may enjoy his land in the way such property is usually enjoyed without being answerable for the indirect or consequential damages which may be sustained by an adjoining landowner."† I think it will be found that more care is taken of the rights and interests of the proprietor under the English statutes, than in this country.

TIME AND MODE OF COMPENSATION.—Much discussion has also been made as to whether the compensation in these cases is to be made concurrently with taking the land, or what results are to follow where a concurrent remedy is not provided in the act authorizing the land to be taken.‡[2]

In New York it is well settled, that where an act authorizing the taking of private property for public purposes provides for a just compensation to the owner, it is sufficient that the act makes provision for future compensation. The assessment and payment of damages need not precede the entry and occupation.‖[3] In regard to the constitutional provision [567] securing trial by jury, it has been decided in New York

* Drake *v.* Hudson R. R. Co. 7 Barb. 508,

† Radcliffe's Ex'rs *v.* Mayor of Brooklyn, 4 Coms. 195.

‡ In New York, wherever the governor is authorized by law to take possession of private property, a writ of *ad quod damnum* is provided; and the benefits of this proceeding have in many cases been extended to the United States. 2 R. S. 589.

The original writ of *ad quod damnum* lay where a man would give lands or tenements in mortmain; before the license of the king and chief lord to make such gift was granted, the course was to sue unto the king to have a license to sue this writ out of the Chancery, directed unto the escheator, to inquire what damage it would be to the king or to other persons if the king should grant the license.—Natura Brevium, *in voc.* 509.

‖ Smith *v.* Helmer, 7 Barb. S. C. R. 416.

[1] So in Macy *v.* The City of Indianapolis, 17 Ind. 267.

[2] As a general rule the compensation should precede or be concurrent in point of time with the taking. Thompson *v.* The Grand Gulf R. and Banking Co. 3 How. (Miss.) 240; 2 Kent's Com. 339, note c; Bonaparte *v.* The Camden and Amboy R. R. Co. 1 Bald. C. C. R. 205; Stewart *v.* Raymond R. R. Co. 7 Sm. & M. (Miss.) 568.

[3] See also Rexford *v.* Knight, 11 N. Y. 308; Bloodgood *v.* Mohawk and Hudson R. R. Co. 18 Wend. 9; Baker *v.* Johnson, 2 Hill, 342; People *v.* Hayden, 6 Hill, 359. For the general principle see preceding note.

that a legislative enactment for the ascertainment of railroad damages by a committee is not unconstitutional.*[1] So in regard to the final decision of the County Court in Vermont.†

In Indiana, an act was passed in 1836, providing for a general system of internal improvement. Under this statute it is held that the assessment and payment of damages for injuries done to real estate in constructing a canal must be in gold and silver, and cannot be made in canal scrip.‡ In Vermont, on a recognizance given on appeal from a judgment rendered in [568] favor of the landowner, the plaintiff is not entitled to recover the value of the rents and profits, but only his costs.‖ In Massachusetts, an action against a town to recover damages assessed by county commissoners in laying out a town way over the plaintiff's land, cannot be commenced before the land is entered on and possession therof taken.¶

In the same State, where a party who has agreed to convey land for a sum certain to a railroad company, refuses to perform, and obtain an assessment of his damages caused by the laying out the road, the measure of the damages to which he is liable for the breach of his agreement, is the excess of the sum assessed over the sum for which he agreed to convey.**[2]

* Beckman *v.* S. R. R. Co. 3 Paige, 45.

† Gold *v.* Vermont Central Railroad, 19 Verm. 479. In Tennessee, the proceeding by writ of *ad quod damnum*, to assess damages where the land of the applicant is subject to a public easement, has been decided to be not in derogation of the common law, but in accordance with its provisions. Nolensville Turnpike Co. *v.* Quimby, 8 Humphreys, 476.

‡ The State *v.* Beackmo, 8 Blackf. 246. See also, The State *v.* Digby, 5 Blackf. 543, and Lucas *v.* Hawkins, 8 Blackf. 337. As to assessment of damages on a writ of *ad quòd damnum* in the same State, see Chapman *v.* Groves, 8 Blackf. 808, and Peck *v.* Van Renssalaer, 8 Blackf. 312. An interesting discussion as to the principle of railroad damages will be found in Somerville and Eastern Railroad Co. *v.* Doughty, 2 Zabriskie, 495.

‖ Drew *v.* Chamberland, 19 Verm. 573.

¶ Harding *v.* Inhabitants of Medway, 10 Met. 465; La Croix *v.* The Same, 12 Met. 123.

** Western R. R. Co. *v.* Babcock, 6 Met. 346.

For other cases in Massachusetts, as to lands flowed by mill-dams, see Leonard *v.* Schenck, 3 Met. 357; Snell *v.* Bridgewater C. G. Manuf. Co. 24 Pick. 296; Williams *v.* Nelson, 23 Pick. 141; Hunt *v.* Whitney, 4 Met. 603; Fitch *v.* Stevens, 2 Met. 505; Seymour *v.* Carter, 2 Met. 520; Fitch *v.* Seymour, 9 Met. 462.

In Maine, as to flowing lands, Nelson *v.* Butterfield, 21 Maine, 220; Seidensparger *v.* Spear, 17 Maine, 123. Under the poor-debtor act, in the same State, Cordis *v.* Sager, 14 Maine, 475; French *v.* M'Allister, 20 Maine, 465; Hathaway *v.* Crosby, 17 Maine, 448.

In Massachusetts, as to sheriffs, &c., Bartlett *v.* Eveleth, 4 Met. 149.

In Mississippi, as to the same subject, Gwin *v.* Breedlove, 2 Howard, 29.

In England, as to works of public improvement, Lee *v.* Milner, 2 Mees. & Wels. 825; Thicknesse *v.* Lancaster Canal Company, 4 Mees. & Wels. 472; Turner *v.* Sheffield & Rotherham Railway Co. 10 Mees. & Wels. 425; Goldie *v.* Oswald, 2 Dow, 535; Burnet *v.* Knowles, 3 Dow, 280.

In this country, on the same subject, in Massachusetts, Patterson *v.* Boston, 23 Pick. 425; Webber *v.* Eastern R. R. Co. 2 Met. 147; Dodge *v.* County Commissioners, 3 Met. 381; Ashby *v.* Eastern R. R. Co. 5 Met. 368; Endicott, petitioner, 24 Pick. 339.

In New York, in a suit on an attachment bond, given on the commencement of a suit in

[1] This is on the ground that the trial by jury is required only on the determination of issues of fact in courts of justice. The assessment of damages is not a trial. *Ibid.* See Vanhorne's Lessee *v.* Dorrance, 2 Dall. 304, 313.

[2] The decisions on the principles applicable to the assessment of damages for taking lands

STATUTES FOR ATTENDANCE OF WITNESSES.—An interesting, though not very numerous, class of cases relates to the statutes which impose penalties on witnesses for non-attendance in obedience to subpœna. The original English statute* imposed a penalty of ten pounds on a witness who made default and refused to appear, "having not a lawful or reasonable let or impediment to the contrary, the said penalty to be recovered by the party so grieved." Under this statute, and those in analogy to it enacted in this country, it has been held that to entitle the plaintiff to recover it must appear that the witness was material, and that damages resulted from his non-attendance; evidence, therefore, that the plaintiff had admitted that the defendant knew nothing about the matter in controversy, is admissible.† A similar liability exists at common law, independent of the statute, and may be enforced by an action on the case.‡[1] [569]

the Justices' Court, by which the plaintiff is to pay all the damages and costs the defendant may sustain by reason of the issuing of the attachment; if the plaintiff in the attachment fail, the defendant is entitled to recover against the obligors, not only the costs, but also damages for the seizure and detention of the property. Dunning *v.* Humphrey, 24 Wend. 31. But a subsequent attachment and judgment thereon may be given in evidence in mitigation of damages. Earl *v.* Spooner, 3 Denio, 246.

As to other cases of damages under statutes in New York, see Jackson *v.* Covert's Adm'rs, 5 Wend. 139; People *v.* Supervisors of St. Lawrence, 5 Cow. 292; Stewart *v.* McGuin 1 Cow. 99; Wendell *v.* Washington & Warren Bank, 5 Cow. 161; Baldwin *v.* Calkins, 10 Wend. 167.

* 5 Eliz. c. 9, § 12.

† Goodwin *v.* West, Cro. Car. 522, 540; Courtney *v.* Baker, 3 Denio, 27.

‡ Pearson *v.* Iles, 2 Doug. 561; Hasbrouck *v.* Baker, 10 J. R. 248. See Hurd *v.* Swan, 4 Denio, 75.

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for improvements, and for the railways and highways which are spreading like spider webs over this broad land, are literally "too numerous to mention;" and as we have before said, we refrain from citing them in general, further than to illustrate the principles we have summarily laid down. *Ante*, 565, note. As the subject, however, has received frequent and careful consideration in Massachusetts, the principal late decisions of the Supreme Court of that Commonwealth on the subject, in addition to those already noted, are subjoined. Chase *v.* City of Worcester, 103 Mass. 60; Walker *v.* Old Colony and Newport R. R. Co. 103 Mass. 10; Presbrey *v.* Same, 103 Mass. 1; Tufts *v.* City of Charlestown, 4 Gray, 537; Brown *v.* Providence, Warren, and Bristol R. R. Co. 5 Gray, 35; Breed *v.* Eastern R. R. Co. 5 Gray, 470 (note); First Parish in Woburn *v.* County of Middlesex, 7 Gray, 106; Farwell *v.* City of Cambridge, 11 Gray, 413; Plympton *v.* Inhabitants of Woburn, 11 Gray, 415; Brainard *v.* Boston and N. Y. Cent. R. R. 12 Gray, 407; Dickenson *v.* Inhabitants of Fitchburg, 13 Gray, 546; Old Colony & Fall River R. R. Co. *v.* County of Plymouth, 14 Gray, 155; First Church in Boston *v.* City of Boston, 14 Gray, 214; Grand Junction Railroad and Depot Co. *v.* County Commissioners of Middlesex, 14 Gray, 553; Boston and Maine R. R. *v.* County of Middlesex, 1 Allen, 324; Whitman *v.* Boston and Maine R. R. 3 Allen, 133, and 7 Allen, 313; Paine *v.* City of Boston, 4 Allen, 168. *Et vid.* Central Bridge Corporation *v.* City of Lowell, 15 Gray, 106, for a discussion of the principles which determine the amount of damages where a franchise is taken by right of eminent domain.

[1] In such an action actual damage must be shown; the law does not imply a loss to the plaintiff from mere disobedience to the subpœna. Couling *v.* Coxe, 6 C. B. 703. But to recover substantial damages, it is not necessary to show that if the defendant had attended as a witness in the previous suit, the plaintiff must have succeeded. Yeatman *v.* Dempsey, 7 C. B. (N. S.) 628; 9 C. B. (N. S.) 881. See note to this case in Am. ed. 7 C. B. (N. S.) 637. It is provided by statute in New York that a witness for failure to attend a trial pursuant to a subpœna, shall be responsible in a proper action to the aggrieved party for the loss and hindrance from such failure, and for all other damages sustained thereby, besides the for-

ROADS AND BRIDGES.—In many of the States, and particularly in New England, laws have been passed to compel the towns to keep their highways and bridges in repair, and requiring them to make compensation for any injury resulting from their neglect. In Connecticut, it has been decided on a statute of this kind, that towns liable to pay *just* damages for defects in bridges or roads, are not liable for *consequential* damages, such as the loss of service, and expense of nursing, resulting to a person from injuries to his wife and daughter.* [1]

The Maine statute provides that "any person who shall suffer any damage in his property," through any defect in a highway, may recover of the town liable to keep the highway in repair, the amount of such damage. In a case on this statute, it was held that a plaintiff traveling with a hired horse, which had been ruined by a defect in the road, and the value of which he had paid to the owner, could recover the sum so paid of the town.†

[570] INJURIES BY ANIMALS.—Injuries done by animals form another class. At common law, the owner of a dog is accountable for mischief done by him, if he had notice of the animal's vicious propensities.[2] This liability is enlarged by statute in New York, where the owner of the dog is made liable for injuries done to sheep, although he has no previous notice. In an action on the statute, the proprietor is not liable, however, to exemplary damages; and where dogs of several owners join in the trespass, each owner is severally liable only

* Chidsey *v.* Canton, 17 Conn. 475. † Littlefield *v.* Biddeford, 29 Maine R. 310.

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feiture to the aggrieved party of a specific sum in addition to such damages, to be recovered in the same action or another (2 R. S. N. Y. 400). Similar provisions exist in England (Stat. 5 Elizabeth, c. 9, § 12, *supra*), and generally in the other States of the Union. The action for damages is in affirmance of the common law (Courtney *v.* Baker, 3 Denio, 27; Lane *v.* Cole, 12 Barb. 680; Heermans *v.* Williams, 11 Wend. 636). If the party omit to go to trial for the reason of the witnesses' non-attendance, he may recover the costs thus fruitlessly incurred. Needham *v.* Fraser, 1 C. B. 815; Hurd *v.* Swan, 4 Denio, 75.

In the case last cited, it is doubted whether, where the demand is a large one, the plaintiff would be justified in going on with the trial with the intent of charging the consequences on the witness by subjecting him to the heavy penalty of paying the whole debt. Practically, it would doubtless be difficult in most cases to show that the loss of a debt or the failure in a suit resulted from the non-attendance of a particular witness. But where a plaintiff is nonsuited for want of the testimony of a witness duly and seasonably subpœnaed, he will be entitled to recover from the witness his costs and expenses of the suit, without showing that he had a good cause of action in the first suit. Lane *v.* Cole, 12 Barb. 680. See Amey *v.* Long, 9 East, 472.

[1] Where, in pursuance of an act of the legislature, a public bridge was removed, making it necessary for the plaintiffs, in order to reach their store, to cross another less commodious bridge, at a much greater distance, this damage was held too indirect and remote to be recovered. Cosler *v.* Mayor, &c. of Albany, 43 N. Y. 399.

[2] Where a horse having strayed on the highway, there kicked a child, the owner was held not liable, unless shown to have been aware of the animal's viciousness. Cox *v.* Burbidge, 13 C. B. (N. S.) 430.

for the damage done by his own dog.*[1] In Massachusetts, it is enacted "that any owner or keeper of any dog shall forfeit to any person injured by such dog, double the amount of *the damage sustained by him*;" and it has been held in construing this language, that when the action is brought by the plaintiff for injury done to his minor son, he might recover for the loss of the child's service, and the expense of his cure.†

STATUTES GIVING DAMAGES.—The rule that penal statutes are to be strictly construed, is applied to enactments on the subject of damages. So in Mississippi, where a statute gave a penalty of "damages in lieu of interest not exceeding thirty per cent. per annum against attorneys for refusing to pay over moneys when collected for their clients," it was held a penal statute to be strictly construed, and that none but "*clients*," strictly, could avail themselves of it.‡[2]

We have seen, under the head of debt, that damages are awarded, not for the debt, which is recoverable *in numero*, but for its detention. This principle is applied to penalties given by statutes; which must, unless some other form of action is provided, be recovered in an action of debt.‖ But a nice question has presented itself on the construction of statutes of this description, whether in the particular case the penalty is to be regarded as a debt or as unliquidated damages. There is a clear distinction between actions brought simply for pen- [571] alties, and actions brought under penal statutes to recover compensation for injuries.¶ If a sum certain be given, by way of penalty, to the party aggrieved, he may recover not only the money, but damages for its detention.** But if the

* Auchmuty *v.* Ham, 1 Denio, 495; Van Steenburgh *v.* Tobias, 17 Wend. 562; Russell *v.* Tomlinson, 2 Conn. 206; Adams *v.* Hall, 2 Verm. 9.

† McCarthy *v.* Guild, 12 Met. 291.

‡ Sloam *v.* Johnson, 14 Sm. & M. 47.

‖ Where a statute creates a liability to pay money, but does not prescribe any remedy by which a recovery shall be had, debt is the proper remedy. Strange *v.* Powell, 15 Ala. 452.

¶ Fife *v.* Bousfield, 6 Q. B. R. 100; and Fitzball *v.* Brooke, 6 Q. B. R. 873.

** North *v.* Wingate, Cro. Car. 559. *Ante*, 392.

[1] See, also, as to the law in New York, Steele *v.* Smith, 3 E. D. Smith's C. P. R. 321; Wheeler *v.* Brant, 23 Barb. 324; Fish *v.* Skut, 21 *Ibid.* 333; also Earl *v.* Van Alstine, 8 Barb. 630; in which case the injury was occasioned by bees. Consult, also, on the law of other States, Campbell *v.* Brown, 19 Penn. St. 359; Johnson *v.* Wing, 3 Mich. 163; Smith *v.* Cansey, 22 Ala. 568. See, also, Garvin *v.* Paul, 47 N. H. 158.

For the rule of damages in cases of injury *to* animals, see *ante*, head p. 559, note 2.

[2] Where a messuage recovered on a writ of entry was, at and after the time when the demandant's title accrued, subject to a right of homestead in the demandant's grantor and his family, and the house was occupied as a homestead by the grantor's wife, who claimed under that right, although without having had her homestead set off to her, it was held that the rentable value of the part occupied by her should not be included in estimating the clear annual value of the premises for which the tenant was liable under the statute (Mass. Gen. St. c. 134, § 15). Marsh *v.* Hammond, 103 Mass. 146.

penalty be given to the party suing, a common informer is not allowed damages for the detention.*

Double and Treble Damages.—But if double or treble damages be given by way of penalty, not even the party aggrieved can have damages for the detention; because the sum being uncertain, it is not to be considered as a debt.† Where double or treble damages are given,[1] it has been held doubtful how the double or treble value is to be arrived at; whether the jury are to find single damages to be increased by the court, or whether they are to find double the whole amount awarded by the statute.‡ The general and better practice would seem to be, for the jury to find single damages, and for the court to double or treble them;[2] although it would probably be equally good for the jury to assess the augmented damages, if it appear on the record that such assessment was in fact made.[3] But in debt for a penalty of double the value of a vessel and cargo under the embargo act of 9th January, 1808, it was held by Mr. Justice Story, that the verdict of the jury must be taken to be the double value, unless the contrary appears. ‖

Interest.—We have already, under the head of interest, examined some of those statutes which give damages, or in-
[572] terest by way of damages, on unsustained writs of error. Sometimes a penalty is imposed, as in Ohio, of a simple percentage on the recovery.¶

Statutes as to Flowage.—The subject of damages arising from the overflow of lands, resulting from the erection of dams, has been in many States of the Union brought very much under the control of special statutes. At common law the riparian

* North *v.* Musgrave, Rol. Abr. 574, Damages, P.

† Dagg *v.* Penkevon, Cro. J. 70. Mr. Sayer states this proposition positively; but it seems by the report that the plaintiff released his damages "because he was in doubt."

‡ The authorities are, Bro. Abr. Damage, pl. 70; 5 Com. Dig. Plead. 2, § 16; 2 Roll. 64; Sayer on Damages, 242; Bennett *v.* Hart, Sayer on Damages, 244; Grant *v.* Astle, Doug. 723, note, 731; Lobdell *v.* Inhabitants of New Bedford, 1 Mass. R. 153.

‖ Cross *v.* The United States, 1 Gallison, 26. In Maine it has been said, that where a statute gives double damages it is wholly immaterial whether they be assessed by the court or the jury. Quimby *v.* Carter, 20 Maine, 218. See also, Warren *v.* Doolittle, 5 Cow. 678.

As to double and treble damages in New York, see Hubbell *v.* Rochester, 8 Cow. 115; Brown *v.* Bristol, 1 Cow. 176; Livingston *v.* Plätner, 1 Cow. 175; Benton *v.* Dale, 1 Cow. 160; Morris *v.* Brush, 14 J. R. 328; Beekman *v.* Chalmers, 1 Cow. 584.

¶ Brady *v.* Holderman, 19 Ohio, 26.

[1] The demand for such damages must be expressly inserted in the declaration, which must either recite the statute, or conclude "to the damage of the plaintiff against the form of the statute." Chapman *v.* Emeric, 5 Cal. 239, and authorities cited. See, as to these damages in patent cases, *post*, 578, head p. 726, note 4.

[2] Gray *v.* James, 1 Peters C. C. R. 394; Evans *v.* Hettick, 3 Wash. C. C. R. 408, 422.

[3] See Welsh *v.* Anthony, 16 Penn. St. 254.

land-owner has a right to have the natural water-course kept open the whole time.[1] But in order to give security and quiet to mill-owners in several States of the Union, statutes have been passed, as in Massachusetts, to regulate the erection and maintenance of those dams, which if observed by the proprietor will secure him from any action at common law.* But if the provisions of these statutes are not complied with, as where the dam is kept up at a season of the year prohibited, the mill-owner shall have no benefit of the statute, but be liable, as if it had not been passed, to a suit at common law for the disturbance.† In the same State it has been held that the provisions of these statutes for the support and regulation of mills, cannot be so construed as to justify or excuse the erection of a dam in such a manner as to overflow a public highway and render it impassable; ‡ and in an action by the town against a mill-owner in such a case, the plaintiffs are entitled to recover the expense incurred in repairing the road, with interest, but not the costs of an indictment for not seasonably repairing the road.‖

NEW YORK RAILROAD ACT.—In New York, by the general railroad act of 27th March, 1848, when the company neglects to erect fences at the sides of the road, and to construct and maintain cattle-guards at road crossings, the company is liable for the death of a cow which comes on the track and is killed, without any proof of negligence on the part of the agents of the company.¶

LANDLORD AND LESSEE.—MASSACHUSETTS STATUTE.—In Massachusetts, where the lessee, on appealing from a judgment in favor of the lessor, gives the statutory bond to pay the intervening rent and damages, such damages are only the rent and interest, and cannot be construed to embrace loss of the sale of the premises or injury to them; nor can proof be [573]

* Stowell *v.* Flagg, 11 Mass. 364.

† Johnson *v.* Kittridge, 17 Mass. 76; Hill and Wife *v.* Sayles, 12 Met. 142.

‡ Commonwealth *v.* Stevens, 10 Pick. 247.

‖ Inhabitants of Andover *v.* Sutton, 12 Met. 182.

¶ Suydam *v.* More, 8 Barb. S. C. R. 358; Waldron *v.* Rensselaer & S. R. Co. 8 Barb S. C. R. 390.

[1] See *ante*, 137, *et seq.* Where one builds a mill-dam under the Kansas mill-dam act, (Kans. Gen. Stat. 66) so as to overflow another's land, the land-owner's damages are the difference between his land's value without the dam and with it. Harding *v.* Funk, 8 Kans. 315. So where, in a deed of mill property, there was a covenant of seizin of the privilege of raising the water of a creek to a certain height, but the grantee could not raise it to that height without liability for damages for flowage, the measure of his damages for the grantor's breach of covenant, was the difference between the value of the property at the time of the purchase, with the right to maintain the water at the height stipulated in the deed, and its actual value, with the right to maintain the water at the height only at which the grantee was authorized to maintain it. The ascertainment of this difference was proper for the jury. Hull *v.* Gale, 20 Wisc. 292.

received that the occupation was worth more than the stipulated rent.*

NEW YORK CITY LIEN LAW.—Under the New York City mechanics' act, as it is called, intended to protect material men and laborers, for work done and materials furnished for buildings, the claimant cannot obtain a lien on unliquidated damages, which the builder has sustained by being wrongfully discharged, and thus prevented from completing his contract; but is restricted to such funds as are due, and to become due for actual performance.†

PATENTS.—Under this head, too, should be considered the subject of actions for infringement of patents. The patent act of the United States [1] authorizes the jury in cases of infringement, to give a verdict for the actual damages sustained,[2] and we have already had occasion to consider the question, whether counsel fees can be allowed by way of damages in actions of this class.‡[3] As to the damages themselves, it has been held that full damages are usually given for the patented articles which have been made and sold to be used, and not for the selling or buying or making alone.‖ If the maker of the machine appear in truth to be ignorant of the existence of the patent, and do not intend any infringement, though this will not altogether exonerate him, it will tend to mitigate the damages.¶[4]

* Bartholomew *v.* Chapin, 10 Met. 1.
† Hoyt *v.* Miner, 7 Hill, 525.
‡ *Ante*, 99, *et seq.*
‖ 10 Wheat, 350; 3 McLean, 427.
¶ Bryce *v.* Dorr, 3 McLean, 583; Whittemore *v.* Cutter, 1 Gallison, 429; Jones *v.* Pearce, Webster's P. C. 122; Hogg *v.* Emerson, 11 Howard, 587–607. See also, Lowell *v.* Lewis, 1 Mason C. C. 182.

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[1] The patent and copyright laws of the United States, were consolidated in an act passed July 8th, 1870 (16 U. S. Stat at Large 198). By this act, the complainant may recover in equity his damages from an infringement, in addition to the profits to be accounted for by the defendant. *Ib.* § 55, p. 206.

[2] "Vindictive damages are out of place in verdicts for patent cases." Parker *v.* Hulme, 7 West. L. J. 417; 1 Fisher (P. C.), 44. See *infra*, n. 4.

[3] Although the recovery of counsel fees, was formerly sometimes permitted in this country in cases proper for vindictive damages (Parker *v.* Corbin, 4 McLean, 462), the law is now settled against allowing them, or even their consideration by the jury as an element of the plaintiff's damages in these actions. Teese *v.* Huntington, 23 How. (U. S.) 2; Day v. Woodworth, 13 How. 363, *ante*, 100, head p. 114, notes 1 and 2; Stimpson *v.* The Railroads, 1 Wall. Jr. 164. Nor are counsel fees or other expenses of obtaining an injunction against the infringement of a trade-mark included in the damages for the infringement. Burnett *v.* Phalon, 21 How. Pr. R. (N. Y.) 100. But in England the expenses into which the plaintiff has been plunged in consequence of the defendant's unlawful acts, are recoverable as special damages in these cases. Dixon *v.* Fawcus, 3 L. T. R. 693 (Q. B.).

[4] The "actual damages" which, by the patent act the plaintiff is entitled to recover for the infringement of his patent, may be trebled by the court in its discretion. Act July 8, 1870, §§ 55, 59; 16 (U. S.) Stat. at Large, 206, 207.

"The price of the machine, the nature, actual state, and extent of the use of the plaintiff's invention, and the particular losses to which he may have been subjected by the piracy, are all proper ingredients to be weighed by the jury in estimating the damages, *valere quantum valeant.*" Earle *v.* Sawyer, 4 Mas. 14, per Story, J.

CLAIMS AGAINST UNITED STATES OFFICIALS.—Where a claim for damages exists against agents or officers of the United States

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But although the jury in these cases have a large discretion in the ascertainment of the "actual damages," according to the circumstances, they must deduce them by calculation from the facts proved. City of New York *v.* Ransom, 23 How. (U. S.) 487; Schwarzel *v.* Holenshade, 3 Fish. (P. C.) 116, South. Dist. Ohio, *cor.* Leavitt, J.; Carter *v.* Baker, 4 Fish. (P. C.) 404; Dist. California, March, 1871. Remote and consequential damages must be discarded. *Ibid.*

It has been repeatedly held that in the "actual damages" should be included all the actual net profits which the defendant had derived from the use of the plaintiff's invention. This is on the ground that if the defendant had not sold his machines there would have been a demand to an equal extent for those of the plaintiff, who would have received the profits. Buck *v.* Hermance, 1 Blatchf. C. C. R. 398; Wilbur *v.* Beecher, 2 Blatchf. 132; Hall *v.* Wiles, 2 Blatchf. 194; Pitts *v.* Hall, 2 Blatchf. 229; McCormick *v.* Seymour, 2 Blatchf. 240; Case *v.* Brown, 1 Bissell, 382; aff'd 2 Wall. 320; Conover *v.* Rapp, 4 Fisher (P. C.) 57 (Ingersoll and Nelson, JJ.); Wintermute *v.* Redington, 1 Fish. (P. C.) 239 (North. Dist. Ohio, *cor.* Willson, J.), Dec., 1856; Bell *v.* Daniels, 1 Fish. (P. C.) 372; South. Dist. Ohio, *cor.* Leavitt, J.), Nov., 1858. And see Carter *v.* Baker, 4 Fish. (P. C.) 404, *supra.* And it was said by Mr. Justice Nelson, at the circuit, in the case of Pitts *v.* Hall (*supra*), that "if on looking into the profits made by the defendant, the jury are of opinion that they do not correspond with the fair profits which the plaintiff, if left alone, would have realized, they are not bound by the measure of the defendant's profits, but have a right to look into the profits which the patentee would have made if not interfered with." And where a defendant, having it in his power to make the valuation of the plaintiff's damages reasonably certain by proving the cost of the article, its value in the market, and the extent of his own manufacture and sales, neglects to do so, the court will not, except in case of palpable extravagance on the part of the jury, interfere with the exercise of a liberal discretion as to the damages. Stevens *v.* Felt, 2 Blatchf. 37.

But the case of McCormick *v.* Seymour, *supra*, was reversed by the Supreme Court of the United States on the question of the measure of damages, and the rule is so far modified as to permit the recovery of the infringer's gains by the inventor, to the extent only that he is himself proved to have been deprived of the profits of his invention, by the unlawful use or sale. It does not apply where the profit of the patentee consists neither in the exclusive use of the thing invented, nor in the monopoly of making it for others to use. See Seymour *v.* McCormick, 16 How. (U. S.) 480 (*infra.*) And the profits allowed must have been actually realized by the defendant. It is not enough that they might have been, with reasonable diligence. Dean *v.* Mason, 20 How. (U. S.) 198. In a suit at law, "it is precisely what is lost to the plaintiff, and not what the defendant has earned, which is the legal measure of the damages to be awarded;" Pr. Woodruff, J., Oct. 1870; Cowing *v.* Rumsey, 4 Fish. (P. C.) 275 (North. Dist. New York). Under the rule thus understood, the complainant is entitled to the value of the *saving* made by a defendant through the wrongful use of the patented process. Tilghman *v.* Mitchell, 4 Fish. (P. C.) 599, Aug., 1871, *cor.* Blatchf., J., South. Dist. of New York. And also, it is said, to interest on the ascertained value of the defendant's savings and profits for each year of the wrongful use, from the close of such year. *Ib.* If, however, a patentee whose profits were derived from the manufacture and sale of the patented article, have recovered from an infringer the full amount of the infringer's profits from making and selling the article, he cannot recover in addition from the infringer's *vendee*, the profits arising from the *use* of the specific article on the sale of which he has already recovered the profit. Spaulding *v.* Page, 4 Fish. (P. C.) 641, Dist. California, *cor.* Sawyer, J., Aug., 1871. But in England, under the 42d section of the 15 and 16 Vic. c. 83, which empowers the court in which an action for the infringement of a patent is pending, or a judge of the court when the court is not sitting, "to make such order for an injunction, inspection, or account," as to the court or judge may seem fit, it is held that the court will only direct an account of the "profits made by the defendants by means of the infringement," and not of those of which the plaintiff has been deprived. Elwood *v.* Christy, 18 C. B. (N. S.) 494. See, as to the difficulties in taking an account of the profits made by the piratical use of a patented invention, Crosley *v.* The Derby Gaslight Co. 3 M. & Cr. 428.

Where there is no established patent or license fee, general evidence must be resorted to, to get at a fair measure of damages. Evidence of the utility of the invention and its advantage over the old modes or devices used for working out similar results, is appropriate and pertinent. In ascertaining the damages on such evidence, the jury are not to estimate them for the whole term of a patent, but for the period of the infringement only, since a recovery does not vest the infringer with the right to continue the use. Suffolk Company *v.* Hayden, 3 Wallace (U. S.), 315. Where a patentee is accustomed to sell rights under his patent to use his invention, the customary charge for the right is the measure of the damages he is entitled to recover for

government, and the Congress of the United States has acted on the claim, and passed a statute awarding damages for the

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an infringement, with interest from the time of the infringement. Hogg *v.* Emerson, 11 How. 587. But if he is not accustomed to sell rights, but uses the patent exclusively himself, a different measure is adopted. If the patent is for an entire machine, he is entitled as damages, in case of an infringement, to the profits he could have made in constructing and vending his machine over the mere profits of its mechanical construction. If the patent is one for any improvement on a machine, he is entitled, as a measure of damages, to all the advantages of the use of his patented improvement, excluding the profits of the manufacture, and the value, if any, of the use of the old machine. Seymour *v.* McCormick, 16 How. (U. S.) 480; 19 How. (U. S.) 96; McCormick *v.* Seymour, 3 Blatchf. C. C. R. 209. In such a case, the jury cannot allow the profits on the sale of the entire thing as improved. Jones *v.* Moorehead, 1 Wall. 155; Seymour *v.* McCormick, 16 How. 480 (*supra*).

And if a machine derive its salable value in part only from the wrongful use of a patent, the damages should ordinarily be apportioned (the burden resting on the wrong-doer to show what part he is entitled to. Carter *v.* Baker, 4 Fish. (P. C.) 404 *supra*. If, however, independently of the patent, it would have no actual or market value, perhaps the entire profit of its manufacture might be the measure of the damages for the wrongful use of the patent. But if, again, the invention be of trifling cost and value, yet so attractive to the public, that an article which would be in itself very costly, but yet without the invention would command no sale, it would be a hard measure of justice to put all the profits of this expensive article in the pockets of the inventor of the improvement. Whitney *v.* Mowry, 4 Fish. (P. C.) 141, *cor.* Swayne and Leavitt, JJ., South. Dist. Ohio.

Profits are "ascertained by finding the difference between cost and yield." Rubber Co. *v.* Goodyear, 9 Wall. 788, 804; Troy Iron and Nail Factory *v.* Corning, 3 Fish. 497. In an accounting for profits, the defendant cannot be credited with a salary paid himself out of his earnings in the business. Williams *v.* Leonard, 9 Blatchf. C. C. R. 476.

Where a patentee, in consideration of a sum of money paid by the defendants, discontinued a suit for the infringement of his patent for covering hams, and released them from all damages theretofore sustained by the infringement, and gave them the privilege of putting up hams in the same manner they had before done for the rest of the year, with the understanding they were to put up no more cemented hams after the year without the patentee's consent, it was held, in an action by the patentee for the violation of this agreement, that the measure of his damages was the amount his hams had depreciated in price after the expiration of the agreed term and before the bringing of the suit, by reason of the influx of the defendant's hams into the market. Billings *v.* Ames, 32 Missouri, 265.

It has been said by eminent authority that if the defendants were sued a second time for violating the plaintiff's right, it might be proper for the jury to give vindictive damages. Alden *v.* Dewey, 1 Story, 336. But the power conferred on the court of increasing the "actual damages" found by the jury in these cases to the extent of trebling their verdict (*supra*), appears to be in lieu of the right they have in other actions of tort, of giving exemplary damages. Seymour *v.* McCormick, 16 How. 480, 489. And thus considered, it is, in proper cases, exercised in practice by the court. Guyon *v.* Serrell, 1 Blatchf. C. C. R. 244. And see *ante*, 573, head p. 726, note 2.

TRADE-MARKS.—These are entitled to protection in equity, and their violation to redress at law, independently of legislation; although express protection can now be obtained for them under a statute of the United States (Act, July 8, 1870, *supra*, § 77 *et seq.* 16 U. S. Stat. at Large, p. 210), and also as in New York, the fraudulent use of them is sometimes made a penal offence by statute. Laws, 1862, c. 306; 3 Edmonds' Stat. at Large, 672. But they may be properly enough referred to here. For the infringement of a trade-mark the plaintiff is entitled to nominal damages without proof that he has been deprived of any particular amount of profits by the defendant's unlawful act. Burnett *v.* Phalon, 21 How. Pr. 100; Blofield *v.* Payne, 4 B. & Adol. 410. The plaintiff should recover for his loss of profit on sales, sustained in consequence of the defendant's sales of the pirated article. Taylor *v.* Carpenter, 2 Woodb. and M. 1. And in equity, an order is made in practice that the defendant account for the sales made by him with a view to the payment of the illegal profit to the plaintiff. Coats *v.* Holbrook, 2 Sand. Chy. 586 (2d ed. 645); Spottiswoode *v.* Clark, *Ib.* 628; 10 Lond. Jur. 1043. Beyond this, no definite rule seems to exist for the ascertainment of the extent of the actual damage, and in practice the plaintiff's remedy lies, perhaps, more commonly in the equitable "security for the future" than the legal "indemnity for the past" afforded by the courts.

In a case arising under Sir Hugh Cairn's act (21 and 22 Vict. c. 27), on an inquiry as to the damages sustained by the alleged violation of a trade-mark, the vice-chancellor (Sir W. Page Wood) refused to assume that the persons who bought what the plaintiffs averred were

injury done, that is a final disposition of the matter, and no further redress can be obtained from the courts of law.*

* U. States *v.* Williams, 4 McLean, 567.

See Regina *v.* The Mayor, &c. of Lichfield, 15 Jur. 812; a case upon the English Municipal Corporation Act, 5 & 6 Will. IV, c. 76, where the power of the Lords of Treasury to make compensation to a party removed from office was considered.

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inferior articles at an inferior price, would necessarily, had they not done so, have bought the superior articles at the higher price, and in the absence of other proof, held that the plaintiffs had sustained no damage. Leather Cloth Co. *v.* Hirschfield, 1 Law R. (Eq. Cases) 299. But, in a late case in California, the plaintiff was awarded the whole profit made by the defendant by the sale of the article bearing the illegal trade-mark. This was on the ground of the difficulty in ascertaining what proportion of the profit was due to the trade-mark and what to the articles' intrinsic value, the court relying on the analogy of the case of a wrongful confusion of goods, and saying, "It is more consonant with reason and justice that the owner of the trade-mark should have the whole profit, than that he should be deprived of any part of it by the fraudulent act of the defendant." In the same case it was held that while the owner of the trade-mark was entitled to so much of the pirate's profit as resulted from his use of the trade-mark, this profit was not the only measure of damages, as the spurious article might have injured the sale of the genuine one. Graham *v.* Plate, 40 Cal. 593. See Pitts *v.* Hall, 2 Blatchf. 229 (*supra*).

CHAPTER XXIV.

OF DAMAGES WITH REFERENCE TO PLEADING AND PRACTICE.

Damages, General and Special.—Special Damages to be Averred in the Declaration.—Misjoinder of Counts and Assessment of entire Damages.—Jurisdiction of the Courts of the United States with reference to Damages.—Statute of Limitations; Accord and Satisfaction.—Tender.—Right to begin.—Bad Counts.—Verdict; Award of Arbitrators.—Damages with regard to Costs.

AVERMENT OF DAMAGE.—The most important remark to be made on this part of our subject, is as to the necessity of distinctly averring in the declaration the damage of which the plaintiff complains. Great nicety has been used in regard to the peculiar mode of allegation; thus, it has been doubted whether an averment was sufficiently clear and positive if preceded by the word "whereby," or "thereupon," on the ground that the words following the "whereby" or "thereupon," could not be considered as containing an averment of *matter of fact*, but merely matter of conclusion or inference drawn from the matters previously alleged. But it now seems to be well settled, that where the allegation following such a word as "thereupon" or "whereby" is clearly intended as an *allegation* of fact, the matter is to be considered averred with sufficient directness; the word "thereupon" or "whereby" not being understood as showing that the proposition following such word is intended to be stated as a consequence deducible from what precedes, but only as showing the time at which, or the occasion on which that which follows the word in question is averred to have taken place.* But if the averment is merely one of a legal liability, it is well established that such an averment being one of matter of law, will not supply the want of those allegations of fact from which alone the court could infer the law to be as [575] stated; so that such allegation is useless when the declaration is insufficient, and superfluous when sufficient without it.

PLEADING SPECIAL DAMAGES.—A question of more frequent occurrence is, as to the necessity of averring the particular

* Pryce *v.* Belcher, 3 M. Gr. & S. 58; Brown *v.* Mallet, 5 *Ibid.* 599.

cause and extent of any special damage for which the plaintiff claims redress.[1]

[1] Mr. Chitty's satisfactory statements cited in the text (and *ante*, 68), of the distinction between general and special damages, leave little to be added. All legal damages must, whether the action be in contract or in tort, *naturally* result from the act or default complained of; and although the law in certain cases permits the recovery of such damages as are physically secondary or consequential, yet they must in legal contemplation be also its *proximate* result. Where such result is necessary, or is legally imported by the facts, the damages are general, and need not be specially set forth in the pleading; otherwise they must. In the one case, the statement of the cause of action sufficiently apprises the defendant of the extent of the claim. In the other, legal justice, in order to enable him to prepare his defence, requires the further averment of the injurious consequence. *A fortiori*, where special damage is essential to the maintenance of the action, such special damage must be alleged. Shaw *v.* Hoffman, 21 Mich. 151; Nunan *v.* City of San Francisco, 38 Cal. 689; Bristol Manufacturing Co. *v.* Gridley, 28 Conn. 201; Chamberlain *v.* Porter, 9 Minn. 260; McTavish *v.* Carroll, 13 Md. 429; Warner *v.* Bacon, 8 Gray (Mass.), 397; Baldwin *v.* Western R. R. Co. 4 Gray, 333; The Town of Troy *v.* The Cheshire Railroad Company, 3 Fost. (N. H.) 83; Olmstead *v.* Burke, 25 Ill. 86; Agnew *v.* Johnson, 22 Penn. St. 471; Patten *v.* Libbey, 32 Me. 379; Roberts *v.* Hyde, 15 La. Ann. 51; Birchard *v.* Booth, 4 Wis. 67; Solmes *v.* Lias, 16 Ab. Pr. R. 311. But where in an action in the nature of trespass for the wrongful seizure of goods, which was the gist of the action, although the form of the plaintiff's plaint was limited to certain heads of special damage which were not proved, but it appeared that the taking was wrongful, the plaintiff was held by the judical committee of the Privy Council entitled not only to nominal damages, but to such substantial damage as the jury thought adequate. Doss *v.* Doss, 14 L. T. 646. See Roberts *v.* Graham, 6 Wallace, 578, where the subject was considered in an opinion pronounced in April, 1868, by the Supreme Court of the United States, in an action for injuries sustained by the plaintiff from the neglect of the defendant (a carrier of passengers by steamers) to furnish proper accommodations and supplies, and in which it was held that under an allegation of facts whereby the plaintiff was "subjected to great inconvenience and injury," proof might be introduced tending to prove the plaintiff's illness, and the negligence of the defendant causing such illness; this not being considered by the court to be special damage. This decision is based on that of Ward *v.* Smith, 11 Price, 19 (*infra*).

A few illustrations in addition to those in the text, pp. 575, 576, 577, are subjoined. The law presumes damages and dispenses with their averment in the following cases: Actions for injury to a plaintiff's feelings in consequence of his daughter's seduction. Phillips *v.* Hoyle, 4 Gray (Mass.), 568; for loss of profit which would have been the direct result of work done at the contract price, and which is prevented by the defendant's wrongful act. Burrell *v.* New York and Saginaw Salt Co. 14 Mich. 34; for slander of the plaintiff in either a public or private official capacity. Foulger *v.* Newcomb, 2 L. R. (Exch.) 32; for bodily pain and suffering in an action for a personal injury. Curtis *v.* The Rochester and Syracuse R. Co. 18 N. Y. 534; affirming 20 Barb. 282 (*ante*, 83, note 1). (See also, Swarthout *v.* N. J. Steamboat Co. 46 Barb. 222); for loss of time and expenses incurred in preparation for marriage, in an action for breach of promise. Smith *v.* Sherman, 4 Cush. (Mass.) 408; damages from imprisonment. Garrison *v.* Pearse, 5 E. D. S. (N. Y. C. P.) 255.

In an action for a trespass by the defendant's horses on the plaintiff's land, and for their kicking and injuring the plaintiff's horse, it is not necessary to aver that the defendant's horses were accustomed to kick, nor that the defendant knew of this vice. Dunckle *v.* Kocker, 11 Barb. (N. Y.) 387. Nor to recover special damages for loss of sheep by disease communicated by other sheep warranted by the defendant, need the plaintiff allege that the defendant knew that the sheep so warranted were to be placed with the others. Packard *v.* Slack, 32 Vt. (3 Shaw) 9. In an action of covenant for breach of contract in not building a house, in payment for which the plaintiff was to have conveyed certain premises, no statement of special damages is necessary to entitle the plaintiff to give evidence of the difference in in value between the house and the premises which constitutes the measure of damages. Laraway *v.* Perkins, 10 N. Y. 371.

In an action for personal injuries it is held in Massachusetts, that proof of damages from the interruption of the plaintiff's occupation, and deprivation of his accustomed means of earning support, is inadmissible unless such damages are specially alleged. (See *infra*, 577). Baldwin *v.* Western R. R. 4 Gray (Mass.), 333. But in the English Court of Common Pleas it is held otherwise. Potter *v.* Metropolitan R. Co. 28 L. T. R. (N. S.) C. P. 735.

In the following cases the damages are special and must be alleged: for loss of rents in actions for injury to real estate. Parker *v.* City of Lowell, 11 Gray (Mass.), 353; Adams *v.* Barry, 10 Gray (Mass.), 361. For a bill for medical services in an action of assault and battery. O'Leary *v.* Rowan, 31 Mo. 117. And see Ward *v.* Hawes, 5 Minn. 440. In an action for the loss of an animal through negligence, damages beyond its value, such as money prop-

"Damages," says Mr. Chitty,* "are either general or special. General damages are such as the law implies or presumes to have accrued from the wrong complained of. Special damages are such as really took place, and are not implied by law; and are either superadded to general damages arising from an act injurious in itself, as where some particular loss arises from the uttering of slanderous words actionable in themselves, or are such as arise from an act indifferent and not actionable in itself, but injurious only in its consequences, as where words become actionable only by reason of special damage ensuing. It does not appear necessary to state the former description of damages in the declaration; because presumptions of law are not in general to be pleaded or averred as facts. But when the law does not *necessarily imply* that the plaintiff sustained damage by the act complained of, it is essential to the validity of the declaration that the resulting damage should be shown with particularity; and when the damages sustained have not necessarily accrued from the act complained of, and consequently are not implied by law, then, in order to prevent the surprise on the defendant, which might otherwise ensue on the trial, the plaintiff must in general state the particular damage which he has sustained, or he will not be permitted to give evidence of it."†

So in the Queen's Bench, in an action on the case for an ex-

* Chitty on Pleading, vol. i, p. 458, cited in Dumont *v.* Smith, 4 Denio, 319. *Vide ante*, 67. "The damages sustained are matter of evidence, and need not be alleged; nor are they scarcely ever stated but in a general manner." Barrusso *v.* Madan, 2 J. R. 149.

† See also, Chitty on Pleading, vol. i, p. 370, *et seq.*, same subject. See also (*ante*, 185), De Forrest *v.* Leete, 16 J. R. 122, where it is held, that in an action on the covenant against incumbrances, it was not enough to aver that the premises were incumbered, but that the declaration must set out the extinguishment of the incumbrance. See also, Butler *v.* Kent, 19 J. R. 228; and Arrowsmith *v.* Gordon, 3 La. Ann. R. 105.

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erly expended in efforts to cure it. Patten *v.* Libbey, 32 (Maine), 378. For prospective profits. Cole *v.* Swanston, 1 Cal. 51. For damages beyond the intrinsic value of a book, for its destruction, on the ground that it contained a subsciption list procured at large expense, assuming that such damages can be recovered under any form of allegation. Nunan *v.* City & Co. of San Francisco, 38 Cal. 689, *supra*. For profits of a mill lost by the obstruction of a water-course. Taylor *v.* Dustin, 43 N. H. 493. For expenses occasioned by the fraudulent imitation of trade-marks. Dixon *v.* Fawcus, 3 L. T. R. (N. S.) Q. B. 693 (*ante*, 573, note 1). Special damage in trover and replevin. Burrage *v.* Melson, 48 Miss. 237; Park *v.* McDaniels, 37 Vt. 594; Stevenson *v.* Smith, 28 Cal. 102; Schofield *v.* Ferrers, 46 Penn. 438. See Clements *v.* Glass, 23 Geo. 395. (*Aliter*, however, it is said as to outrage and wrong attending the taking, which belong to the wrongful act itself. *Ibid.*) For loss of health from the breach of a promise to marry. Bedell *v.* Powell, 13 Barb. (N. Y.) 183. Damages from a breach of a contract which is a material enlargement of that originally declared on. Hill *v.* Smith, 34 Vt. 545; 32 Vt. 433. Damage to an author from the disparagement of a copyrighted work. Swan *v.* Tappan, 5 Cush. (Mass.) 104. In Indiana, in an action of trespass for killing a mare, damages for nursing and feeding two colts she had been suckling, and for care and attention of the mare's wound, not having been alleged, were held not recoverable. Teagarden *v.* Hetfield, 11 Ind. 522. In an action by an unmarried woman against a carrier for personal injury from his negligence, her diminished chances of marriage must be specially alleged to entitle her to an enhancement of the damages on that ground. Hunter *v.* Stewart, 47 Maine, 419. Where damages beyond legal interest for non-payment of a note at maturity are allowed by law, as a penalty, they cannot be recovered unless specially averred. Wilson *v.* Dean, 10 Iowa (2 With.), 432. For the rule in slander and libel suits, see *ante*, 539, head p. 675, notes.

The new codes of practice (see page 41, note 1) require the facts constituting the plaintiff's claim or cause of action to be stated; and therefore, where under those systems the right to maintain the action depends on the fact that certain damages have been sustained, such damages must be averred. See Fagen *v.* Davison, 2 Duer (N. Y.), 153

cessive distress, it was held that no mention being made, in the declaration, of the *sale*, either for damage or by way of substantive complaint, the plaintiff could only recover damages in respect to the detention of the property, and not for the sale.*

New York Decisions.—So in New York, in an action on the case, in which the plaintiff declared against the defendant for placing a quantity of lime, sand, and other [576] building material, opposite to his store, so that the free passage to it was interrupted, and the dust and dirt of the materials blew into his store and damaged his goods, it was held, that proof that customers were prevented from frequenting the store, and that a tenant who occupied it, left it in consequence of the nuisance, whereby it remained empty, was inadmissible, because not alleged in the declaration as special damages. "When the damages," said the Supreme Court, "actually sustained do not necessarily arise from the act complained of, and consequently are not implied by law, in order to prevent surprise to the defendant the plaintiff must state in his declaration the particular damage which he has sustained, or he will not be permitted to give evidence of it upon the trial. Here there is no claim for damages, in the declaration, for the loss of customers. . . . The loss of the tenant and the consequent loss of the rent, ought to have been specially alleged in order to entitle the plaintiff to have proved them as damages." †

So in a still more recent case in the same State, in an action of trespass on the case, the declaration alleged that the defendant, in consideration of the sale by the plaintiff to him of certain premises in the city of New York, covenanted that he would erect on them a brick dwelling-house, and would not erect on them any building to be occupied in any manner that would be a nuisance to the vicinity of the premises. The declaration then proceeded to aver, that the defendant had not erected a brick dwelling-house, but had permitted a bake-house to be erected on the premises, and suffered it to be occupied in a manner that was a nuisance to the vicinity of the premises. There was no allegation of special damage, but the declaration concluded generally, to the damage of the plaintiff $6,000. On the trial, the plaintiff's counsel offered to prove actual damage sustained by him in the depreciation of the value of premises

* Thompson *v.* Wood, 4 Q. B. 493. In Driggs *v.* Dwight, 17 Wend. 71, in New York; and in Ward *v.* Smith, 11 Price, 19, in England,—special damage was allowed, though not stated in the declaration. In Leland *v.* Tousey, 6 Hill, 328 (New York), it was intimated that an averment of consequential damage, though too remote and ineffectual, is no ground of demurrer.

† Squier *v.* Gould, 14 Wend. 159.

owned by him, adjacent to the lot in question, occasioned by the erection of the bake-house. But the evidence was excluded on the ground of the want of any allegation of special damage in the declaration; and the judge who tried the cause, held that the plaintiff could only recover nominal damages. [577] By consent, a nonsuit was ordered, and on motion to set this aside, the Supreme Court held the decision right. "Suppose," said Cady, J., "the bake-house has been so occupied as that it has been a nuisance, how has it damnified the plaintiff? The declaration does not show that he has been annoyed by the heat and smoke issuing from the bake-house, or that he has any property which has been lessened in value by it." *

In a case in New York, where the plaintiff sued the owner of a steamboat for not towing a canal-boat according to contract, he alleged and proved as special damage the expenses of his detention; it was held that the plaintiff could not go further and ask for general damages, there being no proof of any.†

Malicious Prosecution. — Loss of Credit. — So in Alabama, it has been held that in an action brought by a firm for a malicious prosecution, proof of special damage arising from loss of reputation, credit, or business, cannot be given unless it is specially averred in the declaration.‡[1] And the principle has been recognized in South Carolina.‖[2]

Mode of Averment. — The allegation of damage is only required to be of the fact as it exists in legal contemplation.[3] So an allegation that the plaintiff has been put to great expense, will be satisfied by proof that he has incurred a liability to pay.¶[4]

Different Counts. — An important question in regard to the subject of damages, as connected with pleading, is that in re-

* Bogar *v.* Burkhalter, 2 Barb. S. C. R. 525; and as to allegation of special damage, in trover, *vide ante*, 475, *et seq.*

† Vanderslice *v.* Newton, 4 Comstock, 130.

‡ Donnell *v.* Jones, 13 Ala. (N. S.) 490.

‖ Rowand *v.* Bellinger, 3 Strobh. 373.

¶ Richardson *v.* Chason, 10 Q. B. R. 756.

[1] So in a suit for false imprisonment, the plaintiff, who was a claim collector, could not prove as special damages, that he had been twice applied to, to go out of the county while under bonds not to do so. This damage had not been averred, but even if it had been, it seems that the evidence would have been inadmissible. Fuller *v.* Bouker, 11 Mich. 204.

[2] But in England the rule now appears to be different in regard to the necessity for this averment. See Potter *v.* Metropolitan R. Co., 28 L. T. R. N. S. (C. P.) 735. See *ante*, 575, head p. 731, n. 1.

[3] But this rule of the common-law practice is changed by the new codes of procedure, which require the statement of the actual facts, and not merely the averment of their legal effect. Garvey *v.* Fowler, 4 Sandf. 665.

[4] But an averment of *payment* can be satisfied only by proof of actual payment. *Ante*, head p. 120, n. 1.

lation to the misjoinder of counts, and the assessment of damages thereon; but as this matter belongs also to the head of practice, it will be considered under that branch of our subject.

Matters Occurring after Suit.—We have already had occasion, when treating of the rights of parties, with reference to the state of things at the commencement of the suit, to speak of the necessity of pleading specially matters arising after suit brought.*[1]

Damages need not be Precisely Stated.—In regard to the amount of damages to be averred, it is only necessary to lay them so high as to cover the injury; for no recovery can be had beyond the amount in the declaration. It was, indeed, anciently held, both in actions of *indebitatus assumpsit* and *insimul computassent*, that the plaintiff could not recover any less amount of damages than the precise sum laid in the declaration.† But it is now well settled otherwise: and thus, even in an action on a policy of insurance averring a total loss, a recovery may be had for a partial loss.‡

No Damages Recoverable beyond the Ad Damnum.—But the rule the other way is adhered to with [578] severity.[2] If the jury assess the damages at a sum beyond the amount laid in the declaration, the plaintiff must remit the excess, and take judgment only for the residue. If judgment be entered for the whole amount of damages found by the jury, it is error. ‖ Where the plaintiff's particulars of

* *Ante*, 109.

† Sayer on Damages, ch. x, p. 43, *et seq.*; Bagnall *v.* Sacheverel, Cro. Eliz. 292; Ramsden's case, Clayton, 87.

‡ Chitty on Pleadings, vol. i, p. 371; Marshall on Insurance, 629.

‖ Hoblins *v.* Kimble, 1 Bulst. 49; Cheveley *v.* Morris, 2 W. Black. 1300; Curtiss *v.* Lawrence, 17 Johns. 111; Dox *v.* Dey, 3 Wend. 356; Fish *v.* Dodge, 4 Denio, 311; Fowlkes *v.* Webber, 8 Humphreys, 530; David *v.* Conard, 1 Greene (Iowa), 336. In this last-named State (Iowa), the omission to aver damages at the conclusion of a declaration, and of each count, is cured by the verdict, when the declaration contains an allegation of indebtedness for a greater amount than that of the judgment. In Mississippi, it is no objection to a verdict that it is for more than the amount indorsed on the writ, if it correspond with the amount laid in the declaration. Williams *v.* Williams, 11 Smedes & M. 393.

[1] But as we have seen in the case of trover, and of sales where the price is paid in advance, damages are sometimes permitted to be estimated with reference to the market value of the goods which are the subject of the action up to the time of trial. *Ante*, head p. 590, n. 1. So in tort, unless the injury be of such a nature that actions can be brought *toties quoties*, the jury may give all the damages sustained by the plaintiff up to the trial. They are not confined to such as were sustained before the date of the writ. Dailey *v.* The Dismal Swamp Canal Co., 2 Iredell, N. C. 222; *ante*, 552, n.

[2] The New Jersey Flax Co. *v.* Mills, 2 Dutcher (N. J.), 60; Cameron *v.* Boyle, 2 Greene (Iowa), 154.

demand stated the action to be brought for one year's salary, or damages for the dismissal of the plaintiff before the expiration of the year, it was held sufficient to let in a claim on a *quantum meruit* for work done during a portion of the year, it not appearing that the defendant was misled.*

JOINT TRESPASSES.—In many cases of joint trespass and several damages given, the plaintiff is permitted to enter one joint judgment against all, assuming the largest sum assessed against any one as the damages against all, *de melioribus damnis.*† [1]

PLEA TO THE DAMAGE.—There has been much discussion how far a plea can be put in to the damage only;[2] and the reasonable rule appears to be that such a plea is bad, unless the damage is so essentially the cause of action that without it the suit could not be maintained.‡ [3]

* Harris *v.* Montgomery, 15 Jur. 757.
† Halsey *v.* Woodruff, 9 Pick. 555; Fuller *v.* Chamberlain, 11 Met. 503.
‡ Robinson *v.* Marchant, 7 Q. B. 918; Wilby *v.* Eltson, 8 Man. Gr. & S. 142.

[1] So where a joint tort had been committed, and the referee found that the plaintiffs had been damaged by one of the defendants to the amount of $600, and by the other to the amount of $150, it was held by the Superior Court of New York that the judgment was rightly entered against both in the larger amount. O'Shea *v.* Kirker, 4 Bosw. 120; see Bell *v.* Morrison, 27 Miss. 68; Hair *v.* Little, 28 Ala. 236; Clark *v.* Beales, 15 Barb. (Ark.) 452. In an action of tort the damages are not divisible. There can be but one verdict and for one amount against all of those found guilty. All are principals; and each defendant is liable for all the damages sustained without regard to different degrees or shades of guilt. Beal *v.* Finch, 1 Kern. (N. Y.) 128. So where all the defendants, in an action charging them with a joint trespass, are defaulted, and the case referred to an assessor to assess the damages, they are all liable for the whole damage actually sustained by the plaintiff, although it appears by the evidence before the assessor that one of them did not participate in the trespass. Gardner *v.* Field, 1 Gray (Mass.), 151. But the plaintiff may, after verdict against all the defendants, enter a *nolle prosequi* against some, and take judgment against the others. Hardy *v.* Thomas, 23 Miss. 544; Conner *v.* Cockerill, 4 Cr. C. C. R. 3. See *vost*, 584. But where cows belonging to several owners are found in the garden of an individual, committing a trespass, each owner is liable for the damage done by his own cow, and for no more; and in the absence of all proof as to the amount of damage done by each cow, the law will infer that the cattle did equal damage. Partenheimer *v.* Van Order, 20 Barb. (N. Y.) 479. And see Bulkley *v.* Smith, 2 Duer (N. Y.), 261.

[2] In New York, the customary statement in the complaint of the amount of damage sustained by plaintiff is held, under the Code of Procedure, not to be traversable; and it is therefore not admitted by a failure to answer. The plaintiff, on default, must prove his damages, or he can recover nominal damages only. Hackett *v.* Richards, 3 E. D. Smith's C. P. R. 13 (reversed on another point, 13 N. Y. 148); Connoss *v.* Mier, 2 E. D. S. 314. Such is the rule also in Kentucky and New Hampshire. Daniel *v.* Judy, 14 B. Monr. (Ky.) 393, and Wilson *v.* Wilson, 5 Fost. (N. H.) 229. The jury cannot, after a default, find for the defendant. Ellis *v.* The State, 2 Ind. 262. They must find at least one mill in damages. Frazier *v.* Lomax, 1 Cr. C. C. R. 328.

[3] See Reindel *v.* Schell, 4 Jur. (N. S.) 310; 27 L. J. (C. P.) 146; Saltus *v.* Kipp, 2 Abbott's (N. Y.) Pr. R. 382; Hopple *v.* Higbee, 3 Zabr. (N. J.) 342. But matter which if pleaded would have barred the action, cannot, as a general rule, be given in evidence unless pleaded. So in trover, Finch *v.* Blount, 7 C. & P. 478. In assault and battery, Watson *v.* Christie, 2 B. & P. 224. In trespass, Day *v.* Porter, 2 M. & Rob. 151.

ALLEGATION OF CONSEQUENTIAL DAMAGES.—As to demurrer, it is no ground of demurrer to an entire breach in an action of covenant, that certain consequential damages alleged are not recoverable. If the plaintiff is entitled to recover for any damage, it is sufficient to support the breach.*

JURISDICTION OF UNITED STATES COURTS AS CONTROLLED BY AMOUNT.—An important question as to damages with reference to pleading, is presented in the United States, in regard to the jurisdiction of those courts which are prohibited from taking cognizance of any cases unless a certain pecuniary amount is in controversy: as in regard to the Circuit Courts, which do not usually exercise their jurisdiction over cases involving less than five hundred dollars; and the Supreme Court of the United States, the appellate jurisdiction of which in like manner commences at the sum of two thousand dollars. And it [579] has been frequently decided "that the damages claimed in the writ and declaration are the sum in controversy."[1] Even if the plaintiff recover less than $500, it cannot affect the jurisdiction of the court, if a greater sum be claimed in his writ.† But on application to remove a suit from the State court, it has been intimated that the amount in the declaration is not conclusive, and that the plaintiff's affidavit may be received to controvert it.‡

On a writ of error, though the verdict in the Circuit Court be for less than $2,000, but more than that sum is claimed in the declaration, if the plaintiff bring error, the Supreme Court has jurisdiction; for the judgment may be reversed, and the whole amount claimed recovered.‖ But this is not so if the writ of error is brought by the defendant.¶ In such case the amount in controversy is to be decided by the sum in controversy at the time of the judgment, and not by any subsequent additions thereto, such as interest. The court cannot look beyond the

* Amory *v.* Brodrick, 5 B. & Ald. 712.

† Gordon *v.* Longest, 16 Peters, 97 and 104.

‡ People *v.* Judges of N. Y. C. P. 2 Denio, 197.

‖ Gordon *v.* Ogden, 3 Peters, 33.

¶ Smith *v.* Honey, 3 Peters, 469. See also, Wilson *v.* Daniel, 3 Dall. 401; United States *v.* M'Dowell, 4 Cranch, 316; Course *v.* Stead's Ex'r, 4 Dall. 22; Brown *v.* Barry, 3 Dall. 365; United States *v.* Brig Union, 4 Cranch, 216; Peyton *v.* Robertson, 9 Wheat. 527; Ritchie *v.* Mauro, 2 Pet. 243; Scott *v.* Lunt's Adm'r, 6 Peters, 349; United States *v.* M'Daniel, 7 Peters, 1.

[1] In actions of tort, the damages claimed usually determine the jurisdiction as to amount. Aulick *v.* Adams, 12 B. Monr. (Ky.) 104. But under the Indiana Code, the damages laid in the conclusion of the complaint do not enlarge the claim of the plaintiff so as to defeat the jurisdiction of a court limited in jurisdiction to a specified amount, if it appear by the statement of the plaintiff's cause of action that he cannot be entitled to recover as much as the limit within which the jurisdiction is confined. Collins *v.* Shaw, 8 Ind. 516. The sum laid limits but does not enlarge the plaintiff's claim. Epperly *v.* Little, 6 Ind. 344.

time of the judgment, in order to ascertain whether a writ of error lies or not.*

And where the demand is not for money, and the nature of the action does not require the value of the thing demanded to be stated in the declaration, the recognized practice of the courts of the United States has been to allow the value to be given in evidence.†

STATUTE OF LIMITATIONS. — ACCORD AND SATISFACTION. — Whenever it becomes important to set up the defence of the statute of limitations to claims for damages, as in cases of nuisances of long standing, it is necessary that it should be pleaded, otherwise it will be disregarded.‡ It belongs to this [580] branch of our subject to mention that accord and satisfaction by parol, or by writing not under seal, cannot be interposed as a bar to a debt by record, or by specialty, where the debt arises on the deed; but it may be set up as a bar to damages founded on the breach of a specialty.‖[1]

TENDER.—Of the rules of pleading bearing on the defence, one of the most important is that which relates to tender. A tender may be made and pleaded, where the demand is in the nature of a debt, when the sum due is either certain or capable of being made certain by mere computation; but it is not allowed when the action is for unliquidated damages, the amount of which is to be determined by the exercise of discretion by a jury.¶[2]

RIGHT TO BEGIN.—If the rules of pleading are correctly followed, the only remaining questions in regard to damages are those which come properly under the head of practice. The most important of these is that which presents itself at the trial

* Knapp *v.* Banks, 2 Howard, 73. See also, Wilson *v.* Sandford, 10 How. 99.

† *Ex parte*, Bradstreet, 7 Peters, 634; United States *v.* Brig Union, 4 Cranch, 216; Course *v.* Stead's Ex'r, 4 Dall. 22.

‡ Waggoner *v.* Jermaine, 3 Denio, 306; 2 Saunders, 66, note 3; 1 Chitty Pl. ed. 1837, 517, note.

‖ Blake's case, 6 Rep. 43; Bac. Ab. Accord and Satisfaction; Alden *v.* Blague, Cro. Jac. 99; Kaye *v.* Waghorne, 1 Taunt. 428; Strang *v.* Holmes, 7 Cowen, 224; Mitchell *v.* Hawley, 4 Denio, 414.

¶ Chitty on Contracts, 793; Green *v.* Shurtliff, 19 Verm. 592; Holmes *v.* Woodruff, 20 Verm. 97.

[1] A less sum than the debt, although accepted in full payment, is not good as an accord and satisfaction. Blum *v.* Hartman, 3 Daly, 47. But this rule does not apply where the payment accepted in satisfaction exceeds the principal, and falls short only in the calculation of interest. Johnston *v.* Brannan, 5 Johns. (N. Y.) 268.

[2] To constitute a valid tender, the money must be produced and actually offered to the creditor, unless he dispenses with it by a positive act or declaration. It is not enough that the debtor has the money in his pocket or elsewhere, without showing it, and informs the creditor he is ready to pay, without offering to do so. Strong *v.* Blake, 46 Barb. (N. Y.) 557. But a tender in bank-notes is good, unless objected to on that ground. U. S. Bank *v.* Bank of State of Georgia, 10 Wheat. 347; Wright *v.* Reed, 3 Term. 554; Snow *v.* Parry, 9 Pick. 542. A tender stops interest. Dent *v.* Dunn, 3 Camp. 296.

of the cause in regard to the right to begin, as it is called; or, in other words, in what cases does the necessity of proving damages give the plaintiff a right to open and close the cause, where the affirmative of the issue is with the defendant.[1] The importance of this subject has been recently clearly stated by a judge of great experience. "It, unhappily, still remains of great importance to the administration of justice by a jury that the right to begin should be correctly adjudicated on; for all who are conversant with those trials, at Nisi Prius, in which the address of counsel may materially affect the result, well know that the issue often ultimately depends on the decision which party has a right to begin." *

In England, it has at length been settled by a rule of all the judges, that the plaintiff shall begin in all actions for personal injuries, libel, and slander, though the general issue may not be pleaded, and the affirmative be on the defendant. In actions of contract,† however, the subject is still involved in uncer-
tainty. An effort has been made to make the right de- [581]
pend on whether the plaintiff goes for substantial relief or for nominal damages; but the point does not appear to have been yet authoritatively settled.‡

"In this country," says Mr. Greenleaf, in his very valuable work on Evidence, "it is generally deemed a matter of discretion, to be ordered by the judge at the trial as he may think most conducive to the administration of justice; but the weight of authority as well as the analogies of the law, seem to be in favor of giving the opening and closing of the cause to the plaintiff, whenever the damages are in dispute, unliquidated, and to be settled by the jury upon such evidence as may be adduced, and not by computation alone." ‖ It appears to me that this language ascribes a greater discretion to the judge trying the cause, and would lead to greater laxities, than are in fact allowed. In Massachusetts, it has been said, citing with approbation the language of Lord Denman,¶ "Wherever, from the state of the record at Nisi Prius, there is anything to be proved by the plaintiff, whether as to the facts necessary for his obtaining a verdict,

* Pollock, C. B., in Ashby *v.* Bates, 15 M. & Wels. 589, where a new trial was ordered because of an erroneous ruling at Nisi Prius as to the right to begin. See also, Booth *v.* Millns, 15 M. & Wels. 669.

† Greenleaf on Evidence, § 76, 3d ed. 149; Mercer *v.* Whall, 9 Jur. 576, and 5 Q. B. 447.

‡ Chapman *v.* Rawson, 8 Q. B. 673; Cannam *v.* Farmer, 2 Car. & Kir. 747. In the Exchequer, the crown has the right to a general reply in all cases where the crown has an interest. Chandos *v.* Comm'r of Inland Revenue, 20 Law J. Rep. (N. S.) Exch. 269.

‖ Greenleaf on Evidence, § 76, 150, 3d ed. where cases will be found.

¶ In Mercer *v.* Whall, 5 Adol. & Ellis, 447.

[1] As to the right to open and close, see *In re* Mickelthwaite, 33 Eng. L. & E. 410; Day *v.* Woodworth, 13 How. 363; Chamberlain *v.* Gaillard, 26 Ala. 504.

or as to the amount of damages, the plaintiff is *entitled* to begin. But when the *onus probandi* lies on the defendant, he is entitled to begin." So in the same State, when in trespass the defendant pleads soil and freehold in himself, without any other plea, and issue is joined thereon, the right of opening and closing the argument before the jury belongs to the defendant.* So, in the same State, on the hearing before a jury to re-assess damages for taking land for a railroad, the party claiming damages has the right to open and close, and a contrary ruling at the trial was held erroneous.†

ENTIRE OR SEVERAL DAMAGES.—JOINDER OF GOOD AND BAD COUNTS.—We have already said that an important question may arise as to the assessment of entire or several damages.‡ [582] The jury may assess entire, or distinct damages on each of the counts, when separate injuries have been proved. If distinct damages be assessed, judgment may be given on either of the counts; but if the jury find entire damages on all the counts, the judgment must be entire;[1] and in this case, if one of the counts be insufficient, judgment will be arrested, or a writ of error be sustainable.‖ This may be where a good count is joined with a bad count; or where a bad assignment of breaches is joined with good; or where counts, though good in themselves, are improperly joined; or where a single count contains good and bad causes of action; and in those cases, if general damages are assessed, the practice has been different. If the verdict can be amended or applied to the good counts, this in some cases will be done.¶ And it has been said in England to be a settled rule that, "if the same count contains demands for one of which the action lies and not for the other, all the damages shall be referred to the good cause of action; though it would be otherwise if they were in separate counts."**

* Davis *v.* Masons, 4 Pick. 156.

† Conn. River R. R. *v.* Clapp, 1 Cushing R. 559.

‡ *Ante*, 578.

‖ Chitty on Pleadings, vol. i, p. 447; Hambleton *v.* Veere, 2 Saunders, 196; Eddows *v.* Hopkins, 1 Doug. 376; Grant *v.* Astle, 2 Doug. 752. In this case Lord Mansfield, while he maintained the doctrine, declared the rule "inconvenient, ill-founded, and absurd," and called attention to the fact, that it did not apply to criminal prosecutions. But in O'Connell *v.* Reginam, 9 Jurist, 25, the same principle was applied to an indictment for conspiracy. See also, Cheetham *v.* Tillotson, 5 J. R. 430. The rule in civil actions has been recently affirmed in England. Eliot *v.* Allen, 1 Man. Gr. & Scott, 18. Where a breach gives no data to regulate the assessment of damages, though it negative the words of the condition of the bond, it is not well assigned. People *v.* Russell, 4 Wend. 570. But if so assigned that the plaintiff would be entitled to nominal damages only, it is not enough. Albany Dutch Church *v.* Vedder, 14 Wend. 165; Backus *v.* Richardson, 5 J. R. 476.

¶ Chitty on Pleadings, vol. i, p. 448.

** Doe & Lawrie *v.* Dyeball, 8 B. & C. 70; Kitchenman *v.* Skeel, 3 Exch. 49.

[1] So in an action against joint debtors or obligors, where all are named as defendants, a several judgment cannot be given. Sager *v.* Nichols, 1 Daly, 1. *Ante*, 578.

JUDGMENT WHEN ARRESTED.—But if the verdict cannot be awarded or applied to the good counts, then the question is whether the cause should be tried again, or the judgment entirely arrested. In some cases the judgment has been arrested;* and this still seems the practice in England, where counts good in themselves are improperly joined, which is in [583] truth a misjoinder of causes of action;† but where good counts are joined with bad, the rule now seems to be that a new trial will be awarded.‡ Such seems the well-settled system in England; but in some parts of our Union a more rational rule has been adopted. In Connecticut, the Supreme Court has recently said, "that if there be good and bad counts, or good and bad matter in the same count, the presumption in our courts is, that damages are given on the good parts."‖[1] So in Ohio, if the declaration contains a good count among defective counts, the court on error will intend that the verdict was well taken on the good count, unless the record shows that it was rendered upon those that were defective.¶ Mr. Sergeant Williams, in his valuable notes to Saunders' Reports,** after collecting a great number of cases on this subject, observes that the result of them all appears to be, that where it is expressly and positively averred in the declaration that the plaintiff has sustained damages for a cause arising subsequent to the commencement of his suit, or previous to his having any right of action, and the jury gives entire damages, the judgment will be arrested. But when the cause of action is properly laid, and the other matter comes in either under a *scilicet*, or is void, insensible, or impossible, and it therefore cannot be intended that the jury ever had it under their consideration, the plaintiff will be entitled to judgment.†† The better mode, of course, where any difficulty of this kind is apprehended, is to assess the damages severally on each count. In such case the judgment will be arrested only on the count that is bad.‡‡[2]

* Com. Dig. Damages, E. 5; Corner *v.* Shew, 4 Mees. & W. 163. Where the plaintiff declares upon a contract consisting of several parts, and assigns, among other breaches, one which from his own showing could not have taken place before the action was brought, the court cannot intend that the damages, if assessed generally, were given only for that matter in the count which was actionable, and therefore will reverse the judgment. Gordon *v.* Kennedy, 2 Binn. 287; Lewis *v.* Witham, 2 Strange, 1185.

† Johnson *v.* Mullin, 12 Ohio, 10; Chisom *v.* School Directors, 19 Ohio, 289.

‡ Kitchenman *v.* Skeel, 3 Exch. 49.

‖ Leach *v.* Thomas, 2 Mees. & W. 427; Emblin *v.* Dartnell, 12 M. & W. 830; Graves *v.* Waller, 19 Conn. R. 90.

¶ Hopkins *v.* Beadle, 1 Caines, 347; Lyle *v.* Clason, 1 Caines, 581.

** 2 Saund. 169.

†† Steele *v.* Prest. of W. I. L. N. Co. 2 J. R. 286.

‡‡ Hayter *v.* Moat, 2 M. & W. 56. In the

[1] In case of an action for an injury to a right, if necessary, it must be presumed after verdict, that special damage was proved. King *v.* The Rochdale Canal Co. 6 Eng. L. & E. 241.

[2] In slander, if the words are all spoken at one time and all embraced in one count, and

COUNT BAD IN PART.—So part of a count may be bad; [584] and in such a case,* in an action of covenant for quiet enjoyment, the plaintiff had averred by way of special damages, after setting out an eviction, that he had lost divers large sums of money expended on and about improving the premises, it was insisted that, as part of the special damage did not fall within the covenant, and the jury had assessed general damages, the whole was erroneous. But Abbott, C. J., intimated that, the whole declaration consisting of one count, *after verdict* it was to be presumed that the judge at the trial directed the jury to confine their attention to that part of the special damage only which was relevant to the covenant broken. So in New York, it has been held that where a count contains two separate and distinct allegations of damages, one actionable and the other not, no motion in arrest of judgment will be sustained; for the court will intend, after verdict, that the damages were only given for the actionable part of the declaration.† [1]

JOINT TORTS.—In regard to the verdict, the question of severance is important in another point of view.[2] Where several persons are jointly charged in an action of tort, as of assault, battery, and false imprisonment, and they either plead jointly, or sever in their pleas, or one suffer judgment to go by default, if the jury assesses several damages, the verdict is wrong, and the judgment will be erroneous;‡ [3] for the trespass being jointly

case of Gregory *v.* The Duke of Brunswick, 7 Scott's New Rep. 972, the jury having found a general verdict for the defendants, the court refused to award a *venire de novo* on the ground that they had not assessed damages on the issue at law.

* Campbell *v.* Lewis, 3 Barn. & Ald. 392.

† Steel *v.* Prest. of Western I. L. W. Co. 2 J. R. 286; 10 Coke, 130; Willes Rep. 443; 5 Bac. Abr. 249.

‡ Salmon *v.* Smith, 1 Saunders, 207, note 2; Hill *v.* Goodchild, 5 Burr. 2790; Mitchell *v.* Milbank, 6 T. R. 199; Brown *v.* Allen, 4 Esp. (N. C.) 158; Bohun *v.* Taylor, 6 Cowen, 313; Wakely *v.* Hart, 6 Bin. 316, 319; Bostwick *v.* Lewis, 1 Day, 34; Crawford *v.* Mor-

among them are any that will maintain the action, a verdict for the plaintiff will be good, since it will be intended that the damages are for the actionable words only, and that the others were alleged for aggravation. But if the action be for different words spoken at different times, and will lie for the one, but not for the other, a general verdict for entire damages will not be good. Empson *v.* Griffin, 11 A. & E. 186.

[1] This rule was also followed by the New York Supreme Court. Edwards *v.* Reynolds, Hill & D. Supp. 53. But in the New York Superior Court it has been held, that where damages have been assessed by the jury in one sum upon two items of claim, on one of which plaintiff was entitled to recover, while on the other he was not, *and they cannot be severed and apportioned* by the appellate court, there must be a new trial unless the plaintiff will remit the damages entirely. Sherry *v.* Frecking, 4 Duer, 452.

[2] Damages can be assessed only for the injury to the plaintiff. Duncan *v.* Brown, 15 B. Monr. (Ky.) 186. Where the action is brought against two or more as concerned in the wrong, and it turns out on the trial that but one was concerned, the plaintiff may recover against that one. Laverty *v.* Vanarsdale, 65 Penn. St. 507; Hutchins *v.* Hutchins, 7 Hill, 104 (*ante*, 229).

[3] Yeazel *v.* Alexander, 58 Ill. 254.

charged, and the jury finding them jointly guilty, the damages cannot be separated, and consequently the verdict should be for the amount which the most culpable ought to pay.[1] But in such a case, the difficulty can be remedied by entering a *nolle prosequi* against all but one, and taking judgment against him only.* [2]

SEVERAL TORTS BY DIFFERENT DEFENDANTS IN SAME SUIT.—But, on the other hand, if the charge is several, the rule is the reverse. So, in an action against divers persons found guilty of several takings or offences, damages ought to be assessed against them severally; as in trespass for battery and goods, if one be found guilty for the battery, and the other for the goods taken.

ris, 5 Grattan, 90; Halsey *v.* Woodruff, 9 Pick. 555; Beal *v.* Finch, 1 Kern. 128.

* Holley *v.* Mix, 3 Wend. 350.

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[1] See *ante*, 578, head p. 736, note 1. In an action for the wrongful seizure of the plaintiff's cattle, a Mrs. Fleming, one of the defendants, had recovered a judgment against a brother of the plaintiff on which the execution was issued; and she, with her attorney in that suit, who had directed the wrongful seizure, were joined as defendants. A verdict was found against both defendants for £83 15*s.* 10*d.* Of this £25 was for the seizure; and the rest was the amount of the costs ordered against the defendant Fleming in an interpleader suit, which had been had to try the title to the cattle. An order had been made in that suit that Fleming pay those costs, and as this order was equivalent to a judgment, it was held that the judgment against Mrs. Fleming must be reduced by that amount. And as the plaintiff could not recover these costs against her, and could not recover against her attorney any other damages than he was entitled to against her, the court reduced the verdict by the amount of the costs. Powers *v.* Fleming, 4 Ir. R. (C. L.) 404.

When a declaration in assumpsit contains a common count, after judgment for the plaintiff on demurrer, a writ of inquiry should be awarded to ascertain the damages. Stanton *v.* Henderson, 1 Ind. 69.

Where issue on a plea in abatement is found for the plaintiff, the judgment against the defendant is final, and the same jury should assess the damages. If they fail, however, to do so, under the practice in Kentucky a jury to inquire of damages may be called, instead of ordering a *venire de novo*. Weathers *v.* Mudd, 12 B. Monr. (Ky.) R. 112.

A judgment by default after demurrer sustained to a plea in abatement, is an admission of the plaintiff's right to recover damages, but not as to the amount of damages; and upon a writ of inquiry, the defendant has a right to cross-examine the plaintiff's witnesses. Thompson *v.* Haislip, 14 Ark. (Barb.) 220; The Chicago & Rock Island R. R. Co. *v.* Ward, 16 Ill. 522.

Where the defendant, in an action sounding in tort, brought by one (or more) of several joint tenants, permits the plaintiff to sue alone, by failing to plead the joint tenancy in abatement, the recovery should be for the damages sustained by *all* the joint tenants. The defendant is not entitled, in an action by one of several *joint* tenants,—*e. g.* partners,—after neglecting to avail himself of the objection by plea in abatement, to give it in evidence to reduce the damages. He is, however, entitled to do this in an action by one of several tenants in common. Zabriskie *v.* Smith, 3 Kern. (N. Y.) 322. But compare Sheldon *v.* Van Slyke, 16 Barb. (N. Y.) 26.

[2] It is well settled both in England and in the United States that there is neither indemnity nor contribution between joint wrong-doers. One who has voluntarily done a clearly illegal act cannot recover compensation from one who acted jointly with him in its commission. But this rule applies only to cases of known and intended wrongs, and not to those where the parties had acted under the supposition that their act was proper, and it is a tort by legal inference only. Accordingly, where one who had been injured by the fall of a defective bridge, recovered judgment of one county, that county having paid the judgment, was held entitled to contribution from the other. Armstrong Co. *v.* Clarion Co. 66 Penn. St. 218.

[585] So, if against three defendants, one demurs, another makes *default*, and a third *joins* issue; on the trial several damages shall be assessed against those who demur and make default.* Where there is a demurrer to evidence and a joinder, the court may have the damages assessed by the jury conditionally, or they may discharge the jury, leaving the damages to be assessed by another jury, should the demurrer be overruled.†

In a joint action of assault against husband and wife, and evidence of a separate assault by the husband alone, the plaintiff can not recover damages for such separate assault.‡

AWARD OF ARBITRATORS.—It has been held in England, that where a verdict is taken at Nisi Prius, subject to the award of an arbitrator, to whom all matters in difference are referred, he cannot award a greater sum than that for which the verdict was taken. But this does not apply to the action of debt.‖[1]

* Com. Dig. Damages, E. 5; Chapman *v.* House, T. 13 G. II; Str. 2, 1140.

Many curious cases as to assessing damages, may be found in Viner's Abr. tit. Damages, C. & D. But the actions being obsolete, or the cases in themselves peculiar and extraordinary, it would be out of place to take further note of them here.

As to writs of inquiry for assessment of damages, much law is to be found in Vin. Abr. Damages, D. a.; but it does not properly belong in this place.

In New York, in an action against several, if one pleads to issue and another suffers judgment by default, damages must be assessed against both at the same time, by the jury who try the issue. Van Schaick *v.* Trotter, 6 Cow. 599.

On a *venire tam quam*, to try an issue as to one account, and assess contingent damages on demurrer to others, if the plaintiff be nonsuited as to the issue, he can not proceed to assess contingent damages on the counts demurred to. Packard *v.* Hill, 7 Cow. 434.

In the same State, the damage can be assessed by the clerk, on promissory notes, bills, etc., but not on the common counts nor unliquidated demands; and in regard to this, several cases have been decided. Burr *v.* Waterman, 2 Cow. 36; Colden *v.* Knickerbacker, 2 Cow. 31; Rogers *v.* Coleman, 3 Cow. 62; Beard *v.* Van Wickle, 3 Cow. 335; Seebar *v.* Yates, 6 Cow. 40.

† Bull, N. P. 314; 2 Tidd's Pr. 786; Andrews *v.* Hammond, 8 Blackf. 540.

‡ Goddard *v.* Hart, 5 Gilman, 95.

‖ Bonner *v.* Charleton, 5 East, 139; Annan *v.* Job, Nov. 14 and 16, 1846, London Jurist, vol. x, 1083; Pearce *v.* Cameron, 1 Mees. & W. 676, is also cited in the last case, but I cannot find it.

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[1] A verdict for "$100 actual damages, and $1,000 as exemplary damages" is good, as equivalent to a verdict for $1,100 damages. Pendleton *v.* Davis, 1 Jones (N. C.), 98.

The jury should find for the plaintiff the amount of his debt as proved, and the damages (interest) separately; and the judgment should pursue the verdict. Yet where the verdict and judgment give in an aggregate sum, as damages, the amount of the debt and legal interest thereon from the time when due until the time of the verdict, if the total amount found by the verdict for damages does not exceed the principal and interest due or the sum laid as damages in the declaration, such verdict will not be held invalid, but will authorize and support a judgment for the sum in damages so found. Young *v.* Chandler, 14 B. Monr. (Ky.) 252.

In South Carolina, where in debt on a bond, the jury in finding for the plaintiff on the general issue, assess the damages (as, under the practice there, is proper), and allow the plaintiff only the principal sum due, but not the interest, to which he is entitled, his only remedy is by appeal. Judgment for the interest *non obstante veredicto*, will not be allowed, nor can he collect it by marking it for collection on the *fi. fa.* Gourdin *v.* Read, 10 Rich. (S. C.) 217.

OBSOLETE JUDGMENT OF "DAMAGE CLEAR."—There was formerly, in England, a charge on the plaintiff's judgment called *damage clear*, which was a payment required to be made of twelve pence in the pound; but it seems to have been long since abolished; for in an early case it appears that the court "thought it hard that the plaintiff should be stopt of his judgment till he had paid his damage clear," and they resolved to amend it.*

PETITION OF RIGHT.—In England, a petition of right is said to be maintainable for no other objects than land or specific chattels, certainly not for a sum of money claimed either as debt or by way of damages.†

COSTS.—The other questions in regard to damages re- [586] late principally to the subject of costs; and, indeed, in the early periods of the English jurisprudence, damages and costs, *damna et custagia*, were convertible terms;‡ but the questions which regard the relation of damages to costs,[1] though extremely important in practice, are so local in their character, and depend so much on statutes, that it would be inexpedient here to do more than advert to them.[2]

* March's Reports, 75.

† Baron De Bode's case, 8 Q. B. 208, where the authorities are stated at large.

If a demurrer to a declaration in a suit by drawer against acceptor be overruled, the court may, in Indiana, assess the damages so far as the amount due on the bill is concerned; but as to the costs of the protest, if chargeable at all, there must be a jury. Phipps *v.* Addison, 7 Blackf. 375.

In the same State, in debt on a sheriff's bond upon the execution of a writ of inquiry, after a demurrer to the replication assigning breaches has been overruled, the *quantum* of the relator's damages is the only subject of inquiry. Clark *et al. v.* The State, 7 Blackf. 570.

‡ Zink *v.* Langton, Doug. 751.

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[1] Costs are an incident to the judgment, and cannot be allowed by the jury as damages. Shay *v.* Tuolumne Water Co. 6 Cal. 286. And although if a jury ask what amount of damages will carry costs, there is no reason why the judge should not tell them, as it is part of the law, yet their having given a verdict in ignorance that it will not carry costs, is no reason why it should be disturbed after it is recorded. Kelmore *v.* Abdoolah, 27 L. J. (Exch.) 307. And it is said that a verdict, the amount of which is adjusted by a jury for the purpose of giving or withholding costs, cannot be sustained. Russell *v.* Wenewesser, 2 Irish. R. (C. L.) 427, 431. So where in an action of trespass, the jury rendered a verdict in favor of the plaintiff for costs, it was held, that such a verdict and the judgment thereon were nullities; that in legal effect this was a finding in favor of the defendant, and the law carried the costs in his favor against the plaintiff. Mangham *v.* Reed, 11 Ga. 137.

[2] COSTS OF PRIOR ACTIONS.—As to these, see *ante*, head p. 87, n. 2; 247, 325, *et seq.* A plaintiff is entitled to the costs reasonably incurred by him in defending a former action for the defendant or at his implied request. Le Blanch *v.* Wilson, 28 L. T. R. N. S. (C. P.) 415; Baxendale *v.* London, Chatham and Dover Railway Co. 28 L. T. R. N. S. (C. P.) 849.

CHAPTER XXV.

OF DAMAGES WITH REGARD TO EVIDENCE.

As a General Rule, independently of Recent Legislation, the Plaintiff is not allowed to testify.—Exceptions in which he is admitted to give Evidence.—Abrogation of the Common-law Rule.—The Witness is to testify only as to Facts, and not as to Opinions.—Exception in Case of Experts; in Case of Value.—Doctrine of Presumptions.—Estoppel.—Sub-contracts.—Frequent necessity of being content with Imperfect and Unsatisfactory Proof.

We have now to consider the mode of proof by which claims to damage are substantiated. The rules which govern evidence as applied to fix the measure of relief, are neither numerous nor complex, but they deserve careful attention.

We have seen* that in the early stages of the civil law, the plaintiff was allowed to fix the amount of the compensation to which he conceived himself entitled, subject only to the restraining hand of the *judex*. In the common law, independently of statutory innovation, the rule is carried to the other extreme; for, as a general principle, neither party to the record is allowed to give testimony in any branch of the case.† But to this rule certain exceptions were introduced.[1]

Exceptions to the Common-law Rule excluding the Testimony of the Party.—The oath of the party is admitted by the common law, in respect of a lost deed, or other paper, preparatory to the introduction of secondary evidence to prove its contents. So, too, in complaints under the bastardy acts, the oath

* *Ante*, 23.

† In England, in an action of tort, where one defendant joins issue and the other lets judgment go by default, the party who has suffered judgment may give evidence for the plaintiff, if he has no other interest than can be inferred from the fact of his being a party to the record. Haddrick *v.* Heslop *et al.* 12 Q. B. 267. A party to the record as such is no longer, in England, incompetent to testify. Worrall *v.* Jones, 7 Bing. 395.

[1] It is one of the natural concomitants of illness and of physical injuries, for the sick or injured persons to complain of pain and distress. And evidence of such complaints, in connection with other proofs of injury received, is admissible from the necessity of the case, in an action for the injury sustained, to show its extent, etc. Such evidence does not fall within the rule which excludes declaration of a party in his own favor. Caldwell *v.* Murphy, 1 Kern. 416; and see s. c. below, 1 Duer, 233; also, to same effect, Bacon *v.* The Inhabitants of Charlton, 7 Cush. (Mass.) 581.

of the female is admitted to charge the defendant with the paternity of the offspring. So, again, the rule has been relaxed in order to prove the amount of compensation to which a party is entitled; thus the oath of the plaintiff is ad- [588] mitted in many States of the Union to prove the truth of entries in his books, of goods delivered in small amounts, or of daily labor performed, when the party, from his situation, has no evidence but the accounts kept by himself, and where, as a general thing, from the nature of the traffic or service he cannot have. So, too, where robberies or larcenies have been committed, and no evidence exists but that of the party robbed or plundered, he has been admitted as a witness to prove his loss; for it is said that in these cases the party injured shall have an extraordinary remedy *in odium spoliatoris*. On this ground, in an action against the hundred under the English statute of Winton, the person robbed was admitted as a witness to prove his loss and the amount of it.* So, too, in Pensylvania, in an action against the county for the destruction of property by a mob, the plaintiff may prove ownership and the value of wearing apparel destroyed,† but not the destruction of household furniture, because there the argument *ex necessitate* does not apply.‡ So, also, in equity, where a man ran away with a casket of jewels, the party injured was admitted as a witness.‖ So, too, when the defendant, a ship master, broke open and plundered the plaintiff's trunk, the latter was allowed to testify to the contents of the trunk.¶

An effort has been made in Pennsylvania to extend the principle of these exceptions to all cases of passengers by public conveyances, where there is no criminal nor even tortious act committed by the defendant beyond mere negligence; and it has been said that in such cases the plaintiff may testify from necessity.**[1] But in Massachusetts this has been denied; the

* Bul. N. P. 187; Porter *v.* Hundred of Regland, Peake's Add. Cases, 203; Snow *v.* Eastern R. R. Co. 12 Met. 44.

† The County *v.* Leidy, 10 Barr, 45. See also, Clark *v.* Spense, 10 W. 335; M'Gill *v.* Rowand, 3 Barr, 451.

‡ *Ibid.*

‖ East India Co. *v.* Evans, 1 Vern. 305

¶ Herman *v.* Drinkwater, 1 Greenl. 27.

** Whitesell *v.* Crane, 8 Watts & S. 369.

[1] Before the abrogation of the common-law rule, the plaintiff himself, in actions against a common carrier or innkeeper to recover for a trunk, etc., lost, was frequently allowed to prove its contents. Doyle *v.* Keyser, 6 Ind. 242; The Mad River & Lake Erie Railroad Company *v.* Fulton, 20 Ohio, 318; Taylor *v.* Monnot, 1 Abbott's (N. Y.) Pr. R. 325; s. c. 4 Duer, 116. But in Garvey *v.* The Camden & Amboy Railroad Company (4 Abbot's N. Y. Pr. R. 171), it was held, that the rule of evidence which allows the plaintiff, in an action against a common carrier to recover for a lost trunk, etc., to prove the value of the contents by his own oath, was confined to cases in which fraud or wrong is proved upon the defendant; and had no application to cases of loss through negligence merely. To the same effect is Phenix *v.* Clark, 2 Mich. 327.

old principle has been adhered to, and in a case of mere negligence, it has been decided that the plaintiff is not competent, even though he has no other testimony as to the amount of his loss.*

In New York, the admission of the plaintiff, as a witness in these cases, has been sanctioned by statute; the general railroad act† of that State providing, where baggage is properly checked, that if not delivered on the production of the check, "the plaintiff may himself be a witness, in any suit brought by him, to prove the contents and value of said baggage."‡

RECENT ABROGATION OF THE COMMON-LAW RULE.—The original rule of the common law has been now, however, so far changed, both in England and in this country, by statute, that the observations contained in the preceding paragraphs have little importance. In England, New York, Connecticut, and several other States of the Union, the rule of the common law has been abrogated, and, with more or fewer exceptions, parties are permitted to testify in chief and to all facts pertinent to the case.[1]

WITNESS TO TESTIFY TO FACTS, NOT OPINIONS.—Another general rule, which pervades all our law, is that the witness
[589] is to testify only to facts.[2] He is to speak as to the facts which he has heard or seen. His opinion is not to be given;[3] for it is the opinion of the jury on the testimony which forms the verdict and decides the case.

EXCEPTIONS.—But to this rule, again, there are many important exceptions. So, pedigree is often proved by the hearsay of the family. So, handwriting is proved by the opinions of those familiar with the signature of the party. So, too, the witness has been allowed to state his opinion in cases of criminal conversation, to show the state of the affections of the parties.‖ And, on similar grounds, in cases of breach of promise of mar-

* Snow *v.* Eastern R. R. Co. 12 Met. 44.

† Laws of 1850, c. 140, § 37.

‡ As to how far this provision is applicable to all the railroads existing in the State, see Marsh *v.* New York & Erie R. R. Co. 14 Barb. S. C. R. 364, and Milliman *v.* Oswego & Syracuse R. R. Co. 10 Barb. 87.

‖ Trelawney *v.* Coleman, 2 Starkie, 168, 191.

[1] See N. Y. Code of Procedure, chaps. VI and VII, secs. 389 to 399. The jury are not bound by the evidence of one of the parties to the suit in estimating the damages, though there is no evidence before them to fix the amount. Bee Printing Co. *v.* Hichborn, 4 Allen (Mass.), 63.

[2] But in an action of trespass *q. c. f.*, where the defendant's malice might be a ground of exemplary damages, it has been held in New Hampshire, that the plaintiff being a competent witness, might testify what his motive and purpose were in doing the acts complained of. Norris *v.* Morris, 40 N. H. 395.

[3] Blair *v.* The Milwaukee and Prarie du Chien R. R. Co. 20 Wisc. 262.

riage. In an action of the latter description, the Supreme Court of New York said, "We do not see how the various facts upon which an opinion of the plaintiff's attachment must be grounded, are capable of specification, so as to leave it, like ordinary facts, as a matter of inference to the jury. It is true, as a general rule, that witnesses are not allowed to give their opinions to a jury; but there are exceptions, and we think this one of them. There are a thousand things indicating the existence of degrees of the tender passion, which language cannot specify. The opinions of witnesses on this subject must be derived from a series of instances passing under their observation, which yet they never could detail to a jury.* So, too, evidence of this kind has been admitted in cases of insanity; but it has been pronounced by a very able judge, "the most unsatisfactory and the least to be depended on." †

Opinions as to Quantum of Damages Incompetent.—The general rule which requires a witness to speak to facts within his knowledge, is applied to the subject of compensation: the damage must be proved like any other fact in the cause, and no testimony amounting to mere opinion is competent.[1] So in New York, a witness cannot be allowed to give his opinion as to the amount of damages sustained by a party in consequence of a mill lying still.‡ So, the opinions of witnesses as to the amount of damages caused by the deprivation or withdrawal of water from a tavern, are inadmissible. ‖ So, too, on ascertaining the injury caused by an alleged nuisance, a witness [590] cannot give his opinion as to the amount of damages.¶[2]

So in an action for the breach of a covenant contained in a lease, that the defendant would not let any other mill site on the same stream, it was held not proper to admit witnesses to testify their opinion as to the amount of damage which the plaintiffs had sustained by the erection of the rival site, and a new trial was ordered.** And the correctness of the principle laid down in this case has been very recently affirmed.††[3]

* M'Kee *v.* Nelson, 4 Cow. 355.
† Clark *v.* Fisher, 1 Paige, 171.
‡ Doolittle *v.* Eddy, 7 Barb. S. C. R. 75.
‖ Harger *v.* Edmonds, 4 Barb. S. C. R. 256; Giles *v.* O'Toole, *Ibid.* 261.
¶ Fish *v.* Dodge, 4 Denio, 311.
** Norman *v.* Wells, 17 Wend. 137, 161.
†† Fish *v.* Dodge, 4 Denio, 311, 318.

[1] Cook *v.* Brockway, 21 Barb. (N. Y.) 331; Wilcox *v.* Leake, 11 La. Ann. 178.

[2] As a general rule, the *opinion* of a witness as to the *amount of damages* which a landholder will sustain by reason of the construction and use of a railroad, is not evidence. Atlantic & Great Western R. R. Co. *v.* Campbell, 4 Ohio St. 583. Nor in an action in the nature of waste, can he be asked what amount of permanent injury the premises have sustained by neglect. Robinson *v.* Kinne, 1 N. Y. Supreme, 60.

[3] But such damage may be shown by competent evidence. And where a tavern stand was

On the same ground, and with still stronger reason, it has been decided in Ohio that a person who is present during the trial of a cause, and has heard witnesses describe the manner in which a ford is injured by the erection of a dam across a stream of water below it, is not competent to give his opinion of the damages sustained by the party injured.* So, intelligent merchants, well acquainted with the plaintiff and his business, were held not competent to give an opinion as to the damage of the plaintiff in being deprived of the advantage of his own care and oversight.† [1]

EXPERTS.—To the general rule that the witness's opinion cannot be received as to the amount or character of injury sustained, there are, however, some considerable exceptions. Of these, perhaps the most comprehensive and important is that which admits persons of science, or experts in any profession, to testify as to their opinion on a given state of facts relating to matters in regard to which their education gives them peculiar capacity for forming a correct judgment.‡

So in Massachusetts, on the trial of an action to recover damages for injury done to the plaintiff's garden and nursery by smoke, heat, and gas proceeding from the defendant's brick kiln, two gardeners who had much experience in raising and cultivating fruit-trees, shrubs, and plants, and who had testified to the particulars of the plaintiff's injury, were allowed to give their opinion as to the amount of damage. And the court say,

"It seems to us that it would be impracticable to dis-
[591] pense with this species of testimony in many actions for trover for personal property, where no detail of facts could adequately inform the jury of the value of the article. The opinion of a witness as to the value of a horse is much more satisfactory evidence than a detailed statement of his size, color, age, etc., to give the jury the requisite information to enable them to assess damages for the conversion of a horse." ‖ [2] So

* Shepherd *v.* Willis, 19 Ohio, 142.

† 23 Wend. 431; 17 Wend. 161; 24 Wend. 688; 21 Wend. 342.

‡ Folkes *v.* Chadd, 3 Doug. 157.

‖ Van Dine *v.* Burpee, 13 Met. 288.

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sold on the condition that the vendor should not open another in the town within a certain time, which condition he broke, and in his action to foreclose a mortgage for the purchase-money, the vendee's damages from the opening of the rival tavern having been set up by way of counter-claim, the vendee was allowed to show that the direct result of opening it was to reduce the value of his property one half. Evans *v.* Elliott, 20 Ind. 283.

[1] So in Louisiana, in a suit on a sequestration bond, the opinion of witnesses cannot form the basis of a verdict. They should testify to facts, and from those facts the jury should find the actual damages sustained. Bonner *v.* Copley, 15 La. Ann. 504.

[2] See Nickley *v.* Thomas, 22 Barb. (N. Y.) 652; Smith *v.* Hill, *Ibid.* 656; The Milwaukee & Mississippi Railroad Co. *v.* Eble, 4 Chandler (Wis.), 72. But in Dunlap *v.* Snyder, 17 Barb.

in an action on a building contract, a mason may be asked how long, in his opinion, it would take to dry the walls of a house so as to render it fit and safe for human habitation.* [1]

THE TESTIMONY OF EXPERTS IS CONFINED TO MATTERS OF ART AND SKILL, AND MUST NOT DEGENERATE INTO CONJECTURE.—But this exception is generally strictly limited to the case of experts in matters of art and skill, and is not enlarged so as to admit opinions in ordinary cases, where the jury may be supposed competent to form their judgment from the statement of the facts. Nor where the opinion necessarily degenerates into mere conjecture. So, in an action for negligently injuring and sinking a canal-boat, a boatman who knew the boat in question previous to her being injured, and swore that he had raised sunken boats and repaired them, cannot testify as to his opinion of what the damages would be, from the description of the situation of the boat by the witnesses.†

In an action on the case against a railroad company for injury to the person of a passenger through the negligence of the company, evidence of loss sustained by the plaintiff in his business in consequence of the injury received, is proper to aid the jury in estimating the plaintiff's damages; and for that purpose the nature of the plaintiff's business, its extent, and the importance of his personal oversight and superintendence in conducting it, may be shown; but the opinions of witnesses as to the amount of loss are inadmissible.‡

A party in the city of New York, whose property is destroyed by the order of the city officers to stop the spread of a conflagration, is entitled to an allowance to the full value of the property destroyed, without any deduction for the amount insured, and interest on it;[2] but the opinion of bystanders,

* Smith *v.* Gugerty, 4 Barb. S. C. R. 515.
† Paige *v.* Hazard, 5 Hill, 603.
‡ Lincoln *v.* Saratoga & Sch'y R. R. Co., 23 Wend. 425.

(N. Y.) 561, it was held that in an action for damages for killing a dog, the opinions of witnesses as to the value of the animal were not admissible. See as to proper evidence of the value of a horse, Carr *v.* Moore, 41 N. H. 131.

[1] But the testimony of experts must not be given at random, or on insufficient or inexact data. So in an action against the defendants as carriers, for non-performance of a contract to carry live stock from several different places to Detroit, where the circuit judge had allowed a witness to be asked the general question, what in his opinion was the extra shrinkage in consequence of the delay at the several places where the cattle were loaded, and at Detroit, above what it would have been if they had gone on in the regular train, and had been unloaded on arrival, it was held by the Supreme Court of Michigan, that as the different portions of the stock had been on the cars without food or water for various lengths of time, they must have been quite differently affected by shrinkage, and the inquiry should have been as to each separately. The admission of the general question was erroneous. Michigan, Southern and Northern Indiana Railroads *v.* McDonough, 21 Mich. (3 Clarke) 165.

[2] See *ante*, head p. 36, n. 2; and head p. 578, n.

[592] that the buildings destroyed would have been consumed by the fire if they had not been blown up, are inadmissible. It was, however, suggested that perhaps the opinion of firemen and others, having particular knowledge and experience with reference to fires, might be received.*

TESTIMONY AS TO VALUE.—Another exception to the rule which excludes mere opinion, is that which permits testimony to be offered as to the value.[1] Witnesses familiar with the article in question are permitted to state their opinion as to its value † —and that in its actual or in an assumed and hypothetical state. And so as to the value of services.‡[2] So, in an action for a nuisance, an architect, acquainted with the locality, may be asked if the nuisance depreciated the value of the houses in the neighborhood.‖

PRESUMPTIONS.—The question of damages is often governed by the doctrine of presumptions; for it is to be borne in mind that in this branch of our science, as in every other, we are frequently without any clear or conclusive evidence; and in these cases resort is often had to testimony of an inferior character. Such are the presumptions which arise from a given state of facts, where the cause or the amount of the injury is not absolutely certain.¶ In these cases the matter is decided on the probability growing out of the presumption. Presumptions are sometimes absolute, and not to be rebutted by any proof; in other cases they only rise to the force of *primâ facie* evidence, and may be met and contradicted like any other testimony. So, where the plaintiff shows himself to have sustained damage resulting from the act of the defendant, which act with proper care does not ordinarily produce damage, he makes out a *primâ facie* case of negligence, which cannot be repelled but by proof

* The Mayor *v.* Pentz, 24 Wend. 688.

† Joy *v.* Hopkins, 5 Denio, 84.

‡ Brill *v.* Flagler, 23 Wend. 354.

‖ Gauntlett *v.* Whitworth, 2 Car. & Kir. 720.

¶ Bishop Butler, in his Introduction to his Analogy, has some admirable passages on the nature and force of presumptions, and the absolute necessity in many cases of acting on them. "To us," he says, "probability is the very guide of life."

[1] Where the value of real estate is in controversy, opinions of witnesses acquainted with its value are admissible in evidence. See Clark *v.* Baird, 5 Seld. (N. Y.) 183, where the cases on this subject are thoroughly examined. Swan *v.* County of Middlesex, 101 Mass. 173; Kellogg *v.* Krauser, 14 S. and R. 137. Such evidence is of course admissible only where under the pleadings the question of value is material or can be properly raised. Main *v.* Gordon, 12 Ark. (7 Eng.) 651.

[2] Lewis *v.* Trickey, 20 Barb. (N. Y.) 387. But the value of skilled services are to be estimated not by inquiring what A or B would charge for such services, but what the services are fairly worth by the common usage or custom of compensation; and it is error to receive the testimony of witnesses as to what they would charge. Pfeil v. Kemper, 3 Wis. 315.

of care, or some extraordinary accident which makes care useless.* So, in case against a railway company, for setting fire to premises adjoining their line, the fact of premises being fired by sparks emitted from a passing engine is *primâ facie* evidence of negligence on the part of the company, rendering it incumbent on them to prove that precautions had been adopted reasonably calculated to prevent such accidents.†

ESTOPPEL.—So, again, the acts of the parties themselves may determine the value of the thing in controversy,[1] and operate like an absolute liquidation of damages. So, in an action on an agreement in which the defendant acknowledged that he had received of the plaintiff certain enumerated goods, attached by the plaintiff as a deputy sheriff, estimated at fifteen hundred dollars, and which the defendant promised to keep [593] safely and deliver to the plaintiff on demand; it was held that the defendant could not give evidence that the goods were of less value than the specified sum, but that the valuation in the receipt was conclusive.‡

CONTRACTS FOR PUBLIC WORKS.—We have seen that in regard to contractors for public works, who are in certain cases allowed their profits, the sub-contracts made by them are not evidence to show what those profits would have been,[2] but they are required to go into a minute investigation as to the cost of materials, the expense of delivery, the amount and value of labor; and even with all these, it has been said that the estimate of profits must be conjectural.‖

APPROXIMATE EVIDENCE.—The application of the rules which we have thus examined, in regard to the proof necessary to establish a claim for damages, often renders it difficult, if not impossible, to arrive with precise accuracy at the object of the inquiry. But justice is after all but an approximate science, and its ends are not to be defeated by a failure of strict and mathematical proof. The following language of Mr. Justice Story is full of good sense, and susceptible of frequent and wide application:—

* Ellis *v.* Ports. & Roan. R. R. Co. 2 Ired. 138; Herring *v.* Wilmington & Raleigh R. R. Co. 10 Ired. 402.

† Pigott *v.* Eastern Counties Railway, 3 Man. Gr. & Scott, 229.

‡ Jones *v.* Richardson, 10 Met. 481.

‖ Masterton *v.* Mayor of Brooklyn, 7 Hill, 62; Seaton *v.* Second Municipality, 3 La. R. 44.

[1] Henson *v.* Chastine, 3 Jones (N. C.) L. 550.

[2] Story *v.* The New York & Harlem Railroad Co. 2 Seld. (N. Y.) 85.

"It is said, that it is difficult, and indeed impracticable, to ascertain the true and exact value of the property in this case. There may be difficulty, and perhaps an impossibility, to ascertain its exact and minute value, for we have no means of weighing it in scales, or fixing its positive price. But the same difficulty occurs in many other cases of insurance,—as in cases of injuries to sails or rigging, or spars, by tempest, or by cutting them away in cases of jettison; and yet, no one doubts that they must be contributed for according to their value, ascertained by a jury in the exercise of a sound discretion, upon proper evidence. Suppose that fruit is insured, and the vessel has a long passage, in which, by ordinary waste and decay, it must suffer some deterioration, and then a storm occurs, in which it suffers other positive damage and injury, or there is a jettison thereof; how are we to ascertain what diminution is to be attributed to natural waste and decay, and what to the perils of the seas? or what was its true value at the time of the jettison? There can be no positive and absolute certainty. The most that can be done is to ascertain, by the exercise of a sound judgment, what, under all the circumstances, may reasonably be attributed to one cause, and what to the other. Absolute certainty, in cases of this sort, is unattainable. All that we can arrive at is an approximation thereto; and yet no man ever doubted that such a loss must be paid for if it is covered by the policy." * [1]

* Rogers *v.* Mechanics' Ins. Co. 1 Story, 303.

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[1] Questions as to the competency of evidence which bear directly on the extent of the recovery constantly arise. So in an action of trespass for a wrongful seizure of a team of horses, in which exemplary damages were claimed, it was held that evidence that the plaintiff had no actual use for the property at the time of the seizure, was properly excluded. Lynd *v.* Picket, 7 Minn. 184. So in an action by a woman against a railroad corporation for damages for personal injuries, neither the death of her husband from the same cause, nor the fact that she has children dependent on her for support, is admissible to increase the damages. Shaw *v.* Boston & Worcester R. R. Co. 8 Gray (Mass.), 45. In an action for injuries to real estate in the possession of one holding under a contract of purchase, and entitled to the possession on making certain payments, evidence of the value of the premises and of the cost of the buildings thereon, is competent. Honsee *v.* Hammond, 39 Barb. (N. Y.) 89. In a suit in equity to recover damages for a nuisance to the plaintiff's buildings from the unlawful erection and maintenance of a steam furnace, as well as an injunction against their continuance, evidence of the general character of the neighborhood is competent on the question of damages, but not that a particular company has increased the rate of insurance on the plaintiff's house. Call *v.* Allen, 1 Allen (Mass.), 137. In an action by a lessee against his lessor for violating the contract of lease by not giving possession of the demised premises, the plaintiff was held by the Supreme Court of Pennsylvania to have been properly allowed to prove that after making the lease he sold his house and lot and personal property at vendue, for the purpose of preparing to go into the hotel, and that when he failed to get the hotel he was without a house and was compelled to board. Yeager *v.* Weaver, 64 Penn. St. 425. R. agreed to build a sawmill on B.'s land, paying half the expenses, B. paying the other half. B. agreed to prepare the foundation by a specified time, and to furnish the money for erecting and stocking the mill. Evidence of what the mill would have rented for when finished, was held proper in measuring the damages sustained by R. from B.'s delay in fulfilling his part of the contract. Rogers *v.* Bemus, 69 Penn. St. 432. But further illustrations of the admissibility of evidence as to damages, so far as they have not been furnished under the various topics of this book, belong to works on evidence.

CHAPTER XXVI.

POWER OF THE COURT OVER THE SUBJECT OF DAMAGES.

Respective Powers of Court and Jury over the Subject of Damages.—General Division of their Functions.—The Roman System in this Respect.—Curious Analogies between it and the English System.—General Rule with us is, that the Court decides Questions of Law, and the Jury Questions of Fact.—Exceptions.—Verdicts against the Weight of Testimony.—Setting aside Verdicts on Account of Excessiveness of Damages.—Power of the Court exercised with Hesitation and Reluctance.—Stipulations to Reduce Verdict.—Measure of Damages a Question of Law.

We have thus stated the general principles which control the subject of compensation,—when redress is governed by strict rules of law, and when the matter is said to be left to the discretion of the jury.

Relative Power of Judge and Jury.—An important branch of the subject, however, still remains. As the final decision of every case involving an issue of fact, is pronounced by the jury in giving their verdict, and as that verdict also expresses the amount of compensation which the party in fault is to make, it is plain that unless the court retain to itself some control over the action of the jury, their power over the subject of remuneration would be practically unlimited. We have, then, yet to see what remedy is provided if the jury disregard the rules laid down for their government; and this necessarily brings us to a consideration of the relative powers of the judge and the jury.

Analogies of Roman Jurisprudence.—One of the most marked peculiarities of the Anglo-American system of jurisprudence, perhaps its most striking feature, is that division of power by which the decision of questions of law is given to the court, and that of questions of fact to the jury. It is an error to suppose that this division is altogether peculiar to our system, or that it is exclusively of English origin. The recent labors of the German scholars, assisted by this discovery of

Gaius, in 1816, have disclosed the true nature of the procedure by the *formula* in the republican period of the Roman jurisprudence; and the analogies that it furnishes on the present branch of our subject are too striking to be overlooked.

The despotism of Augustus and his successors introduced changes into the administration of justice analogous to those which it wrought in the general frame-work of the imperial government. Its peculiar characteristics were centralization and despotism; it established in all branches of the system a gradation of ranks, deriving their existence from and dependent upon the will of the emperor alone, and it destroyed every vestige of popular action. The first and most important of these changes in the machinery of the law was, by abolishing the *judices* or jurors, to make the judges absolute masters of the whole cause, subject only to the right of appeal; which, in all cases I think, might carry the suitor before the Cæsar himself; and this led directly to the adoption of written and secret instead of oral and public discussion. Thus was produced the system which, in its general outline, ruled continental Europe almost exclusively till the adoption of the Code Napoleon.

But the plan on which justice was administered at Rome in the time of Cicero, perhaps the most truly great period of its development, was very different. The Romans during their republican epoch were too jealous of power to give to the judiciary an uncontrolled authority over questions both of law and fact. The judicial functions were divided, as with us, by an analogous, and in some cases by an identical line. The suit was instituted before a magistrate, usually the prætor; and the proceedings before him were termed *in jure*. Here the cause of action was stated, the defence set up, and the issue whether of law or of fact formed. In other words, the pleadings were put in. To this issue was then joined the instructions proper for its trial, and the issue and instructions together were termed the *formula*. A *judex* or referee was then appointed. This was called *datio judicis*. The cause was then turned over to him: and he decided the question submitted to him, according to the instructions contained in the *formula*. The proceedings before him were termed *in judicio*.

[596] Formulæ.—The *formula* succeeded the old *legis actiones*, which by their technical severity had become odious. These forms were abolished, and the *formula* introduced, by the *Lex Æbutia;* the precise date of which is uncertain, but the better opinion would seem to be that it was

passed early in the seventh century of the city, or not long before the period of Cicero.*

The *formulæ* were of two kinds, according as they turned on questions of law or questions of fact,—*formulæ in jus conceptæ*, and *formulæ in factum conceptæ*. A single instance of the latter kind, will sufficiently exhibit their character: *Judex esto; si paret A. Agerium apud N. Negidium mensam argenteam deposuisse, eamque dolo malo N. Negidii A. Agerio redditam non esse, quanti ea res erit tantam pecuniam judex N. Negidium A. Agerio condemnato; si non paret, absolve.* Which may be rendered thus: Let this cause be referred to ——. If it shall appear that A. Agerius deposited a silver table with N. Negidius, and that through the fraud of the latter it has not been returned to the owner, let the judge condemn N. Negidius to pay to A. Agerius its value. If it shall not so appear, let him decide for the defendant. This is precisely such a charge as might be given to a jury any day in an English or American court.

There is a passage in Cicero, where, while denouncing the perversion of the administration of justice under Verres in Sicily, he gives a very striking picture of the uses and abuses of this division of the judicial functions.† "No one," he exclaims, "can hold or recover his house, his estate, his paternal property, if, when they are sued for, a dishonest prætor from whom there is no appeal, appoints any one whom he pleases judge; or if a profligate and worthless judge decides what the prætor orders; or if, again, the prætor so frame the order (*formula*) that not even the wisest and best judge can decide otherwise. If, for instance, he appoint L. Octavius (an unexceptionable man) *judex* with the *formula*, *If it shall appear that the property in controversy belongs to P. Servilius, order him to deliver it to Catulus*,—is not Octavius forced to compel Servilius to deliver the property to Catulus, although it do not belong to him?" This is precisely what might occur under our [597] procedure, if the judge were corrupt; and without any corruption, it is precisely the error which the system of exceptions to the charge is intended to correct.

The *formula* thus took the place of our charge to the jury. As that charge does, it stated hypothetically the verdict or judgment to be rendered, and gave the instructions according to which the issue should be decided. The only material difference is, that it was in some cases given before the witnesses were heard. The state of facts was therefore assumed to appear correctly in the allegations of the parties; and the instructions

* Gaius by Heff. cap. vii, p. 23. † In Verr. II, l. 2, § 12.

of law arising on these facts were given before the testimony was taken. This may now appear awkward and inconvenient, but does not in principle differ from our own mode.

CHANGES WROUGHT BY THE EMPIRE.—This system was, as has been already said, effaced by the despotism of the empire. The independence of such a judiciary was, of course, hostile to that centralization which was the essence of the imperial organization; the *judices* were abolished, and the decision of the entire cause given to the court alone. This resulted in the abolition of all oral discussion; and such was the system in force at the time when the Institutes of Justinian condensed and embodied the Roman law. Such, too, was the system which was adopted when civilization resumed its progress in continental Europe, and so it remained till the French reforms introduced the jury in certain cases.

ORIGIN AND DEVELOPMENT OF THE ANGLO-SAXON JUDICIAL PROCEDURE.—In the mean time, however, in the island inhabited by that great people from whom we derive our origin, a system analogous to the Roman system in its best days had grown up; a system of unknown origin, whether a relic of Roman or a child of German liberty it is perhaps impossible now to say, but marked by very peculiar and distinct features, and claiming as its chief merits two great principles, oral and public discussion, and a division of the judicial functions between the court and the jury. It is of this latter system and its changes that I now propose to speak.*

* Nor is the division of power between the magistrate and the *judex* the only important analogy between the Roman and the English systems of jurisprudence. Two different and distinct bodies of law, as distinct and different as common law and equity with us, existed in the early days of the Roman system. *La civilization Romaine,* says Troplong, *s'est developpée sous l'influence de deux elemens, qu'on pourrait en quelque sorte appeler de première et de seconde formation, et qui ont vecu ensemble dans une longue alternative de lutte et de rapprochement, jusque ce que le tems ait amené leur fusion plus ou moins complète. . . . Sa formule la plus large et la plus haute, c'est le jus civile et l'æquitas, sans cesse opposés l'un à l'autre, comme deux principes distincts et inegaux.—De l'Influence du Christianisme sur le Droit Civil des Romains, par* M. Troplong, ch. iii.

We are sadly in want of some competent work on the procedure of the Roman system, showing its curious analogies with our own. The subject has been elaborately treated by several German authors, among the best of whose works are Das Römische privat Recht, by Rein; Geschichte des Römischen Rechts, by Walter; Gerichts Verfassung und Prozess des sinkenden Römischen Rechts, by Bethman Hollweg; but neither in England nor this country has the subject received any careful attention since the discovery of Gaius, in 1816, if I except the excellent articles of Mr. Long, in the recently published Dictionary of Antiquities.[1] Mr. Long has evidently made himself master of the subject; but his articles

[1] It should be mentioned, however, that an interesting historical sketch of the law of civil procedure among the Romans, elaborated from a series of lectures delivered at the University of Cambridge, in England, by J. T. Abdy, LL.D., Professor of Civil Law in that University, was published by him in 1857.

FORMER INDEFINITENESS OF THE SEPARATION BETWEEN THE PROVINCE OF THE COURT AND THAT OF THE JURY.—It is very plain from the early records of our jurisprudence, imperfect as they are, that the relative powers of the court [598] and the jury were at first very loosely defined, and that many important changes and modifications have been from time to time introduced. So, originally, the jurors were the witnesses themselves, and found their verdict on their own knowledge of the facts. And in a very large class of cases, not falling within those in which exemplary damages may be claimed, the jury exercised an almost unlimited control over the subject of remuneration. On the other hand, the court, in many cases of default and demurrer, took the disposition of the facts of the case to themselves, and pronounced the judgment. Thus it was at one time held that the court could dispose of the case if the plea were sent to be tried in a foreign country, for the jury there had not full knowledge of the fact.* And so, where the court could increase damages, it was held they could mitigate them.† So, also, in an early author it is said, that "though the justices use to award inquest of damages when they give judgment by default, yet they themselves may tax the damages if they will."‡ So, too, from another early case, [599] where judgment was given by default, it seems clear that the judges originally might award damages without the intervention of a writ of inquiry.‖[1] So, too, on demurrer, and in

are only *disjecta membra;* and I could wish to see it systematically and elaborately discussed by some person equally familiar, if possible, with the Roman and English jurisprudence. It is one full of interest to the general as well as the legal scholar; it is calculated to throw much light on many of the most interesting questions in the annals of Rome, and is worthy of the attention not less of the historian than of the jurisconsult. But it cannot be done without a very thorough familiarity with the actual operation of both systems, as well that of the common as of the civil law. And perhaps, other things being equal, it would be most satisfactorily treated by one who was acquainted with the practical working of popular institutions in a state of extreme development, who had seen and understood their defects and their advantages, their irregular and often convulsive action, their fierce passions, their vast energies, and generous impulses.

* 1 Rol. 572, l. 50.

† 1 Rol. 572, l. 25–28; 573, l. 7.

‡ Viner Abr. Dam. I.

‖ So, says Brooke, Dam. 55, *Le def. fist defaut et le pl. recouer dams. a lui, il. taxe p. l'court et no dam. come il cout, quod nota q. le court m. taxa les Damages.*

[1] DAMAGES SUPER VISUM VULNERIS.—By the practice which prevailed for a time, the court, in actions for injuries to the person, itself often took a view of the injury, and thereupon increased or mitigated the damages found by the jury according to its judgment. See the cases collected in Rolle's Abr. pp. 571, 572; also Brooke, Dam. 49, 86, 87, *vide infra.*

And as lately as 1856, an appeal from the decision of the circuit judge denying a motion to increase the damages *super visum vulneris* was formally argued before the South Carolina Court of Appeals, in an action of trespass *vi et armis*, where the jury had awarded the moderate sum of $30 for a mayhem, whereby one of the plaintiff's eyes and his right thumb were destroyed. The court held that the old common-law practice, on which the motion was founded, had been abrogated by disuse. The rule gradually developed was now long established, that in all cases sounding in damages, these damages are to be assessed by a jury under

actions of debt, the sum being certain, this power seems to have been exercised at a much later day.*

The following case shows the unsettled condition of the law in the respect we are now considering. A motion being made to increase damages, because the jury had only given twelve pence, whereas the plaintiff's arm was broke; Rolle, C. J., refused, because it did not appear by the declaration what manner of maiming it was that he received.† It was early decided, however, that the justices of Nisi Prius could not increase the damages,‡ nor the court on the certificate of the justices of Nisi Prius.‖[1] And we have seen other cases, where the jury were declared to be chancellors, and to have entire power over the subject of relief. But the fluctuations and oscillations of the system have been gradually corrected and brought under fixed rules. The progress of time and the accumulation of experience enable us now to draw the lines of demarkation with great clearness, and the complication of the machinery disappears when carefully examined.

Questions of Law are for the Court.—The first leading proposition on which the whole structure of our system depends is, that the court decides all questions of law. Statutes are expounded, contracts interpreted, written instruments construed, evidence admitted or excluded, by the court and by the

* Page 56: *Car sur demur. in ley, le court poet agard damag sans inquire de ceo p. curiam qd. nota. Vide,* also, pl. 59–68, 194. See Sayer on Damages, ch. xx, 105. Holdipp *v.* Otway, 2 Sand. 102; 21 Car. 2; Sayer, 107.

† Jervis *v.* Lucas, Style, 345 (1652).

There seem to be some cases in England, where the court still exercises a direct control over the verdict. So in some instances, on bills of exchange, the court assesses the damages without the intervention of a jury. Robinson *v.* Reynolds, 2 (Q. B.) Adol. & El. N. S. 196; and see Clement *v.* Lewis, 3 Br. & B. 297.

So in case of mayhem, the courts exercised the power of altering and even increasing the verdict. Thus, where a verdict had been found for the plaintiff of £150, and it was moved to increase the damages, Lee, C. J., said, "There is no doubt but the court can increase the damages in this case, even upon view of the party maimed." But they held the £150 sufficient, and discharged the rule. Brown *v.* Seymour, 1 Wilson, 5.[2]

‡ 1 Rol. 573, l. 30.

‖ 1 Rol. 572, l. 20.

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the direction of the court, and not by the court independently of the jury. McCoy *v.* Lemon, 11 S. C. Law R. (Rich.) 165.

[1] *Except* on a view of the injury. 1 Rol. 572, l. 20.

The Revised Statutes of Indiana (2 Rev. Stat. 115, § 340), have abrogated the common-law rule, that in an action of tort, the court cannot assess the damages. Under that provision, the right to a jury trial of the question of damages is waived by not appearing. Langdon *v.* Bullock, 8 Ind. 341. And in Louisiana the Supreme Court have power to increase the damage on appeal. See Donnell *v.* Sandford, 11 La. Ann. 645. And it is well settled that provisions of law providing for the ascertainment of damages without the intervention of a jury, where no issue of fact is involved (as in the case of the taking of land under the right of eminent domain), do not violate the constitutional requirement of trial by jury. Beekman *v.* Saratoga & Schenectady R. Co. 3 Paige, 45; Bonaparte *v.* the Camden & Amboy R. Co. 1 Bald. C. C. R. 205.

[2] So where in such a case the jury gave twenty marks damages, on a view in court, and information of the surgeons present, the court increased the damages because the party lost the use of his arm. Freeman *v.* Trevers, 1 Rol. 572.

court alone.* And it necessarily follows from this that [600] if the jury disregard the instructions of the court on any question of law, their verdict will be set aside. It is by the exercise of this power alone that the control of the court over questions of law can be preserved.

QUESTIONS OF FACT FOR THE JURY.—The correlative proposition to this is, that the jury decides all questions of fact. Where the facts are admitted, the rights of the parties must depend on a pure question of law, and they are of course under the control of the court; but the instant that an issue of fact is presented, the decision of the cause passes from the court to the jury.[1] The principle is, indeed, carried so far, that in some States of the Union, as in Texas, the court is not even allowed to charge them as to the weight of testimony.† The rule giving the jury the decision of all questions of fact, if no exception were admitted, would, as has been said, effectually make the jury masters of the whole matter in controversy. Various modifications have therefore been introduced to it, which we now proceed to consider.

MODIFICATIONS.—SETTING ASIDE VERDICT.—In the first place, a verdict may be set aside, because it is against the weight of testimony. This power is, however, very sparingly exercised; and on mere questions of fact the court always interferes with great hesitation and reluctance. So, a verdict will not be disturbed merely because it appears that the jury have reasoned incorrectly. In a recent case in the English Common Pleas, Maule, J., said, "We are not, however, to set aside a verdict because the jury, one *or all* of them, may have reasoned inconclusively. If such a doctrine were to prevail, scarcely any verdict would stand. The trial by jury is not founded upon a supposition so absurd, as that the whole twelve will reason infallibly from the premises to the conclusion." ‡[2]

* U. S. *v.* Hodge *et al.* 6 Howard, 279.
† Smith *v.* Dobson, 3 Scott N. R. 336.
‡ Nels *v.* The State, 2 Texas, 282.

[1] The court, at a comparatively early day, refused to increase the damages on an affidavit of all the jurors that they had thought the effect of their verdict would be to give the plaintiff more than it did. Jackson *v.* Williamson, 2 T. R. 281.

"I doubt much," says Mr. Justice Jackson, in delivering an opinion in the Court of the Irish Exchequer Chamber, "whether in any case sounding in damages, for an acknowledged breach of covenant, the judge ought to take it on himself to *direct* a verdict for nominal damages." Strong *v.* Kean, 13 Ir. Law R. 93.

[2] So powerless is the court over the determination of the facts, when no error in law has been committed, that where in an action against a railroad company, by a farmer for the death of his wife, who had been thrown out of his market wagon, and killed through collision

So, again, where the judge who tries a cause in trespass recommends a verdict for nominal damages, but the jury give substantial damages (£5), such a verdict will not be set aside as perverse.*[1] And this rule has been repeatedly affirmed in this country. So in Mississippi, it has been decided that a verdict will always be permitted to stand unless it is opposed by [601] a decided preponderance of the evidence, or is based on no evidence whatever;† and in Texas, that the verdict of a jury founded on conflicting testimony will not be set aside unless it be very apparent that they decided wrong.‡

Excessive Damages.—The court, again, holds itself at liberty to set aside verdicts and grant new trials in that class of cases where there is no fixed legal rule of compensation, whenever the damages are so excessive as to create the belief that the jury have been misled either by passion, prejudice, or ignorance.[2] But this power is very sparingly used, and never except

* Chilvers *v.* Greaves, 5 Man. & Gr. 578.
† Cicely *v.* State of Mississippi, 13 Smedes & M. 202.
‡ Perry *v.* Robinson, Adm'x, 2 Texas R. 490.

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with the defendant's train, although the wagon had descended to the point of collision, down a gradual slope for more than a quarter of a mile in plain view of the railroad, upon which the train could have been seen coming at a great distance, and the court considered that there was not a doubt, that the evil happened from "either the plaintiff's misfortune or fault, for neither of which was the company liable;" yet as the case had been given to the jury without any error in law, they felt themselves compelled to affirm a judgment on a verdict of $9,150 for the plaintiff. Penn. R. Co. *v.* Goodman, 62 Penn. St. 329.

So a late case in the English Court of Exchequer illustrates the jury's command of the damages, where no rule of law is violated.

The plaintiff, who claimed special damage from a carrier for non-delivery of goods, had sold them for as much as he could have obtained if there had been no delay, and the defendant paid into court £10, which the court considered ample to cover the expense of a journey he had taken to look after the goods, and all his actual damages. The jury having found a verdict for £5 more than had been paid in, a motion was made to set it aside as perverse. (The damages being under £20, the motion could not, under the English practice, be entertained on the ground that they were excessive.) The court, although considering the amount decreed clearly too large, reluctantly refused to disturb the verdict, as the question whether the amount paid into court was a sufficient compensation for the plaintiff's pecuniary loss had been properly left to the jury, and the verdict was not contrary to any direction of the judge at Nisi Prius. Adams *v.* The Midland R. Co. 31 L. J. R. N. S. (Exch.) 35. See, as to the boundary between the power of the court and that of the jury on this subject, Smith *v.* Symonds, 1 L. T. (N. S.) 299.

It is hardly necessary to say, that as a necessary consequence of the control of the court over questions of law, if the court misinstruct the jury on a point material to the measure of damages as well as the right of recovery, the judgment will be set aside. So in a suit for the conversion of a promissory note, an instruction that if the maker were insolvent and had no property subject to execution, then the note was of *no* value, and the defendant not liable, was erroneous, and a new trial therefore granted. Pratt *v.* Boyd, 17 Ind. 232. The practice is too familiar to need further illustration.

[1] See Adams *v.* The Midland R. Co. preceding note.

[2] This practice hardly needs the citation of authorities, but some of the later ones are subjoined. The court exercise the power wherever the injury is a matter of computation or within a pecuniary estimate, and they are satisfied the damages are excessive. Potter *v.* Chicago & N. W. R. Co. 22 Wisc. 615; Green *v.* Southern Express Co. 41 Geo. 515; Chicago & North western R. Co. *v.* Jackson, 55 Ill. 492; City of Decatur *v.* Fisher, 53 Ill. 407; Davidson *v*

in a clear case.[1] So in an action for malicious indictment of the plaintiff for perjury, where a verdict of £400 was obtained, on a rule for new trial it was insisted that the verdict was excessive. But it was refused, and Lord Mansfield said, "New trials are not to be granted in this class of cases without very strong

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Molyneux, 17 L. T. (N. S.) 289; The Terre Haute, Alton & St. Louis R. R. Co. *v.* Vanatta, 21 Ill. 188; Clapp *v.* The Hudson River Railroad Co. 19 Barb. (N. Y.) 461; Creed *v.* Fisher, 26 Eng. L. & E. 384; Kountz *v.* Brown, 16 B. Monr. (Ky.) 577; Treanor *v.* Donahoe, 9 Cush. (Mass.) 228; Nicholson *v.* The New York & New Haven Railroad Co. 22 Conn. 74; Bell *v.* Morrison, 27 Miss. 68; Lang *v.* Hopkins, 10 Ga. 37; Duffield *v.* Tobin, 20 *Ibid.* 428; Marshall *v.* Gunter, 6 Rich (S. C.) L. 419. See, also, Wilcox *v.* Green, 23 Barb. (N. Y.) 639; Potter *v.* Thompson, 22 *Ibid.* 87. Compare Lewis *v.* Black, 27 Miss. (5 Cush.) 425; Payne *v.* The Pacific Mail Steamship Co. 1 Cal. 33; George *v.* Law, *Ibid.* 363; McDaniel *v.* Baca, 2 *Ibid.* 326; Potter *v.* Searl, 5 *Ibid.* 410; Farish *v.* Reigle, 11 Gratt. (Va.) 697; De Briar *v.* Minturn, 1 Cal. 450; Eastman *v.* Mayor, &c. of New York, 5 Robertson (N. Y. Superior), 389; Chicago & R. I. R. R. Co. *v.* McKean, 40 Ill. 218.

Where one employed by a railway company as a brakeman, at $40 a month, having lost an arm through the company's negligence, recovered in an action against the company for the injury a verdict of $10,000, the Supreme Court of Illinois—considering that this amount, the annual interest on which in that State was more than double the plaintiff's yearly wages, and was twice as much as his legal representatives could have recovered in case of his death, in which contingency the recovery would have been limited by statute to $5,000; and considering, also, that he was still capable of earning as much in many occupations as he did before the accident—set aside the verdict as excessive. Illinois Cent. R. Co. *v.* Welch, 52 Ill. 183. The statutory limit to a recovery by the representatives of the deceased in the case of a fatal injury, however, does not appear to us to have any bearing. See the next note.

[1] Saunders *v.* The London & North Western Railway Co. 2 L. T. R. (N. S.) 153; Pittsburgh R. Co. *v.* Hennigh, 39 Ind. 509; Waters *v.* Bristol, 26 Conn. 398; Letton *v.* Young, 2 Metc. (Ky.) 558; Chapman *v.* Dodd, 10 Minn. 350; St. Martin *v.* Desnoyer, 1 Minn. 156; The City of St. Paul *v.* Kurby, 8 Minn. 154; Beaulieu *v.* Parsons, 2 Minn. 37; Goetz *v.* Ambs, 27 Mo. 28; Weaver *v.* Page, 6 Cal. 681; Alexander *v.* Thomas, 25 Ind. 268; Scherpf *v.* Szadeczky, 4 E. D. S. (N. Y.) 110; Danville, L. & N. Turnpike Co. *v.* Stewart, 2 Metc. (Ky.) 119; Pryor's Appeal, 5 Abbott's (N. Y.) Pr. R. 272; Blum *v.* Higgins, 3 *Ibid.* 104; Fletcher *v.* Tayleur, 19 C. B. 21; 33 Eng. L. & E. 187; Woodson *v.* Scott, 20 Mo. 272; Barth *v.* Merritt, *Ibid.* 567; Wells *v.* Sanger, 21 Mo. 354; Sexton *v.* Brock, 15 Ark. (Barb.) 345; Pleasants *v* Heard, *Ibid.* 403; Creed *v.* Fisher, 9 Exch. 472; Marshall *v.* Gunter, 6 Rich. (S. C.) L. 419; Wolff *v.* Cohen, 8 *Ibid.* 144; Barnette *v.* Hicks, 6 Tex. 352; McGehee *v.* Shafer, 9 Tex. 20 Hillebrant *v.* Brewer, *Ibid.* 45; Potter *v.* Thompson, 22 Barb. (N.Y.) 87; Oldfield *v.* The New York & Harlem Railroad Co. 3 E. D. Smith's (N. Y.) C. P. R. 103; Chenowith *v.* Hicks, 5 Ind. 224; Spencer *v.* McMasters, 16 Ill. 405. Compare, however, Blanchard *v.* Morris, 15 Ill. 35; Butler *v.* Mehrling, *Ibid.* 488; Travis *v.* Barger, 24 Barb. (N. Y.) 614. If the evi dence conflicts, and there is enough to sustain the verdict, the court will not interfere. Newton *v.* Price, 41 Geo. 186; Holland *v.* Brooks, 40 Geo. 94. See the cases on this subject reviewed, 1 Grah. & W. on New Trials, 409–441.

In Collins *v.* The Albany & Schenectady R. R. Company, 12 Barb. (N. Y.) 492, the plaintiff had been injured by a railroad collision, through negligence of those in charge of the train, without, however, any gross fault. The jury found a verdict for $11,000. The Supreme Court ordered a new trial on the ground of excessive damages, remarking, with reference to the statute of New York (of 1849) allowing the personal representatives of one whose death is caused by the negligence, etc., of another, to maintain an action for damages to the limit of $5,000, as follows: "The damages which the jury have seen fit to award to the plaintiff are more than twice as much as could have been awarded if the accident had proved fatal to the plaintiff. The legislature . . . . has limited the recovery in such cases to $5,000. There is certainly great plausibility in the argument that the defendants ought not to be liable for a greater amount of damages in this case than they would have been if the plaintiff had actually lost his life." See, also, Murray *v.* The Hudson R. R. Co. 47 Barb. (N. Y.) 196.

This argument seems, however, to limit the plaintiff's recovery in all cases of personal injuries to $5,000. The act of 1847 (*supra*, 551), as we have seen, authorized a recovery in favor of the personal representatives of a person killed by the negligent act of another, on the ground of their pecuniary loss, and the purpose of the act of 1849 (*supra*, head p. 695, n. 2) is to limit this recovery, not the estimate to be placed upon the *injury* inflicted on the sufferer. And see Cassin *v.* Delany, 38 N. Y. 178; *post*, 603, note.

grounds indeed, and such as carry internal evidence of intemperance in the minds of the jury."* [1]

The doctrine has been repeatedly affirmed in this country. So Mr. J. Story has decided that in cases of *tort* the verdict will not be disturbed unless it is so excessive or outrageous with reference to all the circumstances of the case, as to demonstrate that the jury have acted against the rules of law, or have suffered their passions, their prejudices, or their perverse disregard of justice to mislead them.† So, again, the same sagacious judge has said, "A court of law will not set aside a verdict upon the ground of excessive damages, unless in a clear case where the jury have acted upon a gross mistake of facts, or have been governed by some improper influence or bias, or have disregarded the law."‡ Again, in another case, Mr. Justice Story said, "The damages are certainly higher than what, had I sitten on the jury, I should have been disposed to give; and I should now be better satisfied if the amount had been less. . . . . It is one thing for a court to administer its own measure of damages in a case properly before it, and quite another thing [602] to set aside the verdict of a jury merely because it exceeds that measure. The court, in setting aside a verdict for excessive damages, should clearly see that they are excessive; that there has been a gross error; that there has been a mistake of the principles upon which the damages have been estimated, or some improper motives, or feelings, or bias, which have influenced the jury. . . . . Upon a mere matter of damages, where different minds might and probably would arrive at different results, and nothing inconsistent with an honest exercise of judgment appears, I, for one, should be disposed to leave the verdict as the jury found it." ‖ [2] So in New Jersey, too, it has been declared that the court, in actions of

* Gilbert *v.* Burtenshaw, Cowper, 230.
† Whipple *v.* Cumberland Manuf'g. Co. 2 Story, 661.
‡ Wiggin *v.* Coffin, 3 Story, 1.
‖ Thurston *v.* Martin, 5 Mason, 197.

[1] See Boyce *v.* Cal. Stage Co. 25 Cal. 460.

[2] In an action for damages against a railroad company by a woman who had been badly injured by being struck by a locomotive engine, and whose health and memory had been much impaired in consequence, the plaintiff obtained successive verdicts of $15,000, $18,000, and $22,250. The two first having been set aside for erroneous instructions to the jury, the court refused to disturb the last, on the ground of the damages being excessive. Shaw *v.* Boston & Worcester R. R. Co. 8 Gray (Mass.), 45. "In all cases," said the late Mr. Justice Wilde in the case of Worster *v.* Proprietors of Canal Bridge, 16 Pick. 547, "where there is no rule of law regulating the assessment of damages, and the amount does not depend on computation, the judgment of the jury, and not the opinion of the court, is to govern, unless the damages are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or have been misled by some mistaken views of the merits of the case." See Kelly *v.* Sherlock, 1 L. R. (Q. B.) 686, *infra*.

trespass for personal torts, where damages can be gauged by no fixed standard, but necessarily rest in the sound discretion of the jury, interferes with a verdict on the mere ground of excessive damages with reluctance, and never except in a clear case.*

RESTRICTIONS ON THE EXERCISE OF THE POWER.—Although it is conceded that the courts have the power of granting a new trial in cases of *crim. con.*, still it seems that the power has never been exercised.†[1] Even in cases where rules of law have been disregarded, or where for any reason the [603] verdict cannot be supported, the power of the court to set aside the decision of the jury will not be exercised without regard to the justice of the case. So, where a verdict was obtained for principal and interest, as to which latter the defendant was clearly liable, but there being no count adapted to it the verdict was not strictly regular, the court nevertheless refused to set it aside, saying, "In motions for new trials, the court may fairly endeavor to do that which advances the justice of the case; and by refusing this rule we only save the defendant from paying with the tremendous amount of accumulated costs, what he in justice is bound to pay at once." ‡[2]

OPTION IN SOME CASES GIVEN PLAINTIFF OF REDUCING VERDICT.—Thus, again, where the jury have given such excessive damages that the court feel bound to set aside the verdict, they will, instead of simply ordering a new trial, give the plaintiff the option of reducing the verdict to the sum which the court considers reasonable, and on his remitting the excess will deny the motion for a new trial, and this in actions of tort as well as on contracts. ‖[3] Or the court may send the cause back to a

* Berry *v.* Vreeland, 1 Zabriskie, 183.

† Duberly *v.* Gunning, 4 T. R. 651; Smith *v.* Masten, 15 Wend. 270.

‡ Harrison *v.* Allen, 2 Bing. 4.

‖ Diblin *v.* Murphy, 3 Sandford S. C. 19; Guerry *v.* Keston, 2 Rich. R. 507; Young *v.* Englehard, 1 Howard Miss. R. 19.

[1] A verdict against the defendant in an action for enticing away plaintiff's wife will not be set aside as excessive, unless facts appear which show that the jury were actuated by improper motives. And the court will not infer this merely from the amount of damages awarded. Scherpf *v.* Szadeczky, 1 Abbott's (N. Y.) Pr. R. 366. See, also, many cases of *crim. con.* and seduction reviewed in Travis *v.* Barger, 24 Barb. (N. Y.) 614.

[2] And where interest is not recoverable, the court may direct it to be remitted. Connelly *v.* M'Neil, 2 Jones (N. C.) L. 51.

[3] Belknap *v.* Railroad, 49 N. H. 374; Doyle *v.* Dixon, 97 Mass. 208; Blunt *v.* Little, 3 Mason, 102; Mortimer *v.* Thomas, 23 La. Ann. 165; Armytage *v.* Haley, 4 Ad. & El. 91 (*infra*); where the Court of Queen's Bench ordered a new trial, unless the defendant would consent to *increase* the verdict, which was one farthing, by the amount of his surgeon's bill. See, also, Sears *v.* Conover, 3 Keyes (N. Y.) 113; Clapp *v.* Hudson R. R. R. Co. 19 Barb. 461; Murray *v.* Hudson R. R. R. Co. 47 Barb. 196; Yeager *v.* Weaver, 64 Penn. St. 425; Kinsey

second jury on the quantum of damages alone.*[1] But in Texas, this power of reducing the verdict by the action of the court, has been limited to those cases where the measure of damages is matter of law, upon the ground† that in other cases the court has no right to substitute its opinion for that of the jury.

SMALL DAMAGES.—The forbearance of the court to interfere with the jury is so great that, in actions of tort, the general rule is, that a new trial will not be granted for smallness of damages.‡[2] But it seems that if the jury so far disregard the justice of the case as to give no damages at all where some redress is clearly due, the court will interpose.[3] So where, in case for

* Boyd *v.* Brown, 17 Pick. 453.

† Thomas *v.* Womac, 13 Texas, 580, per Wheeler, J.

‡ Lord Townshend *v.* Hughes, 12 Mod. 150; Mauricet *v.* Brecknock, 2 Doug. 509; Hayward *v.* Newton, 2 Strange, 940; Barker *v.* Dixie, 2 Strange, 1051; 21 Vin. Abr. 486, Trial Y. g.; Lord Gower *v.* Heath, Barnes' Notes, 445; Regina *v.* Justices of West Riding, 19 B. 624, 631.

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v. Wallace, 36 Cal. 462. But although this practice is frequently sanctioned, as stated in the text, even in actions of tort, and also in those actions on contract where the contract does not itself furnish the measure of damages, and though it is unquestioned in actions on contract where specific items can be allowed or rejected, or the damages are otherwise ascertainable as matter of law, it is no longer, as it seems, in New York permitted to control undefined damages for a tortious act. And where in an action for a malicious prosecution a referee had awarded $1,000 damages, and the General Term of the Court of Common Pleas for the City and County of New York ordered a new trial unless the plaintiff would stipulate to reduce the recovery to $250, the Court of Appeals holding that the Common Pleas had exceeded its power, reversed the judgment, and ordered a new trial. Cassin *v.* Delany, 38 N. Y. 178.

This decision in effect overrules on the point in question that of Collins *v.* The Albany & Schenectady R. Co. 12 Barb. N. Y. 492; *ante*, 601, head p. 763, n. See, also, Moffet *v.* Sackett, 18 N. Y. 522, *ante*, 556, n.; George *v.* Law, 1 Cal. 363; Lambert *v.* Craig, 12 Pick. 198.

[1] In Louisiana the Supreme Court has power to render judgment absolutely for the reduced amount. See Black *v.* The Carrolton Railroad Co. 10 La. Ann. 33.

[2] Hayward *v.* Newton, 2 Str. 939; Kelly *v.* Sherlock, L. R. (1 Q. B.) 686; 35 L. J. (Q. B.) 209; 12 Jur. (N. S.) 937; Howard *v.* Barnard, 11 C. B. 653; 20 Eng. L. & E. 286; Apps *v.* Day, 14 C. B. 112; 26 Eng. L. & E. 335; Bradlaugh *v.* Edwards, 11 C. B. (N. S.) 377; Gibbs *v.* Tunaley, 1 C. B. 640; Kennedy *v.* Way, 7 West. L. J. 414.

But the power exists, and is sometimes, though very rarely exercised, as where the action is for a debt, and the verdict is less than the amount due; or where in trespass or trover it is less than the value of the property taken; or where in an action for a personal injury it is less than the medical expenses necessarily incurred and paid, or is so clearly inadequate to the damage sustained as to be contrary to evidence. Porteous *v.* Hazel, 1 Harper, 332; Tedd *v.* Douglas, 5 Jur. (N. S.) 1029; Robbins *v.* Hudson R. R. Co. 7 Bosw. 1. So, in an action brought by a seller against a purchaser to recover damages for not accepting or paying for the goods sold, the judge set aside the verdict for the plaintiff because, although a verdict for the defendants would not have been disturbed, the damages found by the jury were less than any of the evidence in the case justified, if there were any recovery whatever. The order setting aside the verdict was affirmed by the Supreme Court, and the court of last resort. McDonald *v.* Walter, 40 N. Y. 551. See Wilson *v.* Hicks, 26 L. J. Exch. 242; 40 Eng. L. & E. 571, where this power was exercised conditionally on the plaintiff's relinquishing the costs of the first trial. In Rendall *v.* Hayward, 5 Bing. (N. C.) 424, however, it was said by Tindal, C. J., that "the courts never grant a new trial because the damages are low, unless there has been some mistake in point of law on the part of the judge who presided, or in the calculation of figures by the jury." See, also, Hayward *v.* Newton, 2 Strange, 939, *supra*, and note 1, head p. 767.

[3] A new trial will not be granted on the ground that, from the small amount of damages the jury must have come to a compromise, unless, from the circumstances of the case, it is evident that there has been a total refusal on the part of the jurors to discharge their duty,

negligence for defendant's servant driving against the plaintiff, it appeared that the plaintiff's thigh was broken, and considerable expense incurred for surgical treatment; the plaintiff obtained a verdict; damages *one farthing*, a new trial was granted on payment of costs; and Lord Denman said, "A new trial on a mere difference of opinion as to amount, may not be grantable; but *here* are no damages at all." * [1]

THE MODES OF COMPUTING DAMAGES ALLOWED THE JURY.—A question has presented itself as to the mode in which the jury may arrive at the quantum of damages in cases where they are greatly divided on the question of amount: and it has been decided that if they *agree beforehand* that each juror shall mark the sum to which he conceives the plaintiff entitled, and that the total of these amounts divided by twelve (the number of jurors) shall be the verdict, the whole proceedings will be void, and a new trial will be ordered, for the reason that the whole thing is a mere matter of chance. So in New York, it has been decided that the jury will not be allowed to arrive at a verdict by each of the jurors marking down a particular sum and then dividing the whole amount by the number of jurors; and on assignment of error in fact, the judgment for this cause will be reversed.† [2] So in England, the court will not permit the jury to arrive at a verdict by splitting a difference.‡ [604] But if the same course be taken in order to ascertain

* Armytage *v.* Haley, 4 Q. B. 917. See, also, Cook *v.* Beal, 1 Ld. R. 176; s. c. 3 Salk. 115; Brown *v.* Seymour, 1 Wils. 5; Austin *v.* Hilliers, Hard. 408.

† Harvey *v.* Rickett, 15 J. R. 87, and Roberts *v.* Failis, 1 Cowen, 238.

‡ Hall *v.* Poyser, 13 Mees. & W. 600.

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and the verdict is necessarily wholly inconsistent. Richards *v.* Rose, 24 Eng. L. & E. 406. The court may grant a new trial as well where the damages are inadequate as where they are excessive, if the case be such as clearly to indicate that the jury have acted under the influence of partiality, bias, or a perverted judgment. Accordingly, where a recovery was had in an action for the defendant's negligence, whereby the plaintiff was injured and sustained severe bruises upon his mouth and face, and one of his teeth was knocked out; it was held that a verdict of the jury for $10 only was grossly inadequate, and that the plaintiff was entitled to a new trial on payment of costs, unless the defendant should consent to a material increase on the amount of damages found. Richards *v.* Sandford, 2 E. D. Smith's (N. Y.) C. P. R. 349.

[1] See Nicholson *v.* N. Y. and N. H. R. Co. 22 Conn. 84. But although, in such a case, the injury might seem to warrant more than nominal damages, yet if the judge who tried the cause is not dissatisfied with the verdict, or there is no reason to suppose the jury were actuated by wrong motives, or if another verdict would probably be so small that a new trial would not be worth while in view of the additional costs, it will not be granted. Howard *v.* Barnard, 11 C. B. 653, and Gibbs *v.* Tunaley, 1 C. B. 640.

[2] So in New Hampshire; Boynton *v.* Trumbull, Supreme Ct. N. H. 4 Am. Law Reg. (N. S.) 512. In Kentucky; Allard *v.* Smith, 2 Metc. (Ky.) 297; and in California; Turner *v.* The Tuolumne Water and Mining Company, 25 Cal. 397; Boyce *v.* The California Stage Co. 25 Cal. 460; Wilson *v.* Berryman, 5 Cal. 44. So it seems it is error to charge the jury that if witnesses differ as to value, an average of their estimate may be taken. Thomas *v.* Dickinson, 2 Kern. (N. Y.) 364. (Per Johnson, J.)

with more accuracy how the jury stands, the rule is different; and it has been held not improper for them to arrive at their verdict by each marking a sum and dividing it by twelve, provided they do not previously bind themselves to adhere to the result of the arithmetical computation.*[1]

THE MEASURE OF DAMAGES USUALLY A MATTER OF LAW.—To the other rules which we have thus briefly enumerated, intended to maintain the dignity of the law and the harmony of the administration of justice, is finally to be added that to which we have had so frequently to refer in these pages—that the measure of damages is a matter of law to be decided by the court; and that whenever it shall appear that the jury have disregarded the instructions of the bench in this respect, the verdict will not be permitted to stand.[2]

* Fowler *v.* Colton, Wisconsin Reports, by Burnett, 175.

[1] And where the jury merely take that means of arriving at an amount, leaving the result to be agreed to or dissented from when known, it is held not to vitiate the verdict. St. Martin *v.* Desnoyer, 1 Minn. 156; Dana *v.* Tucker, 4 J. R. 487; Wilson *v.* Berryman, 5 Cal. 44.

[2] Although, as has been seen, the law sometimes, as in many actions of tort, fails to prescribe a precise *measure* of the damages, but confines itself to *principles*, it always determines whether and how far the extent of the compensation is to be left to the jury's discretion.

CONCLUSION.

We have in the preceding pages taken a survey of the subject of compensation as awarded by the legal tribunals known to English and American jurisprudence. But much of the great demesne of justice still remains unexplored. The courts of admiralty, of narrow jurisdiction, but broad and liberal doctrines, and the courts of equity, with their vigorous and complete specific performance, have not been even touched in these pages.* [1]

* It would seem that we do not owe our doctrine of specific performance to the Roman Law. "According to the principle, *aliud pro alio invito creditori solvi non potest*, the plaintiff by the civil law may, as a general rule, bring his suit for the specific performance which constitutes the object of a debt, and the court is to give its judgment, and to issue execution accordingly. Still, there being no other means of execution recognized by the later civil law than such as are directed against the debtor's *property*, a specific performance cannot be compelled except in the case of things due *in specie*, which, if requisite, are taken from the debtor forcibly (*manu militari*); while in all other cases, if the debtor refuses to obey, the execution can only be directed against his property. The latter is done, either by sale at auction of personal or real estate (even rights or claims) belonging to the debtor, for the purpose of satisfying the creditor by paying him off; or by ejecting the defendant and putting the creditor into possession (*exmissio et immissio*), so as to enable the creditor to pay himself by means of the possession and enjoyment of real estate, or so as to secure him through the debtor's claims or rights. See Gaius, iii, 168, fr. 176, D. 50, 16; fr. 13, § 4, D. 36, 1; fr. 17, § 2; fr. 44, D. 40, 4; fr. 36, D. 40, 12; fr. 68, D. 6, 1; fr. 15, D. 42, 1; fr. 3, D. 43, 4; const. 2, 7, C. 7; fr. 53; fr. 5, § 6, D. 7, 6; fr. 12, D. 8, 5; fr. 4, § 1, D. 39, 2; fr. 15, D. 39, 1; *const. un*, C. 8, 6. Hence, if the specific object be lost or deteriorated, or if, for some reason or other, it cannot be produced by the debtor, its value (*æstimatio*) is exacted; and the same is the case where the debtor is prevented from performing any act *purely personal*, or where its performance would be no longer of any use to the creditor, or where it is refused by the debtor altogether, or at the due period and in the due manner. For the Romans very justly regarded compulsion in such cases as inconsistent with personal freedom, and could not resolve to restrict the latter, when the creditor is amply protected by his right to full compensation for the non-fulfilment (*Si non facit debitor quod promisit, in pecuniam numeratam condemnatur, sicut evenit in omnibus faciendi obligationibus*), and thus they adopted the principle, *ad faciendum nemo præcise cogi potest*. And it would seem to be always safest and best to take the side of freedom and of the debtor, wherever there be a doubt. With regard to such acts, however, as may be performed by another person as well as by the defendant himself, compulsion is applied, either by forcible fulfilment in his name and place (*e. g.* delivery of the thing adjudged and transfer of title), or by having some other person perform the act at the debtor's expense. Fr. 14, 68, 72; fr. 82, § 1; fr. 84; fr. 91, § 3; fr. 113, 114, D. 45, 1; fr. 3, D. 13, 3; § 4, J. 2, 20; fr. 71, § 3, D. 30; fr. 1, pr. D. 19, 1; fr. 13, § 1; fr. 15, § 10, D. 42, 1; const. 4, C. 4, 49.

"These principles are retained in the canon law, cap. 2, x. 3, 21 (*Homo liber pro debito non tenetur* (*i. e. non pignoratur*), *etsi res defuerint quæ possint pro debito addici*); and so, too, with only a few modifications, in the French law. C. Civ. art. 1142–45, art. 1146, *seq.*; C. Proc. art. 552, 780–805; C. Com. art. 636–38.

"According to the German law, on the other hand, the debtor may not only be compelled in case of a negative act (an omission promised or otherwise due), by means of fines gradually increased, but the German practice applies a direct or absolute compulsion by means of personal arrest, civil imprisonment, military watch placed in his dwelling, by tak-

[1] See, however, *ante*, 10 (head p. 8), note 1, and 469 (head p. 576), note 2, where certain rules of damages observed in these two jurisdictions are respectively noticed.

[606] NECESSARY INCOMPLETENESS OF LEGAL RELIEF.—We have here only examined the subject of redress as awarded by the courts of law, or, as it may strictly be termed, *legal* relief; and the general result of our inquiry will be, I think, that the compensation obtained by the process of litigation is partial and irregular. Its partial or incomplete character arises from the imperfect nature of all human administration, and the impossibility to do more than approach correct results. Tribunals able to carry their inquiry beyond the reach of our investigation, to scan the motive of each act, to determine how much is due to malice, how much to neglect, and how much to honest incapacity, would be alone fit to make complete compensation in each particular instance. As our jurisprudence is administered, we must content ourselves with dividing the loss between the contending parties.[1]

EMBARRASSMENT FROM FORMS OF ACTION.—The irregularity of legal relief is a very different matter. This arises mainly, as it appears to me, from the technical character of our forms of action; and would be removed by their removal. When there shall cease to be two actions against an agent, one on the case and the other on the contract; when it shall no longer be possible to bring trover, trespass, or assumpsit, upon the
[607] same facts; when the suit for mesne profits shall cease to be based on the fiction of a forcible entry; when the action for seduction shall no longer be grounded on a pretence of ervice,—when anomalies of this kind shall have disappeared, hen, and not till then, will it be easy to reduce the subject of elief to order, system, and harmony.

I am happy to find these views sustained by the opinion of a very accomplished judge, delivered in New York since the abolition of the English system of pleading in that State: "The arbitrary distinctions which were permitted to flow from a difference in the forms of action are abolished, and the time has arrived when general and uniform rules upon the subject of damages, rules so just and comprehensive as to be susceptible of universal application, may be adopted."* [2]

ing him to a workhouse, and even by whipping; also in all those cases where the specific performance of any obligation whatever is refused by the debtor, and cannot be made at his expense by another person; or where the debtor fails to perform merely from lack of good will. Yet, from what has been said above, it will be evident that it is altogether without any foundation that some older and later jurists have made the assertion, that the application of absolute compulsion to enforce any obligation, whether it have for its object a doing or giving, could be justified by the later Roman law." I am indebted for this note to the learning and courtesy of Dr. Kauffman. As to where compensation and damages are decreed in equity, see 2 Story's Equity Jurisprudence, ch. xix, § 794.

* Suydam *v.* Jenkins, 3 Sandf. 646, per Duer, J.

[1] But see *ante*, 38 (head p. 34), note 1.

[2] See *ante*, 41 (head p. 38), note 1.

OTHER IRREGULARITIES.—There are, however, other irregularities entirely independent of the forms of action. Such are those connected with the questions, whether actual injury must in all cases be proved, or whether a suit at law may be brought, *quia timet*, as by a surety, who has given his note for the principal's debt; the discrepancy between suits on warranties of chattels, where the price paid is only evidence of the value, and on sales of land, where the consideration money is the absolute limit of recovery; the contradiction between the rule in trover, where the value is taken at the time of the conversion, and on sales of chattels, where, if the price is paid, the damages are estimated at the day of trial.[1] These difficulties, and others which we have noticed in the course of the preceding pages, can only be removed either by decisions pronounced after a careful survey of the whole subject, and with a view to a complete classification of this branch of the law; or by legislative interference.

IMPORTANCE OF FIXED RULES.—The importance of fixed rules in this branch of jurisprudence cannot be overrated. Where the law and the facts are disposed of by the same persons, as under the civil law, no particular evil, perhaps, results from the exercise of an arbitrary authority over the subject of compensation. But where, as with us, the cognizance of matters of fact is separated from that of the questions of law, and where the arbiters of the former are declared incompetent to pass upon the latter,—to give them an uncontrolled discretion over the amount of relief would lead to incalculable mischief [608] and confusion.* "It is desirable," say the Supreme Court of Massachusetts, "to have as definite and precise rules on the subject of damages as are practicable."† "A proper administration of justice," say the Supreme Court of Louisiana, "requires that the rules established by law for the assessment of damages should be adhered to."‡ The judicial authority to settle legal questions would be utterly nugatory, if the amount of compensation were a mere matter of arbitrary discretion with the jury; and hence, the settled tendency of our law, as well as of all sound reasoning on the subject, is to reduce the measure of damages as far as possible to fixed legal rules, excepting only

* For a very able discussion of the relative powers and duties of court and jury under our system, see Commonwealth *v.* Porter, 10 Metcalf, 263, and many cases there cited.

† Batchelder *v.* Sturgis, 3 Cush. 201.

‡ Arrowsmith *v.* Gordon, 3 La. Ann. R. 105.

[1] See *ante*, 481 (head p. 590), note 1.

in those cases of flagrant outrage where the law steps in not merely to compensate but to punish.

And here I cannot better close this volume than by adopting the words used by old Molinæus, in terminating his discussion of the same subject: *Jam tempus est manum tollere de tabulâ, et reliqua quæ plura occurrunt, suis locis reservando, finem huic syntagmati imponere.**

* Dumoulin, de Eo quod Int. § 219.

FINAL NOTE

OF

CORRECTIONS AND ADDITIONS.

CORRECTIONS.

Page 8, line 1 of note 1. For "last" read "third."

Page 153, line 19 of note 2. For "Alden J." read "Agnew J."

Page 215, line 4 of the note continued from the preceding page. Omit "of" before "all."

Page 531, last line of note 1. For "1 Crand P." read "1 Cr. and P."

Page 567, line 32 of note. For "his" read "the."

Page 570, line 50 of note. For "exceptionable" read "exceptional."

Page 575, last line but one of note 1. Before "a plaintiff" insert "of."

Pages 576, 577. Strike out from the words "The Vaughan" inclusive, on last line but one of note 2 on page 576, to the end of the second line of same note on page 577.

Page 577, line 4 of note. Strike out "Adams *v.*" For "Gordon *v.* The" read "The Propeller."

Page 599, line 31 of note. For "profits" read "profit."

ADDITIONS.

Recovery Beyond Compensation.—Page 36. Add at the end of note 2: See Weber *v.* The Morris & Essex R. Co. 35 N. J. 409, where the right of a plaintiff whose buildings had been burned through the defendant's negligence, to recover their entire value, was maintained, although he had recovered an insurance on the property.

Remote Damages.—Page 65. Add at the end of the first editorial note continued from preceding page: See Gadbury *v.* Stahl, executor, 41 Ind. 348.

Page 93. Add at the end of the editorial note continued from the preceding page, after "L. R. 5 C. P. 98:"

The case of Clemens *v.* Hannibal & St. Joseph R. Co. 53 Mo. 366, in the Supreme Court of Missouri, is a very recent authority to the same effect. In this case it is held, in accordance with several previous decisions in that State, that the circumstance that dry grass in a field adjoining a railway is set on fire by a passing locomotive engine, creates a presumption of negligence on the part of the railroad company, which must be rebutted, to prevent a recovery against it. See also Smith *v.* Hannibal & St. Joseph R. Co. 37 Mo. 287; Bedford *v.* Same, 46 Mo. 456; Fitch *v.* Pacific R. Co. 45 Mo. 322.

Same page. After the citation in the same note of "Webb *v.* Rome, Watertown & Ogdensburg R. Co. 3 Lansing (N. Y.), 453," add "aff'd 49 N. Y. 420."

Consequential Damages.—Page 83. The question of the nature and extent of the notice to be given within the rule in Hadley *v.* Baxendale (9 Exch. 341) in order to charge the defendant with exceptional damages was considered by the English Court of Common Pleas in a late case. This question is so important and so

frequently recurs, that we may be excused from referring to this decision more at length than would otherwise be proper in a supplementary note.

After the word "article" on the 23d line of the second paragraph of the note on this page, insert the following:

During the late Franco-Prussian war the plaintiffs, who were shoe manufacturers, contracted to supply to a firm in London a quantity of military shoes for the use of the French army, at four shillings a pair, which was a very high price. The shoes were to be delivered in London by the 3d of February, 1871, and the plaintiffs sent them to the defendants' station at Kettering for carriage to London, in time to be delivered in the usual course in the evening of that day, when they would have been accepted and paid for by the consignees. Notice was given to the company's station-master at the time, that the plaintiffs were under a contract to deliver the shoes by February 3d, and that if not so delivered they would be thrown on their hands, but no further notice was given than this. The shoes were not delivered in London till the 4th, and consequently were not accepted by the consignees, and the plaintiffs were obliged to sell them at two shillings and nine pence a pair, which in consequence of the cessation of the war was (apart from the above mentioned contract), the best price that could have been obtained for them, even if they had been delivered on the evening of February 3d. In an action for the damages sustained by the non-delivery of the shoes in due time, it was held by a majority of the court that the plaintiffs' claim of the difference between the price at which they had contracted to sell, and that which they obtained, could not be sustained. The grounds of this decision were that the damage was not such as might reasonably be considered as arising naturally from the breach, or as might be reasonably supposed to have been in the "contemplation" of both parties at the time when they made the contract, and that the notice was not such as to have brought within the defendant's "contemplation" such exceptional damages as those claimed.

Martin B., intimated that a notice to impose exceptional damages on the carrier, should, be under circumstances making it equivalent to a *contract* on the defendant's part to be liable to such damages; and Blackburn, J., expressed his disposition to agree, and Lush, J., his actual agreement with this suggestion.

Lush, J., however, and Pigott, B., dissented from the judgment of the court, considering the notice, under the circumstances, sufficient within the rule in Hadley *v.* Baxendale. Horne *v.* Midland Railway Co. L. R. 8 C. P. 131; 28 L. T. R. (N. S.) Ex. Ch. 312.

Page 99. Beginning of note 2. In regard to the case of Powell *v.* Salisbury (2 Y. and Jer. 391), which was tried in Wales, it should be observed that a majority of the court put their decision discharging the rule to show cause why the judgment should not be corrected, on the ground of their want of jurisdiction, although two of the three barons expressed the opinion stated in the text, and one of those who had doubts as to the question of jurisdiction, rested his judgment on the ground not of the want of jurisdiction, but that the declaration was good. The case is recognized and followed by the Court of Queen's Bench, as an authority on the point in question. Lawrence *v.* Jenkins, L. R. 8 Q. B. 274.

Nuisance.—Page 162. At the end of note 1 add: So where one maintains a nuisance on his land, the measure of damages for the injury to adjoining premises is the difference in their rental value caused by the nuisance. Francis v. Schoellkopf, 53 N. Y. 152. But the damages to a lessee for a nuisance are not to be measured by the rent paid by him, but by the actual amount of the injury sustained. Smith *v.* Phillips, 8 Pa. 10.

Real Covenants.—Page 196. At the beginning of note 2, insert: See Farmers' Bank *v.* Glenn, 68 N. C. 35.

Covenant against Incumbrances.—Page 199. At the end of note 1 add: Where in the conveyance of a strip of land to a railroad corporation, the grantor covenanted to maintain a fence along that part of the railroad which ran through his farm, this constituted an incumbrance on his land adjoining the railroad; and the measure of damages for a breach of a covenant against incumbrances in a subsequent conveyance of such land was the difference in the fair market value of the estate conveyed by reason of such incumbrance, taking into consideration the expense of the fencing, so far only as it exceeded the cost of maintaining any fence which would reasonably have been

required to prevent the straying of persons or cattle upon those lands if no agreement had been made, as the burden of such fencing would have rested on the owner of the lands independently of the covenant. Bronson *v.* Coffin, 108 Mass. 178.

CONTRACT TO SELL REAL ESTATE.—Page 220; at the end of note 1, add: But where one who under an executory contract to sell real estate has received the purchase money, but refuses to surrender possession of the estate, the vendee in case the rental value is less than the interest on the purchase money is not restricted to such value as damages for being kept out of possession, but may recover such interest. And if again such a vendor thus wrongfully in possession commit waste on the premises by cutting wood or removing materials belonging to them, the diminution in the value of the land is not the only measure of the vendee's damages. He may also recover the value of the timber cut and material removed. Worrall *v.* Munn, 53 N. Y. 185; 38 N. Y. 138.

PAROL CONTRACTS TO CONVEY LAND.—Page 226. After "occupancy" at the end of the ninth line of the editorial note, add: "The only exception to the rule is where there has been fraud on the part of the vendor in the original contract. But the failure to convey is not such a fraud." Harris *v.* Harris, 70 Penn. St. 170, *per* Thompson, C. J. See, also, in reference to the rule of damages for the breach of these contracts. Thompson *v.* Sheplan, 72 Penn. St. 160.

COVENANT TO REPAIR.—Page 229, note 3. After "Doe *v.* Rowland, 9 C. and P. 734," add: So in a late case in the English Common Pleas it is again held that the proper measure of damages for the breach of the lessee's covenant to repair, is the extent to which the actual value of the reversion is injured. Mills *v.* East London Union L. R. 8 C. P. 79.

Page 232. Add at the end of the first paragraph of note 2. The measure of damages for the failure of the lessee of a mill to keep it in repair, is the difference between its rental value in the condition it is in, and such value if it had been kept in the condition stipulated. Winne *v.* Kelly, 34 Iowa, 339.

COMPENSATION.—Page 238. After "Jones *v.* Van Patten, 3 Ind. 107," in the note continued from the preceding page, insert: But this case is overruled, so far as it deprives the plaintiff of the direct profits he would have made from the contract, had it been carried out. Dunn *v.* Johnson, 33 Ind. 54.

Page 249. Insert in note 1, after the citation of "Jones *v.* Van Patten": But this case has been overruled as to the measure of damages. Dunn *v.* Johnson, 33 Ind. 54.

PARTIAL PERFORMANCE.—Page 256. At the bottom of the page add: The same liberal rule is maintained in Michigan, Begole *v.* McKenzie, 26 Mich. 470. But a recovery for the partial performance of an entire contract on the ground of an implied contract arising out of the defendant's acceptance of the benefit of the part performance, must not be extended to the case of a wilful refusal in bad faith, to perform a contract. Wilson *v.* Wagar, 26 Mich. 452.

IMPLIED AGREEMENT.—Page 275. At the end of the note continued from the preceding page, add: Where the plaintiff was induced to take care of a paralytic old man till his death, by his promise to "provide for her, and give her full and plenty after he was gone," this was held sufficiently certain within the maxim of *Id certum est quod certum reddi potest*, to constitute a valid contract; and the measure of the plaintiff's damages was held to be such a reasonable sum, ascertained by the annuity tables or otherwise, as would provide her with such an annuity as would keep her in her condition of life, relieved from the necessity of work. Thompson *v.* Stevens, 71 Penn. St. 161.

LEGAL TENDER.—Page 285. After the word "market value" in the 29th line of the editorial note, insert, Bank of the State *v.* Burton, 27 Ind. 426.

SEVERAL DELIVERIES.—Page 315. Add at the end of note 2: Where a contract is for the delivery of goods in equal proportions in a given number of months, and the action for non-delivery is brought after the period stipulated for the last delivery, the proper measure of damages is the sum of the differences between the contract and market prices on the last day of each month respectively. Brown *v.* Muller, L. R. 7 Exch. 319. And where in such a case the contract was repudiated by the defendant, and the action was brought (and even tried) before the expiration of the stipulated number of months, it was held (in the absence of evidence on the part of the

defendant, that the plaintiffs could have obtained a new contract to mitigate their loss), that the true measure of damages was the sum of the differences between the contract price and the market price, at the several periods fixed for delivery. In the case in question the last month stipulated for delivery was August, and the action was tried in that month. Roper *v.* Johnson, L. R. 8 C. P. 167; 28 L. J. R. N. S. (C. P.) 296. See Tyers *v.* The Rosedale and Ferryhill Iron Co. limited, L. R. 8 Exch. 305; *Ex parte* Llansamlet Tin Plate Co. *In re* Voss, L. R. 16 Eq. 155.

ARTIFICIAL MARKET VALUE.—Page 316. Add at the end of the note continued from the preceding page: The anticipation of the editor expressed in this note has been realized by a very recent decision of the Supreme Court of Pennsylvania, which accords with the views there expressed. Kountz *v.* Kirkpatrick, 72 Penn. St. 376.

SALE OF PERSONAL PROPERTY.—Page 338. At the end of the first paragraph of note 1, insert: See also Hayden *v.* Demets, 53 N. Y. 426.

COVENANT TO INDEMNIFY.—Page 368. At the beginning of note 2, insert: See Stout *v.* Folger, 34 Iowa, 71.

BOND.—Page 373. At the end of the note continued from the preceding page, add: Dehler *v.* Held, 50 Ill. 491.

CARRIER'S LIABILITY.—Page 433. At the end of the second paragraph of the editorial note, after "arrived," add: See also Zinn *v.* New Jersey Steamboat Co. 49 N. Y. 442.

PROFITS.—Page 449. At "this class of agreements," in the sixth line of the second paragraph of the text, insert as an additional note: "But the law can recognize no distinction (in respect to the measure of damages) between public and private contracts." Dunn *v.* Johnson, 33 Ind. 54.

LIQUIDATED DAMAGES.—Page 516. Add at the end of the note continued from the preceding page:

Whenever the stipulation is a measure to determine a damage, which would otherwise be uncertain and difficult to ascertain, it is a liquidation of damages, and not a penalty. Wolf Creek Co. *v.* Shultz, 71 Penn. St. 180. But a covenant to pay a certain sum as stipulated damages for the failure to do a specified thing, should be restricted to that particular thing. Thus a covenant to pay $5.000 in case of not executing and delivering a proper deed of certain premises, does not, where such a deed is tendered in good faith, become stipulated damages to be paid on a breach of the warranty of title implied in the agreement to sell. Leggett *v.* Mutual Life Ins. Co. 53 N. Y. 395. This decision reverses two below in the same case. 50 Barb. 616 (cited in the second line of note 3 on this page), and 64 Barb. 23. See the following additional cases in illustration of the subject. Cushing *v.* Drew, 97 Mass. 445; Morse *v.* Rathburn, 42 Mo. 594.

Page 492. At the beginning of note 2, insert: But even the use of the word "penalty" in an agreement in reference to a stipulation in such an agreement fixing the damages in case of a breach, will not convert the stipulation into a penalty, if the intention of the parties to fix the damages is evident. Parfitt v. Chambre, L. R. 15 Eq. 36; 5 Eng. 701.

RECOUPMENT.—Page 550. Add at the end of note 2: And a defendant, it is now held in Michigan, may set up by way of recoupment, damages sustained after the suit was brought, if he might have declared on it at the time of pleading. Platt *v.* Brand, 4 Mich. 173.

Page 551. Add at the end of note 1. Damages cannot be assessed in two actions for the same breach, nor can the claims for such damages be divided between the two as the plaintiff sees fit. Star Glass Co. *v.* Morey, 108 Mass. 570.

Page 571. After "Goddard *v.* Grand Trunk R. Co. 57 Maine, 202" insert in the 41st line of the editorial note: See Jeffersonville R. Co. *v.* Rogers, 38 Ind. 116.

EXEMPLARY DAMAGES.—Page 571. Line 28. After "156" insert: See also in reference to a master's responsibility for these damages for his slave's act. Byram *v.* McGuire, 3 Head (Tenn.) 530.

Page 572. Insert at the end of the first paragraph of the note, after the citation of Johnson v. Camp, 51 Ill. 219: But such damages are not permitted, where the defend-

ant, although his act was unlawful, was free from malice, and did only what he honestly believed to be his duty. Hamilton *v.* The Third Avenue R. R. Co. 53 N. Y. 25.

AGAINST PUBLIC OFFICERS.—Page 652. Subjoin as a note to the second paragraph ending with the word "plaintiff." See Rodgers v. Ferguson, 36 Tex. 544.

SALVAGE.—Page 578. At the end of the editorial note continued from the preceding page, add: In cases of salvage the value at the time and place of saving is generally to be considered. The George Dean, Swabey, 290. But where the salvors refused to deliver the property to the owners, and did not file their libels till after its market value had declined, it was held that the price at the time the libels were filed should be the measure. The Albion Lincoln, 1 Lowell, 71.

INTERMEDIATE VALUE.—Page 593. Add in the 14th line of the editorial note, after "Neiler *v.* Kelly, *supra:*" also, Work *v.* Bennett, 70 Penn. St. 484.

Page 598. The case of Baker *v.* Drake, cited at the 26th line of the note on this page is since reported, in the 53d volume of New York Reports, at page 211.

CONVERSION.—Page 605. Add at the end of the editorial note: It is now held in Michigan that in trover for the conversion of pine timber, wrongfully cut on the plaintiff's lands, and removed to the defendant's mill, the recovery is not limited to the value of the trees when cut down at the place where they had been standing, but may be extended to their value at the mill. Grant *v.* Smith, 26 Mich. 201.

Page 614. After the citation of "Ewing *v.* Blount, 20 La. 694," at the end of the second paragraph of note 2, add: In Lucas *v.* Trumbull, 15 Gray, 306, the rule of damages for the conversion of a horse and carriage, which, after the conversion, had been returned to and received by the owner, was held to be their value at the time of the conversion, less such value at the time of the return.

MITIGATION.—Page 688. Add at the end of note 3: The principle stated in the text applies in an action of slander. Sheffill *v.* Van Deusen, 15 Gray, 485.

MINING TRESPASS.—Page 671. Add at the end of note 1: Where coal has been wrongfully taken by a mine-owner by working a mine adjoining his own, the trespasser, in the absence of any suggestion of fraud, will be treated as a purchaser at the pit's mouth, and must pay the actual market value there, excluding profits, but less any actual disbursements in severing it and bringing it to the pit's mouth, so as to place the owner in the same position as if he had severed and raised the coal. *In re* United Merthyr Collieries Co. L. R. 15 Eq. 46. V. C. B. Nov. 14, 1872.

NEGLIGENCE OF CORPORATION.—Page 674. Note to the second paragraph of the text. Where the city of Chicago became liable for wrongful neglect to open a bridge across the Chicago river, on account of which a propeller was frozen in, delayed, and damaged, the measure of damages was held to be: 1. The necessary expense incurred by the vessel in cutting her way out. 2. Damages in the nature of demurrage sufficient to indemnify the plaintiff for his loss from the detention. 3. The damage actually sustained by the vessel. Scott *v.* City of Chicago, 1 Bissell, 510.

ASSAULT AND BATTERY.—Page 688. At the end of the editorial note continued from the preceding page, add: See Hanson *v.* Fowle, 1 Sawyer, 539.

DEATH BY NEGLIGENT ACT.—Page 696. Insert at the end of the first sentence of the last paragraph: Caldwell *v.* Brown, 6 Am. Law Reg. (N. S.) 752.

TENDER.—Page 738. Add at the end of note 2. A manual delivery of ponderous and bulky goods is not necessary to a valid tender. It is enough if they are placed in the vendee's power. Hayden *v.* Demets, 53 N. Y. 426.

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[The *head* pages are referred to in this Index. The letter *d*, signifies damages; the letter *n*, note.]

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